
EJIL Foreword

Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance? 9.5

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Abstract 9.15

The law on global governance that emerged after World War II was grounded in irrefutable trust in international organizations and an assumption that their subjection to legal discipline and judicial review would be unnecessary and, in fact, detrimental to their success. The law that evolved systematically insulated international organizations from internal and external scrutiny and absolved them of any inherent legal obligations – and, to a degree, continues to do so. Indeed, it was only well after the end of the Cold War that mistrust in global governance began to trickle through into the legal discourse and the realization gradually took hold that the operation of international organizations needed to be subject to the disciplining power of the law. Since the mid-1990s, scholars have sought to identify the conditions under which trust in global bodies can be regained, mainly by borrowing and adapting domestic public law precepts that emphasize accountability through communications with those affected. Today, although a ‘culture of accountability’ may have taken root, its legal tools are still shaping up and are often contested. More importantly, these communicative tools are ill-equipped to address the new modalities of governance that are based on decision making by machines using raw data (rather than two-way exchange with stakeholders) as their input. The new information and communication technologies challenge the foundational premise of the accountability school – that ‘the more communication, the better’ – as voters turned users obtain their information from increasingly fragmented and privatized marketplaces of ideas that are manipulated for economic and political gain. In this article, I describe and analyse how the law has evolved to acknowledge the need for accountability, how it has designed norms for this purpose and continues in this

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endeavour, yet also how the challenges it faces today are leaving its most fundamental assumptions open to question. I argue that, given the growing influence of public and private global governance bodies on our daily lives and the shape of our political communities, the task of the law of global governance is no longer limited to ensuring the accountability of global bodies but also serves to protect human dignity and the very viability of the democratic state.

1 Introduction

Dag Hammarskjöld, the legendary Secretary-General of the United Nations (UN), famously extolled international organizations, such as the League of Nations and the UN, as ‘advanc[ing] ... beyond traditional “conference diplomacy”’ due to the ‘basic tenets in the[ir] philosophy’. This philosophy was based on ‘the introduction on the international arena of joint permanent organs, employing a neutral civil service, and the use of such organs for executive purposes on behalf of all the members of the organizations’.¹ Hammarskjöld was responding to a challenge by Nikita Khrushchev, chairman of the Communist Party of the Soviet Union – the underdog in the heyday of a Western-dominated UN – who had criticized the notion of an impartial international civil service: ‘While there are neutral countries, there are no neutral men.’²

In a rather lengthy text, Hammarskjöld portrays an idyllic vision of the trustworthy civil servant whose independence and impartiality are secured by a host of legal and institutional constraints, by a ‘spirit of service’ that inspires ‘dedicated professional service only to the Organization’ and, ultimately, by an awareness of his own ‘personal sympathies and antipathies ... so that they are not permitted to influence his actions’.³ ‘At the final last’, he continues, ‘this is a question of integrity’, not significantly different from that of the judge: ‘Is not every judge professionally under the same obligation?’⁴ Hence, Hammarskjöld concludes, ‘[m]utual confidence and trust’ can, and should, exist between governments and international civil servants.⁵ But Khrushchev had reasons to reject this vision. As Guy Fiti Sinclair points out, Hammarskjöld’s eagerness to resolve the Congo crisis in 1960 was probably motivated by his view that Patrice Lumumba, then the new leader, was ‘clearly a Communist stooge’, having ‘conceived the United Nations operation [in the Congo] as a means of preventing the Soviet penetration of Africa’.⁶

¹ D. Hammarskjöld, ‘The International Civil Servant in Law and in Fact’, Lecture delivered to Congregation at Oxford University, 30 May 1961, reprinted in *Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld, Secretary-General of the United Nations, 1953–1961* (1962), at 329, 329.

² *Ibid.*

³ *Ibid.*, at 342, 348.

⁴ *Ibid.* But see Schachter, ‘The Invisible College of International Lawyers’, 72 *Northwestern University Law Review* (1977) 217, at 219: ‘It would be myopic to minimize the influence of national positions on the views taken by the great majority of international lawyers.’ See also Schachter, ‘The Invisible College of International Lawyers’, in A. Bianchi (ed.), *Non-State Actors and International Law* (2009) 173, at 178: ‘The point is that a judgment among competing principles by an independent jurist can be made and justified on grounds that are valid for the relevant community of states, rather than on grounds held by the individual alone, or by his government.’

⁵ Hammarskjöld, *supra* note 1, at 340.

⁶ Fiti Sinclair, ‘The International Civil Servant in Theory and Practice: Law, Morality, and Expertise’, 26 *European Journal of International Law (EJIL)* (2015) 747, at 757, n. 62. Appropriately, Fiti Sinclair criticizes

The same laudatory stance on the trustworthiness of international bureaucrats can be found in complacent accounts of international organizations in the jurisprudence of the Western-dominated International Court of Justice (ICJ). The majority of its judges (except those from the Soviet bloc)⁷ have consistently adopted a deferential legal attitude towards international organizations. The Western-dominated academic scholarship, by and large, has given support to this approach.⁸ The law developed by the ICJ exudes confidence in the impartiality of international organizations.⁹ Accordingly, the evolving law on such organizations consists mainly of scholarly tomes that compare systems of voting, budgeting rules and so on, without even acknowledging internal power plays, such as when powerful state parties secured majorities by buying votes,¹⁰ changed the decision-making rules with their practice,¹¹ or shifted to other organizations in the face of potential defeat.¹²

the generally laudatory accounts of Hammarškjöld's life achievements as 'oversights that prevent a full appreciation of the dilemmas faced by international civil servants in managing the conflicting demands of diverse missions and broad constituencies' (at 757); see also Gibbs, 'The United Nations, International Peacekeeping and the Question of 'Impartiality': Revisiting The Congo Operation of 1960', 38 *Journal of Modern African Studies* (2000) 359; Christiansen, 'Tensions of European Governance: Politicized Bureaucracy and Multiple Accountability in the European Commission', 4 *Journal of European Public Policy* (1997) 73; G. Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017), at 161, 168. The USA apparently shared Khrushchev's concerns; its International Organizations Employees Loyalty Board (1953) sought to remove US citizens who were employed by international organizations and whose loyalty to the US government was subject to a reasonable doubt. See *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal (Effects of Awards)*, Advisory Opinion, 13 July 1954, ICJ Reports (1954) 47, at 63; *Judgements of the Administrative Tribunal the ILO upon Complaints Made against the UNESCO*, Advisory Opinion, 23 October 1956, ICJ Reports (1956) 77.

⁷ Gzybowski, 'Socialist Judges in the International Court of Justice', 1964 *Duke Law Journal* (1964) 536 (suggesting that Socialist judges regard the creation of the United Nations (UN) as having produced no basic change in the legal position of the member states, even within the context of the organization, and, therefore, states may question the legality of its resolutions). For such views, see Judge Milovan Zoricic of Yugoslavia, in *Conditions of Admission of a State to the United Nations*, Advisory Opinion, 28 May 1948, ICJ Reports (1948) 57, at 106; Judge Winiarski of Poland, in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Certain Expenses)*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151, at 181; Judge Koretsky in *Certain Expenses* at 181 and Judge Winiarski, in *Effects of Awards*, *supra* note 6, at 63.

⁸ Klabbers, 'The Transformation of International Organizations Law', 26 *EJIL* (2015) 9, at 10: 'Almost all international organizations lawyers, practitioners and academics alike have been functionalists.'

⁹ On demands for accountability of the League of Nations through 'publicity' (but also the 'reinvention and rehabilitation of secrecy') in the inter-war period, see Donaldson, 'The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order', 111 *American Journal of International Law (AJIL)* (2017) 575.

¹⁰ On vote buying in international organizations, see Bueno de Mesquita and Smith, 'Aid: Blame It All on "Easy Money"', 57 *Journal of Conflict Resolution (JCR)* (2013) 524; Lockwood, 'International Vote Buying', 54 *Harvard International Law Journal* (2013) 97; Dreher and Raymond Vreeland, 'Buying Votes and International Organizations', Central European Governance and Economic Development Research Discussion Paper no. 123 (2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1845525.

¹¹ See G. Nolte (ed.), *Treaties and Subsequent Practice* (2013); especially, A. Roberts, *Subsequent Practice: The Battle over Interpretive Power* (2013).

¹² Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford Law Review (SLR)* (2007) 595, at 599, 615; E. Benvenisti and G.W. Downs, *Between Fragmentation and Democracy* (2017), at 39–44. International relations theorists were more attentive to the challenges early on. See, e.g., Cox, 'The Executive Head: An Essay on Leadership in

The deferential approach towards international organizations and their officials lasted much longer than the equivalent approach to domestic public authorities. While in the immediate post-war era, a general culture of trust prevailed, the 1960s saw mounting mistrust in government, both in the USA and in Europe, as reflected, *inter alia*, in the legislation surrounding the US 1966 Freedom of Information Act.¹³ But demand for accountability in external matters remained modest. As Robert Dahl observes, ‘the sheer complexity of many international matters often put them beyond the immediate capacities of many, probably most, citizens to appraise’.¹⁴ Among academics, the first alarm bells rang only in the late 1980s, when a bankrupt international organization – the International Tin Council – proved that the idols of international progress and prosperity could be deceptive.¹⁵ However, in general, until the end of the Cold War, few in the West shared Khrushchev’s concerns.

Hence, the first incarnation of the law on global governance that emerged after World War II was grounded in irrefutable trust in international organizations – a Pollyannaish vision in which these bodies were ‘the harbingers of international happiness’¹⁶ and which assumed that their subjection to legal discipline and judicial review would be too onerous for them.¹⁷ These assumptions informed a law that systematically insulated international organizations from internal or external scrutiny and absolved them of any legal obligations. Part 2 of this article elaborates on this first phase. It was only well after the demise of Khrushchev’s Soviet Union that his mistrust in global governance began to trickle through into the legal discourse and his concerns about international organizations and their operators gained the attention of civil society activists. The early part of the 1990s had seen a triumphal West celebrating ‘the end of history’,¹⁸ contemplating the rise of a global democracy¹⁹ and

International Organization’, 23 *International Organization (IO)* (1969) 205, at 211: ‘In historical perspective the two opposing arguments lose their absolute character and will be seen as ideologies buttressing particular sides in a global conflict; but both are very inadequate descriptions of actual behavior and are of very little use to the analyst.’ Weiss, ‘The John W. Holmes Lecture: Reinvigorating the International Civil Service’, 16 *Global Governance* (2010) 39.

¹³ 5 USC § 552b (FOIA). It was not until 1974, after the Watergate scandal, that Congress amended the FOIA to compel government agencies to comply with the law’s requirements. Other laws expanding access to information were enacted later on, such as the Sunshine Act of 1976, which obliges all government agencies to publish a schedule of their planned meetings, which must be open to the public. Scholars understood the perils of information asymmetry for democracy early on. See, e.g., A. Downs, *An Economic Theory of Democracy* (1957).

¹⁴ Dahl, ‘Can International Organizations Be Democratic? A Skeptic’s View’, in I. Shapiro and C. Hacker-Cordon (eds), *Democracy’s Edges* (1999) 19, at 24.

¹⁵ *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, Decision on Appeal, [1989] 3 WLR 969, [1990] 2 AC 418, [1989] 3 All ER 523, [1990] BCLC 102, (1990) 81 ILR 670, ILDC 1733 (UK 1990), 26 October 1989, s. F3 (UKHL), available at <http://opil.ouplaw.com/view/10.1093/law/ildc/1733uk89.case.1/law-ildc-1733uk89>.

¹⁶ Klabbers, ‘The Life and Times of the Law of International Organizations’, 70 *Nordic Journal of International Law (NJIL)* (2001) 287, at 288.

¹⁷ See, e.g., N.D. White, *The Law of International Organizations* (2nd edn, 2005), at 4–5; Klabbers, *supra* note 16, at 287–291.

¹⁸ F. Fukuyama, *The End of History and the Last Man* (1992).

¹⁹ D. Held, *Democracy and the Global Order* (1995).

indifferent towards the implications of the North American Free Trade Agreement for the democratic processes within the member states.²⁰ Gradually, however, the proliferation of international organizations in their different forms and guises,²¹ and the growing dependency on them, brought home the understanding that powerful states and special interests were, in fact, steering them in favour of their own ends.²² 13.5

The initial enthusiasm about a functioning UN Security Council was curbed by failures of multilateralism to ensure peace and human rights in Somalia, Rwanda, Srebrenica and Kosovo, culminating in Security Council-led targeted sanctions regimes that failed to live up to the accepted standards of due process in the protection of rights and liberties. Examples of incompetence and mismanagement,²³ and even sheer disregard for the lives of those directly subject to the organizations' control,²⁴ shattered the image of the impartial, competent international organization.²⁵ They also demonstrated that there is nothing inherently 'good' about international organizations and that their operation must be subject to the disciplining power of the law if the corruption of power is to be addressed.²⁶ It thus became clear that the immense growth and spread of international organizations had extended the executive command of the powerful states that controlled these institutions. Meanwhile, these organizations further disempowered disparate domestic electorates, who could not benefit from the traditional constitutional checks and balances found in many democracies intended to limit executive discretion. At the same time, too few new checks and balances were created to compensate for the loss. Nowhere was the problematic experience with these organizations more pronounced than in Southern countries, as scholars from these regions pointed out, stressing the adverse consequences of Northern domination that was exerted through these global bodies.²⁷ 13.10 13.15 13.20

Part 3 describes the ongoing scholarly efforts since the mid-1990s to identify the conditions under which trust can be regained. These efforts have consisted mainly of borrowing from domestic public law precepts (administrative law and constitutional law) to 13.25

²⁰ But see Dahl, *supra* note 14, at 24. North American Free Trade Agreement (NAFTA) 1992, 32 ILM 289 (1993), at 605. 13.30

²¹ Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15, at 18–20; E. Benvenisti, *The Law of Global Governance* (2014), at 25–69.

²² Benvenisti, 'Exit and Voice in the Age of Globalization', 98 *Michigan Law Review (MLR)* (1999) 167 (arguing that information-based capture at the global level is even more intense than at the domestic level). See also Downs, *supra* note 13; Lohmann, 'An Information Rationale for the Power of Special Interests', 92 *American Political Science Review (APSR)* (1998) 809; G.M. Grossman and E. Helpman, *Special Interest Politics* (2001). 13.35

²³ See, e.g., Rayner, *supra* note 15.

²⁴ See section 2.B below.

²⁵ On Tin Council effects, see Chandrasekhar, 'Cartel in a Can: The Financial Collapse of the International Tin Council', 10 *Northwestern Journal of International Law and Business* (1989) 309, at 312.

²⁶ Case C-402/05 P, *Kadi and Al Barakat International Foundation v. Council and Commission* (EU:C:2008:461), paras 1–31, 278–326; Case C-584/10 P, *Commission and Others v. Kadi* (EU:C:2013:518), paras 27–46, 97–165. ECtHR, *Al Dulimi v. Switzerland*, Appl. no. 5809/08, Judgment of 21 June 2016. 13.40

²⁷ Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1; S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), at 39–42; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007), at xi–xiii. 13.44

view international organizations as exercising public authority. As such, it follows that they should be subject to a strict discipline of accountable and inclusive decision making, as elaborated by the path-breaking scholarship of global administrative law associated with the New York University's School of Law and the Institute for Research on Public Administration in Rome²⁸ as well as other approaches such as the Max Planck Institute's project on international public authority.²⁹ Perhaps responding to growing public and scholarly demands, the operators of various international organizations have begun to invoke the language of accountability to single themselves out from the crowd or to forestall criticism. A 'culture of accountability'³⁰ has taken hold in public discourse.³¹

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14.10 What characterizes the emerging literature on accountability in global governance is the emphasis on bidirectional communications between governors and the governed as the means to overcome the information asymmetry that lies at the root of popular mistrust of government. This literature suggests that obligations of transparency and participation – of the duty to hear and give reasons for decisions – will bridge the information gap and resolve the principal agent problem that is the source of mistrust. Indeed, the establishment of the discipline of accountability through communication appears to have succeeded in re-establishing trust in global governance in some quarters. Slowly, but resolutely, domestic regulators and courts have stepped into the global arena, pushing back against global pressures, citing the language of individual rights and of public accountability to justify their refusal to give effect to global regulation.³² The effort of the so-called mega-regional agreements to remove such domestic constraints by promoting global regulatory mechanisms and internationalized judicial review mechanisms may reflect the success of domestic actors in limiting the capture of decision-making processes by interest groups.³³

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14.25 However, as we know from domestic public law, the language of accountability can sometimes amount to no more than cheap talk. Going through the motions of communications can be meaningless, if not counterproductive, as decision makers can, in fact, maintain and even increase pre-existing or newly formed pockets of discretionary space.³⁴ Moreover, the same obligations to communicate – designed to limit the impact of special interest groups – have been utilized by those very groups to stall or block regulation that is likely to affect them adversely by making excessive demands for

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²⁸ Kingsbury, Krisch and Stewart, *supra* note 21; S. Cassese *et al.* (eds), *Global Administrative Law: The Casebook* (3rd edn, 2012).

14.35 ²⁹ 'International Public Authority', *Max Planck Institute*, available at www.mpil.de/de/pub/forschung/nach-rechtsgebieten/voelkerrecht/ipa.cfm.

³⁰ M. Zürn and M. Stephen, 'The View of Old and New Powers on the Legitimacy of International Institutions', 30 *Politics* (2010) 91, at 98–99.

³¹ T.B. Lee, 'Brexit Is Trumpism without Trump; and Voters Liked It', *Vox* (27 June 2016), available at www.vox.com/2016/6/25/12025388/brexit-donald-trump-politics: 'Brexit was driven by popular anger at unaccountable institutions.'

14.40 ³² Benvenisti and Downs, *Between Fragmentation*, *supra* note 12, at 105–165.

³³ See generally C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2011); Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law', 23 *Constellations* (2016) 58, at 64.

14.44 ³⁴ For a recent assessment, see Morison, 'Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations', 37 *Oxford Journal of Legal Studies (OJLS)* (2017) 636, at 658–659: 'Consultation on policy development can reinvigorate democratic engagement, but it can also often

information about planned measures and for voicing their own concerns.³⁵ At the same time, civil society actors have come to realize the benefits of operating almost clandestinely to advance partisan goals. Decision makers in many established international organizations that tended to turn to non-governmental organizations (NGOs) as reliable sources of information discovered that they operate just like economic interest groups by providing incomplete information to international organizations as well as to their supporters.³⁶ Part 3 of this article, therefore, assesses the relative success of the ambitious effort to enhance bidirectional communication of information as a fundamental part of global regulatory processes. It also highlights the inherent limits of such an approach in the context of global governance, and the questions that are yet to be addressed. 15.5
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Part 4 examines the third phase that we are facing today as a result of the rise of new information and communication technologies (ICTs) that impact old and new modalities of global governance. These ICTs present unprecedented challenges to the 'bidirectional communications' school as the key to promoting information symmetry and ensuring trust in global governance. The ICTs even render at least some of the legal tools designed to ensure effective and accountable governance superfluous. In the age of 'big data' and information overload, the challenge is no longer how to remedy the dearth of information, such as by insisting on bidirectional communication, but, rather, quite the opposite – how to guarantee that well-informed machines give due hearing to those affected by their decisions or at least offer them explanation for the decisions they take – namely, that human judgment will remain 'in the loop' and that access to data will be secured for all. Communications remain crucial, but not so much for the purpose of informing government so as to secure the human dignity of citizens, secure their access to reliable information and secure space for a public, inclusive marketplace of ideas rather than one that is regulated by private media companies and possibly manipulated for private gain. 15.15
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In other words, if in the heyday of trust in international organizations communication seemed superfluous and even burdensome, and, later on, communication seemed the key to resolving asymmetric information problems, we are now facing an era where communication itself becomes increasingly part of the problem and is insufficient to ensure accountability. I contend that the issue of trust is no longer resolved by communications 15.30

silence views through a sort of participatory disempowerment whereby the existence of an official consultation exercise closes off further, alternative or subaltern voices that are silenced by the existence of an official depiction of "the public".

³⁵ Durkee, 'Astroturf Activism', 69 *SLR* (2017) 201 (analysing how businesses have been infiltrating international legal processes, secretly lobbying lawmakers through front groups that function as 'astroturf' imitations of grassroots organizations). On their involvement in Notice and Comment proceedings related to the Montreal Protocol, see Berman, 'The Role of Domestic Administrative Law in the Accountability of Transnational Regulatory Networks: The Case of the ICH', Institute of International Law and Justice Emerging Scholars Paper no. 22 (2012), available at www.iilj.org/publications/the-role-of-domestic-administrative-law-in-the-accountability-of-transnational-regulatory-networks-the-case-of-the-ich/. For the practices of the tobacco companies, see Mitchell and Voon, 'Someone to Watch over Me: Use of FOI Requests by the Tobacco Industry', 22 *Australian Journal of Administrative Law* (2014) 18; Dimopoulos, Mitchell and Voon, 'The Tobacco Industry's Strategic Use of Freedom of Information Laws: A Comparative Analysis', 2016 *Oxford University Comparative Law Forum* (2016) 2. 15.35
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³⁶ Tallberg *et al.*, 'NGO Influence in International Organizations: Information, Access, and Exchange', 48 *British Journal of Political Science* (2015) 213. 15.44

alone. It is access to data and the regulation of the machine processing of raw data that have become the central challenges for ensuring trust in domestic and global governance. Part 4 explores the challenges of this post-communication regulatory arena, observing the proliferating use of algorithmic decision making and the rise of big data as a commercial resource that is both a tool of governance and a depository of human knowledge. On the basis of these observations, this section of the article elaborates on the potential for ensuring accountability in regulatory decision making and the available legal remedies – including in international law – that can help promote accountability and ensure democracy of process in an era of digitized global governance.

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- 16.10 As global governance bodies become increasingly intrusive in the lives of citizens and communities, it becomes apparent that the law regulating their activities is not merely designed to ensure the accountability of remote, foreign bodies such as the UN, the World Trade Organization (WTO) or the World Health Organization (WHO). Given the growing influence of global governance bodies, private actors and rogue states on our daily lives and the shape of our communities, it is increasingly clear that the task of the law of global governance is also to enable the continuance of the democratic institutions in the domestic sphere.
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2 Origins: Opacity and Complacent Trust in the ‘Harbingers of International Happiness’

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A *Introducing Functionalism*

The law on international organizations that emerged after World War II from the jurisprudence of the ICJ shared Hammarskjöld’s utopian vision of international civil servants. As Jan Klabbers succinctly points out, ‘[t]raditionally, international organizations were heralded as the harbingers of international happiness, embodying a fortuitous combination of our dreams of “legislative reason” and the idea that everything international is wonderful precisely because it is international’.³⁷ This law asked us to have confidence in international decision makers; their purported impartiality was presented as a proxy for selflessly working for the common good. It was entirely within the spirit of an era characterized by endemic problems of information asymmetry; people sought not to become better informed but, rather, to identify actors whom they could trust more than others.³⁸

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It is noteworthy that the widespread trust in ‘everything international’ was not questioned in academic literature. In fact, such trust was subsequently endorsed by the

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³⁷ Klabbers, *supra* note 16, at 288.

³⁸ Downs, *supra* note 13, at 140–141; as Megan Donaldson writes: ‘in 1945, general interest and faith in publicity was weaker than it had been a generation earlier ... the connections between multilateralism, international organization, and publicity, influential in the design of the League, were weakened in the transition to a new international organization. The Security Council was envisaged as wielding centralized military force, which would give it greater powers to police state conduct without relying on publicity, and would require the United Nations itself to maintain regimes of military and intelligence secrecy.’ Donaldson, *supra* note 9, at 606.

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neo-liberal school of international relations, which extolled the virtues of creating international organizations to promote the frequent exchange of information and mutual monitoring. Much like the firm as an institution of private law, the international organization was seen as the response to endemic problems of transaction costs and collective action.³⁹ If international organizations are created ‘whenever the costs of communication, monitoring, and enforcement are relatively low compared to the benefits to be derived from political exchange’, then their presence implies greater benefits to the members.⁴⁰ Note that the benefits are assumed to be shared by all states parties and all segments of their societies, somehow including benefits to the less powerful states parties and their citizens. Indeed, many scholars tended to portray the leadership of these organizations, dubbed ‘epistemic communities’, as a legitimate cadre of experts who should be trusted by the masses,⁴¹ and they emphasized the ability of international organizations to somehow reduce the opportunities for domestic interest groups to inappropriately skew national policies in their favour.⁴² While this depiction certainly reflected the practice of some institutions, particularly those involving the small-scale management of boundary waters,⁴³ the extrapolation of the argument was certainly dubious, if not self-serving.

Reflecting this trust in ‘everything international’ in the immediate post-World War II era – within a UN still dominated by the West⁴⁴ and against Soviet opposition⁴⁵ – the

³⁹ R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984), at 85–98.

⁴⁰ R.O. Keohane, *International Institutions and State Power* (1989), at 167; see also Abbott and Snidal, ‘Why States Act through Formal International Organizations’, 42 *JCR* (1998) 3.

⁴¹ Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, 46 *IO* (1992) 1, at 2; Slaughter, ‘Governing the Global Economy through Government Networks’, in M. Byers (ed.), *The Role of Law in International Politics* (2000) 177. On this discourse, see E. Benvenisti, *Sharing Transboundary Resources* (2002), at 64–100.

⁴² See generally P.M. Haas, R.O. Keohane and M.A. Levy (eds), *Institutions for the Earth* (1993); Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, 93 *AJIL* (1999) 596; Keohane *et al.*, ‘Democracy Enhancing Multilateralism’, 63 *IO* (2009) 1. But see Benvenisti, *supra* note 22; Benvenisti and Downs, *Between Fragmentation*, *supra* note 12, at 52–87; Elsig, ‘The Democratizing Effects of Multilateral Organizations: A Cautionary Note on the WTO’, 12 *World Trade Review* (2013) 487.

⁴³ See, e.g., LeMarquand, ‘Preconditions to Cooperation in Canada-United States Boundary Waters’, 26 *Natural Resources Journal* (1986) 221, at 232: ‘Informal intelligence gathering [by low level officials] helps to provide an early warning of impending issues, and permits actions before issues become too politicized’; Toope and Brunnee, ‘Freshwater Regimes: The Mandate of the International Joint Commission’, 15 *Arizona Journal of International and Comparative Law* (1998) 273; Wouters, ‘Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States’, 30 *Canadian Yearbook of International Law* (1992) 43. Fitzmaurice, ‘The Finnish-Swedish Frontier Rivers Commission’, 5 *Hague Yearbook of International Law* (1992) 33, at 44; Benvenisti, *supra* note 41, at 64–100.

⁴⁴ Morgenthau, ‘The New United Nations and the Revision of the Charter’, 16 *Review of Politics* (1954) 3, at 4, 6–8, 15: ‘While in its relations with its members it is an international government, in its relations with the Soviet bloc the new United Nations is a grand alliance opposing another grand alliance’ (at 15). On the UN as a Western action, see M. Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (2012), at 215; M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2008), at 77; P. Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* (2006), at 155. On the League of Nation as a British project, see S. Pedersen, *The Guardians* (2015), at 357.

⁴⁵ On the Soviet attitude towards this approach, see Fiti Sinclair, *Reform the World*, *supra* note 6, at 140: ‘International lawyers in the Soviet bloc argued vehemently that member states’ sovereignty required

18.5 ICJ fleshed out a doctrine that was grounded in functional terms.⁴⁶ The functional approach insulated not only the UN but also all international organizations from any external legal discipline or judicial accountability. It achieved this outcome by insisting on five principles: (i) international organizations have legal personality that is independent of the member states; (ii) the powers of the organization are defined by the treaty that sets it up, subject to the treaty's object and purpose, broadly defined and even implied, and subject also to subsequent practice of the organization (the exact opposite to domestic public law doctrines of *ultra vires* or abuse of rights); (iii) the external legal constraints on the organization are those general rules of international law applicable to organizations as well as their international agreements; (iv) the organizations enjoy immunity from domestic court review (and, hence, are subject only to judicial proceedings to which they agreed); (v) member states that can operate through international obligations are capable of 'laundering' their direct responsibility for the acts or omissions that are attributed to the organization.⁴⁷

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Let me now examine each of these principles in turn.

1 International Organizations Have Legal Personality That Is Independent of the Member States

18.20 In its advisory opinion in *Reparations for Injuries Suffered in the Service of the United Nations*,⁴⁸ the ICJ asserted that the UN had the 'capacity to bring an international claim' because this was the intention of the UN Charter: to give the organization an 'international personality' with that capacity, among others.⁴⁹ This explanation, reminiscent of Baron von Münchhausen raising himself from the swamp by pulling his own hair, was embedded in a functional triumphalist vision of the organization as the harbinger of good:

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Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations.⁵⁰

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18.35 their explicit consent to any expansion of UN powers. The Idea of "constitutional growth" or "de facto amendment" of the Charter was anathema, not least because it served to legitimize what they saw as the unlawful manipulation of Charter rules and procedures by the United States and its allies.' See also G. Tunkin, *International Law in the International System* (1975), at 173–78; on the Socialist judges' position, see note 7 above.

⁴⁶ Klabbers, *supra* note 8, at 22–29, 48–55.

⁴⁷ Abbott and Snidal, *supra* note 40.

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⁴⁸ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174. See also Case 22–70, *Commission v. Council* (EU:C:197:32); *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, Advisory Opinion, 1928 PCIJ Series B, No. 16 (supporting the existence of elements of personality).

⁴⁹ *Reparations*, *supra* note 48, para. 42.

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⁵⁰ *Ibid.*, para. 14

In other words, the Court imposed no limits on the proposition that the end – effective international organizations – justifies whatever means are necessary: ‘[T]o achieve these ends the attribution of international personality is indispensable.’⁵¹ Even third parties were bound by this functionalist view, the Court explained, invoking an unreasoned proto-argument about the power of the many to constrain the few:

[F]ifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.⁵²

While this opinion addressed the UN specifically, the general understanding was that the same principles applied to all international organizations.⁵³

2 *The Powers of the Organization Are Defined by the Treaty That Sets It Up, Even Implicitly, As Interpreted by the Organization*

In his recent book, Guy Fiti Sinclair elaborates on what he calls ‘IO expansion’, namely ‘the expansion of powers exercised by international organizations under international law ... [that] has occurred through processes of discourse, practice, and (re)interpretation’.⁵⁴ This expansion was facilitated by the interpretative approach adopted by the Permanent Court of International Justice and the ICJ that enabled international organizations to extend their powers far beyond those defined in their founding texts.⁵⁵ Under the doctrine of ‘effective interpretation’ of treaties,⁵⁶ these courts asserted that international organizations also had ‘implied powers’,⁵⁷ namely ‘subsidiary powers

⁵¹ Klabbers, *supra* note 8, at 42–43; Sohn, ‘The UN System as Authoritative Interpreter of Its Law’, in O. Schachter and C. Joynter (eds), *United Nations Legal Order* (1995) 169, at 174.

⁵² *Reparations*, *supra* note 48, para. 42.

⁵³ Sands and Klein, quoting the International Court of Justice (ICJ) in *Reparations*, *supra* note 48, and concluding that in practice an international organization in the conduct of its activities is subject to the rules of international customary law. P. Sands and P. Klein, *Bowett’s Law of International Institutions* (6th edn 2009), at 463, 474–475 (arguing that an organization is bound by customary law). See in general J. Klabbers, *An Introduction to International Law* (2nd edn, 2009), at 38–39, 46–47; Lauterpacht, ‘The Development of the International Organization by the Decisions of International Tribunals’, 152 *Collected Courses of the Hague Academy of International Law* (1976) 377, at 405–407, 409; White, *supra* note 17, at 27–29; see also Treaty of Rome Establishing the European Economic Community 1957, 298 UNTS 11, Art. 210.

⁵⁴ Fiti Sinclair, *Reform the World*, *supra* note 6, at 1. See also Klabbers, *supra* note 53, at 40–41; Sands and Klein, *supra* note 53, at 448; Brölmán, ‘Specialized Rules of Treaty Interpretation’, in Duncan Hollis (ed.), *The Oxford Guide to Treaties* (2012) 507, at 509–510; Sohn, *supra* note 51, at 169, 174, 226–227.

⁵⁵ White, *supra* note 17, at 3; Bernhardt, ‘Ultra Vires Activities of International Organizations’, in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 599, at 603; Sohn, *supra* note 51, at 190.

⁵⁶ See H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 267–281 (discussing the ‘[e]ffectiveness of International Institutions and International Organisations’); Lauterpacht, *supra* note 53, at 420–421, 444; Brölmán, *supra* note 54.

⁵⁷ Klabbers, *supra* note 16, at 295–297; Blokker, ‘International Organizations or Institutions, Implied Powers’, in *Max Planck Encyclopedia of Public International Law* (2009) 467; Lauterpacht, *supra* note 53, at 423–424, 426–428 (the Court of European Communities does not use the same phrase, ‘implied powers’, and does not speak of these powers as essential, yet it adopts the same approach as the ICJ).

20.5 which [were] not expressly provided for in the basic instruments which [governed] their activities'⁵⁸ and which were 'conferred upon [them] by necessary implication as being essential to the performance of [their] duties',⁵⁹ enabling them to adjust to 'the necessities of international life ... in order to achieve their objectives'.⁶⁰ In the advisory opinion in *Reparations*, the ICJ identified the treaty that set up the organization as being the key to its powers:

20.10 Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.⁶¹

These functions, even implied ones, also bound third parties: 'The functions of the Organization ... could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices.'⁶²

20.15 The organization could also modify its internal proceedings by majority decision. In a subsequent advisory opinion in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, it found that the UN General Assembly (UNGA) had the authority to establish a tribunal competent to render judgments binding on the UN,⁶³ stating that:

20.20 the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intentment out of the Charter.⁶⁴

20.25 In a subsequent opinion, this time indirectly questioning the UN's actions in the Congo and the Middle East, the Court found that the organization could also interpret

20.30 ⁵⁸ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Nuclear Weapons)*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 66, at 78; *Interpretation of the Greco-Turkish Agreement*, *supra* note 48; *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, 1926 PCIJ Series B, No. 13. But see *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, 1927 PCIJ Series B, No. 14 (restricting the powers to those attributed by the states parties). See Klabbers, *supra* note 16, at 295–296.

⁵⁹ *Reparations*, *supra* note 48, at 182–183. See also *Effect of Awards*, *supra* note 6, at 57.

⁶⁰ *Nuclear Weapons*, *supra* note 58, at 78; Klabbers, *supra* note 53, at 53; see generally D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2007); Blokker, *supra* note 57.

20.35 ⁶¹ *Reparations*, *supra* note 48, at 179.

⁶² See also *Nuclear Weapons*, *supra* note 58, at 79: 'The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.' But, 'to ascribe to the WHO the competence to address the legality of the use of nuclear weapons – even in view of their health and environmental effects – would be tantamount to disregarding the principle of speciality ... for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States'.

20.40 ⁶³ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Application for Review, UN Admin Trib, No. 158 (1954), at 47.

20.44 ⁶⁴ *Ibid.*, at 57.

its own purposes.⁶⁵ In *Certain Expenses of the United Nations*, the ICJ was asked whether the costs of UNGA-authorized operations in the Congo and the Middle East constituted 'expenses of the Organization'.⁶⁶ The task was seemingly daunting: how to reconcile the UNGA's 'control over the finances of the Organization ... to enable it to carry out its functions' with the UNGA's limited role *vis-à-vis* the maintenance of peace and security. The Court invoked, yet again, the functionalist argument. The UNGA's authority derived from 'the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an 'expense of the Organization'.⁶⁷ The purposes need to be interpreted by the organs of the organization, '[b]ut when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.⁶⁸ Indeed, because there is no internal mechanism for determining internal allocation of competences, 'each organ must, in the first place at least, determine its own jurisdiction'. Therefore, in 'a resolution purportedly for the maintenance of international peace [that incurs costs] ... these amounts must be presumed to constitute "expenses of the Organization"'.⁶⁹

Obviously, this principle weakened the position of member states that found themselves consistently in the minority, as was the Soviet Union, for example, during the 1950s. The Soviet Union learned this lesson when its absence from UN Security Council meetings was interpreted as a 'concurring vote' for the purposes of Article 27 of the UN Charter, a decision the Soviet Union found illegal.⁷⁰ In this context, the only meaningful ICJ advisory opinion that reflected a commitment to the initial decision rules was the 1960 decision concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*.⁷¹ In contrast to its generally

⁶⁵ White, *supra* note 17, at 32–33.

⁶⁶ *Certain Expenses*, *supra* note 7, at 181. See also White, *supra* note 17, at 32–33; Bernhardt, *supra* note 55, at 602–603.

⁶⁷ *Certain Expenses*, *supra* note 7, at 167.

⁶⁸ *Ibid.*, at 168.

⁶⁹ *Ibid.*; Klabbers, *supra* note 53, at 91.

⁷⁰ Repertoire of the Practice of the Security Council, 1946–1951 (1954), at 178. This practice has been endorsed by the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, para. 22: 'The proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By absenting, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.' See also Lauterpacht, *supra* note 53, at 451–452.

⁷¹ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, 8 June 1960, ICJ Reports (1960) 150, at 154, 170–171; Lauterpacht, *supra* note 53, at 451–452.

complacent approach to claims concerning the *ultra vires* of international organizations, the ICJ insisted on strict adherence to the identity of the decider, as stipulated in the founding treaty, when it came to the internal question of *ultra vires* within an organization (which had little impact on its functionality *vis-à-vis* third parties). In this case, which Klabbers describes as the ‘most explicit constitutional interpretation’,⁷² the Court regarded the founding treaty as the internal constitution of the organization and insisted that a decision taken not in accordance with the rules inscribed in the treaty had no legal effect. Apparently, the blatant attempt by the United Kingdom and the Netherlands to misinterpret the explicit text of the treaty and, thereby, to exclude Liberia and Panama from the Maritime Committee (an attempt opposed by the USA) went beyond what the ICJ was willing to tolerate.⁷³

Given the difficulty of modifying the constituent documents by subsequent agreements, it can perhaps be understood why certain member states promoted lax rules of interpretation, with an emphasis on evolving practice to keep these institutions able to fulfil their tasks.⁷⁴ However, it must be acknowledged that this interpretative approach was less mindful of the less powerful member states within the organizations.⁷⁵

3 *The External Legal Constraints on the Organization Are Those General Rules of International Law That Are Applicable to Organizations*

The independent personality of international organizations, together with their distinctive nature as international entities rather than states, make them unique actors in international law; they are born into this world almost entirely free of external legal obligations.⁷⁶ As mentioned in passing by the ICJ in 1980: ‘International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’.⁷⁷

⁷² Klabbers, *supra* note 53, at 89.

⁷³ See Bernhardt, *supra* note 55, at 603.

⁷⁴ Sohn, *supra* note 51, at 174: ‘[A]n interpretation made by an organ of the Organization which is generally acceptable is binding, or to use the more common phrase ... authoritative.’ Hexner, ‘Interpretation by Public International Organizations of their Basic Instruments’, 53 *AJIL* (1959) 341, at 341: ‘Every international organization is, of course, interpreting its basic instrument in its daily routine work’; R. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (2005), at 8; Arato, ‘Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations’, 38 *Yale Journal of International Law* (2013) 289, at 312; Bröلمان, *supra* note 54; Peters, ‘Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?’, 3 *Göttingen Journal of International Law* (2011) 617, at 623.

⁷⁵ Fiti Sinclair, *Reform the World*, *supra* note 6, at 5 (discussing the informal expansions of the powers exercised by international organizations as a ‘more troubling possibility’, namely its being ‘indistinguishable from its originary “civilizing mission”, which has consistently supplied a pretext for imperialist actions’).

⁷⁶ White, *supra* note 17, at 34–35; Evans, ‘Finding Obligation: Foundation for a More Accountable Security Council’, 14 *New Zealand Journal of Public and International Law (NZJPIL)* (2016) 129, at 130–131; Alvarez, ‘International Organizations and the Rule of Law’, 14 *NZJPIL* (2016) 3, at 8–9.

⁷⁷ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, para. 37.

But the critical point here is the reference to ‘obligations incumbent upon them under general rules of international law’. This qualifier – *upon them* – made clear that they certainly were not bound by the customary international law that applied to states, including the new states emerging from de-colonization, which were bound by legal obligations from the very outset.⁷⁸

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On these grounds, another UN Secretary-General asserted that the UN forces were not necessarily bound by customary international humanitarian law.⁷⁹ As late as 1999, at the height of UN peacekeeping missions, Kofi Annan issued a bulletin in which he promulgated only a limited set of norms: ‘The *fundamental* principles and rules of international humanitarian law *set out in the present bulletin* are applicable to United Nations forces when in situations of armed conflict they are *actively engaged* therein as combatants, *to the extent and for the duration* of their engagement.’⁸⁰ As we will see, the UN refused to acknowledge any external limitations on its territorial administration missions in Kosovo or East Timor. Most recently, the UN also refused to acknowledge its human rights obligations or other duties towards individuals under its jurisdiction in Haiti.⁸¹

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4 Organizations Enjoy Immunity from Domestic Court Review (and, Hence, Are Subject Only to Judicial Proceedings to Which They Agreed)

Insulating international organizations from review requires immunity from judicial scrutiny.⁸² They enjoy absolute immunity from national courts, granted to them either in headquarters agreements with host states or in the constitutive treaties that bind all states parties.⁸³ While immunity is often secured by the founding treaty (for

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⁷⁸ Klabbers, *supra* note 53, at 38 (international organizations are generally counted among the subjects of international law together with states, individuals and perhaps some other entities as well).

⁷⁹ But see Sands and Klein, *supra* note 53, at 517–518, 523–530 (arguing that an organization is bound by customary international law).

⁸⁰ Annan, ‘Observance by United Nations Forces of International Humanitarian Law’, 81 *International Review of the Red Cross* (IRRC) (1999) 812, at 812.

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⁸¹ *Georges v. United Nations*, 15–455 (2d Cir. 2016). Background materials are available on Institute of Justice and Democracy, *Justice for Haiti Cholera Victims: The Lawsuit against the United Nations*, available at www.ijdh.org/2014/12/topics/health/cholera-litigation-faq/; J.M. Katz, ‘U.N. Admits Role in Cholera Epidemic in Haiti’, *New York Times* (17 August 2016); Alvarez, *supra* note 76, at 24; P. Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (2017). Highlighting recent examples, such as the cholera outbreak in Haiti, this book reveals how individual victims of human rights violations by international organizations are frequently left in the cold, due to the lack of an independent, impartial dispute settlement mechanisms before which they can file claims for such violations. Considering both global mechanisms and current mechanisms established by international organizations, such as administrative jurisdictions for employment-related disputes, Pierre Schmitt finds that they either are not competent or that they have a limited scope. See also Burke, ‘Central African Republic Peacekeeper Sexual Crimes, Institutional Failings: Addressing the Accountability Gap’, 14 *NZJPIL* (2016) 97.

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⁸² Sands and Klein, *supra* note 53, at 494.

⁸³ See Klabbers, *supra* note 53, at 131–152; Parish, ‘An Essay on the Accountability of International Organizations’, 7 *International Organizations Law Review* (IOLR) (2010) 277, at 305–306; see also A. Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts* (2013); Wouters *et al.*, ‘Western European Union v. Siedler; General Secretariat of the ACP Group v. Lutchmaya; General

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members) and the host state (in headquarters agreements), it is not necessarily recognized in third states.⁸⁴ To close this menacing gap, a general doctrine of immunity was developed.⁸⁵ As recently stated by the European Court of Human Rights (ECtHR) in *Mothers of Srebrenica v. The Netherlands*:

24.5 The attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. The immunity from jurisdiction ... is a long-standing practice established in the interest of the good working of these organisations.⁸⁶

24.10 This position echoes that of the ICJ (in the aforementioned *Reparations* opinion of 1951), where the Court opined that immunity from state authorities was necessary '[t]o ensure the independence of the agent, and, consequently, the independent action of the Organization itself'.⁸⁷ One cannot ignore the tension between Hammarskjöld's vision of the impartial international civil servant and the Court's deferential approach to the sudden concern about undue influence by national review. One would have thought that Hammarskjöld's civil servants were above these petty concerns.⁸⁸

24.15 The immunity of international organizations from external scrutiny not only raises concerns over effects on third parties with whom they engage or on whom they impact. It also carries significant consequences for the internal discipline within the organization: corrupt civil servants thrive in a culture of unaccountability. But the UN leadership has perhaps tended not to be overly concerned about that possible scenario either. UN Secretary-Generals have tended to drag their feet before reluctantly setting up internal dispute settlement mechanisms.⁸⁹ Yet, even then, they have vindictively pursued whistle-blowers, sending a clear message to their employees to remain submissive to their bosses.⁹⁰ Indeed, as recently as 2015, intervention by US federal agents

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24.30 Secretariat of the ACP Group v. B.D.', 105 *AJIL* (2011) 560, at 562; Schmalenbach, 'International Organizations or Institutions, General Aspects', in *Max Planck Encyclopedia of Public International Law* (2006), para. 7. Available at <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e499?rskey=v6QSSq&result=1&prd=EPIL>; Obsieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations', 77 *AJIL* (1983) 239.

⁸⁴ Klabbers, *supra* note 53, at 137–138; Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends', 7 *IOLR* 121, 124 (2010).

⁸⁵ Klabbers, *supra* note 53, at 33; Ryngaert, *supra* note 84, at 125, 146.

24.35 ⁸⁶ ECtHR, *Stichting Mothers of Srebrenica v. Netherlands*, Appl. no. 65542/12, Judgment of 11 June 2013, Art. 139. Ryngaert, *supra* note 84; Brölmann, 'Member States and International Legal Responsibility: Developments of the Institutional Veil', 12 *IOLR* (2015) 358.

⁸⁷ *Reparations*, *supra* note 48, at 183.

⁸⁸ Klabbers, *supra* note 53, at 132–133.

24.40 ⁸⁹ Shockley, 'Ethics and the United Nations International Civil Servant: The Jurisprudence of the United Nations Dispute Tribunals and the United Nations Appeals Tribunal on Workplace Retaliation – The Rights of the Whistleblower in the United Nations', 20 *Southwestern Journal of International Law* (2013) 1; Reinisch and Knahr, 'From the United Nations Administrative Tribunals to the United Nations Appeals Tribunals: Reform of the Administration of Justice System within the United Nations', 12 *Max Planck Yearbook of United Nations Law (MPYBUNL)* (2008) 447.

24.44 ⁹⁰ See *Wasserstrom v. Secretary-General of the United Nations*, Case no. UNDT/NY/2009/044/JAB/2008/087, 21 June 2012.

was required to combat corruption at the UN.⁹¹ The same happened at the World Bank and other international development banks; only with pressure from domestic courts did they set up internal procedures to adjudicate employment disputes.⁹²

5 Member States That Operate through International Organizations Can ‘Launder’ Their Legal Responsibility for Acts or Omissions That Are Attributed to the Organization 25.5

According to Article 4 of the International Law Commission’s (ILC) 2011 Articles on the Responsibility of International Organizations,⁹³ ‘[t]here is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributable to that organization under international law; and (b) Constitutes a breach of an international obligation of that organization’.⁹⁴ Hence, a state will evade its own responsibility if it acts through an international organization that is not bound by the state’s obligations.⁹⁵ According to Article 61 of these articles, the state will not be responsible for breaching its own international obligations when operating within international organizations, unless ‘by taking advantage of the fact that the organization has competence in relation to the subject matter of one of the State’s international obligations, it *circumvents* that obligation by *causing* the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation’.⁹⁶ 25.10 25.15 25.20

The same deferential approach is reflected in the 1995 Lisbon Resolution of the Institut de Droit International.⁹⁷ Article 5(b) of the Resolution on ‘[t]he Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties’ states that ‘[i]n particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights’. But it also suggests in Article 8 that ‘[i]mportant considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and comprehensive rule of liability of member States to third parties for the obligations of international organizations’.⁹⁸ 25.25 25.30

⁹¹ Lynch, ‘U.S. Accuses Former U.N. General Assembly President of Corruption’, *Foreign Policy* (6 October 2015), available at <http://foreignpolicy.com/2015/10/06/u-s-accuses-former-u-n-general-assembly-president-of-corruption>; see also Alvarez, *supra* note 80. 25.35

⁹² World Bank Administrative Tribunal, *De Merode and Others v. World Bank*, 83 ILR 639 (1981); International Monetary Fund Administrative Tribunal, *Ms. “EE” v. International Monetary Fund*, IMFAT Judgment no. 2010–4 (3 December 2010).

⁹³ Report on the Work of Its Sixty-third Session (26 April to 3 June and 4 July to 12 August 2011), UN Doc. A/66/10, ch. V.

⁹⁴ International Law Commission, Articles on the Responsibility of International Organizations, Doc. A/66/10 (2011) (emphasis added). 25.40

⁹⁵ On this see Klabbers, *supra* note 53, at 279–283, 285–288; Brölmann, *supra* note 86.

⁹⁶ *Ibid.* (emphasis added).

⁹⁷ Resolution on the Obligations of Multinational Enterprises and Their Member Companies, 1 September 1995.

⁹⁸ Higgins, ‘The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations Toward Third Parties’, 66 *Annuaire de l’Institut de Droit International* (1995) 249. 25.44

This logic may work well in relation to astute third parties that can protect themselves through insurance and other measures, but it would not protect other types of stakeholders, including the organization's own employees. Thankfully, the ECtHR was in a position to address this sore point, when it emphasized that it would be 'incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution'.⁹⁹

As scholars of administrative law know full well, there is no real tension between functionalism and accountability, but, quite the opposite, accountability facilitates a functioning institution, while opacity breeds corruption and a loss of direction. The following case study demonstrates that the same old truth applies in equal measure to global institutions.

B Case Study: UN Interim Administration in Kosovo: Functionalism on the Ground

This section focuses in some detail on one example of UN territorial administration that offers a paradigmatic demonstration of the destructive consequences of the functionalist approach and its dismissive attitude towards accountability. It is also an appeal for the UN to wholeheartedly adopt the culture of accountability described in Part 3. The UN Interim Administration in Kosovo (UNMIK) was the first attempt by the UN to exercise direct plenary administrative powers in a territory of a member state. It was established in 1999 to serve as the temporary government in Kosovo, which had been wrested from the Serbian government by the forces of the North Atlantic Treaty Organization.¹⁰⁰ UNMIK was directed by the Special Representative of the Secretary-General (SRSG), who effectively held all three branches of government, endowed with vast legislative and executive powers,¹⁰¹ as well as authority to control the judicial branch by appointing or removing judges from office.¹⁰² UNMIK offered no effective mechanism for administrative review of its policies or of their implementation, except for a few technical aspects, such as certain tax matters.¹⁰³ In addition, an

⁹⁹ ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgment of 18 February 1999; see J. Crawford, *State Responsibility: The General Part* (2013), at 431.

¹⁰⁰ UN Secretary-General, Report of the Secretary-General pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), delivered to the UN Security Council, UN Doc. S/1999/672, 12 June 1999. On this administration, see also G. Verdirame, *The UN and Human Rights: Who Guards the Guardians* (2011), at 244–269; S. Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (2004).

¹⁰¹ UNMIK Regulation no. 1999/1 on the Authority of the Interim Administration in Kosovo, UN Doc. UNMIK/REG/1999/1, 25 July 1999, Art. 1.1, available at www.unmikonline.org/regulations/1999/reg01-99.htm.

¹⁰² UNMIK Regulation no. 2001/2 Amending UNMIK Regulation no. 2000/6, as Amended, on the Appointment and Removal from Office of International Judges and International Prosecutors, UN Doc. UNMIK/REG/2001/2, 12 January 2001.

¹⁰³ Zimmerman and Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo', 70 *NJIL* (2001) 423, at 448, n. 124 (citing Regulation 2000/36 establishing the Media Appeals Board or Regulation 2000/20 creating an Independent Review Board in the area of Tax Administration).

UNMIK regulation ensured itself and the Kosovo peacekeeping force (KFOR) immunity from the reach of the local courts.¹⁰⁴ Instead, claims against these bodies were to be settled by claims commissions to be established by them.¹⁰⁵ However, such commissions were not established. Instead, UNMIK relied on a rather opaque UN procedure concerning such claims,¹⁰⁶ based on a broad UNGA resolution from 1998,¹⁰⁷ which, in some cases, offered compensation to individual claimants.¹⁰⁸ The SRSG reacted angrily to a handful of domestic court decisions that refused to enforce executive orders or regulations and, in one case, refused to follow a contrary decision by a local court because it was, in his view, 'without legal basis' and 'unenforceable'.¹⁰⁹ 27.5

Pressure led the SRSG to set up an ombudsperson institution that has 'jurisdiction to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration' (excluding the military part – KFOR).¹¹⁰ It was the SRSG who had the authority to appoint the ombudsperson for two-year terms (renewable) and also to remove the ombudsperson from office, *inter alia*, for 'failure in the execution of his or her functions'.¹¹¹ The ombudsperson issued several reports criticizing the immunities of the SRSG and UNMIK from judicial oversight, warning that '[s]uch blanket lack of accountability paves the way for the impunity of the state'.¹¹² But to no avail; the SRSG either disagreed with most of these reports or simply ignored them.¹¹³ 27.10

¹⁰⁴ UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, UN Doc. UNMIK/REG/2000/47, 18 August 2000; see generally Cordial, 'Outline of Presentation of the Situation in Kosovo', in A. Faite and J. Grenier (eds), *Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (2004) 49, at 52–55; Vité, 'Case Study: The Applicability of International Human Rights Law in Kosovo', in International Committee of the Red Cross, *Expert Meeting on Multinational Peace Operations* (2003) 87, at 92. 27.15

¹⁰⁵ UNMIK Regulation 2000/47, *supra* note 104. 27.20

¹⁰⁶ This process is referred to in Human Rights Advisory Panel, *N.M. and Others against UNMIK*, Case no. 26/08, Decision, 31 March 2010, paras 5–7 (concerning the Roma camp located near a lead smelter. In that case, the process was not finalized until more than four years after submission of the claim). 27.25

¹⁰⁷ GA Res. 52/247, 17 July 1998, Art. 8 (referring to 'third party claims' as 'claims against the [UN] resulting from peacekeeping operations'. The Resolution defines the temporal and financial limitations for damage 'resulting from or attributable to the activities of members of peacekeeping operations arising from "operational necessity"'). 27.30

¹⁰⁸ See, e.g., Human Rights Advisory Panel, *Kadri Balaj et al. against UNMIK*, Case no. 04/07, Decision, 31 March 2010. KFOR established, in 2003, a commission regarding claims only with respect to activities at its main headquarters. It delegated the responsibility to process other claims to the 'Troop Contributing Nations' regarding 'claims that arise from their own activities, in accordance with their own claims rules, regulations and procedures'. See Standard Operating Procedure 3023 for Claims in Kosovo (2003), reprinted in Pacquée and Dewulf, 'International Territorial Administrations and the Rule of Law: The Case of Kosovo', 4 *Essex Human Rights Review* (2007) 1, at 8–9. 27.35

¹⁰⁹ Everly, 'Reviewing Governmental Acts of the United Nations in Kosovo', 8 *German Law Journal (GLJ)* (2007) 21, at 28–29. 27.40

¹¹⁰ UNMIK Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, UN Doc. UNMIK/REG/2000/38, 30 June 2000. 27.40

¹¹¹ D. Pacquée and S. Dewulf, *On Governance, Accountability and Human Rights: The United Nations Interim Administration in Kosovo* (2006), at 8, n. 51. 27.44

¹¹² Ombudsperson Institution in Kosovo, On the Compatibility with Recognized International Standards of UNMIK Regulation no. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, Special Report no. 1, 18 August 2000, para. 23. 27.44

¹¹³ Everly, *supra* note 109, at 32.

28.5 Mounting international pressure prompted the SRSG to finally accept external scrutiny of his or her policies. Both the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) extended (in 2004 and 2005, respectively) requests to UNMIK to submit reports on its compliance with their respective covenants.¹¹⁴ UNMIK complied and submitted reports to both bodies (in 2006 and 2008, respectively) and received highly critical reviews.¹¹⁵ Among its more damning observations, the HRC noted ‘the legal uncertainty resulting from the failure to specify which provisions of the formerly applicable law [were] being replaced by’ UNMIK regulations and Kosovo Assembly laws and criticized ‘the absence of adequate guarantees for the independence of international judges and prosecutors ... the low remuneration of local judges and prosecutors, [and] the low representation of ethnic minorities in the judiciary’.¹¹⁶ The CESCR expressed its concerns, *inter alia*, about the inadequate protection of minority rights against discrimination by the Albanian majority.¹¹⁷

28.10 The observations of the ombudsperson, the HRC and the CESCR were shared by many commentators who lamented the culture of unaccountability of the UNMIK regime. In particular, there was widespread criticism of the absence of a clear commitment to universal standards of human rights and the lack of reliable checks and balances and an effective means of review of UNMIK policies and practices: ‘With regard to KFOR, the question of whether it is bound even by the applicable law has never been clearly answered and has led to KFOR’s possessing seemingly unchallengeable authority.’¹¹⁸ Reflecting on the administration of Kosovo by UNMIK and KFOR, Siobhán Wills observes:

28.25 [I]t is oversimplification to suggest that the UN administration will always have no interest of its own. The Security Council ... acts in the interests of maintaining international peace and security, as those interests are perceived by its Member States, particularly the Permanent Five. The inhabitants ... may have a different perspective ... to the UN ... and may not always regard the UN as an impartial representative of their interests.¹¹⁹

28.30 ¹¹⁴ Concluding Observations of the Human Rights Committee, Serbia, UN Doc. CCPR/C/UNK/CO/1 (2006), s. 4 (based on the theory ‘that the rights guaranteed under the Covenant belong to the people living in the territory of a State party, and that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in the administration of that territory’).

28.35 ¹¹⁵ See *ibid.*; UN Committee on Economic, Social and Cultural Rights (CESCR), Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant [on Economic, Social and Cultural Rights]: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Document Submitted by the United Nations Interim Administration Mission in Kosovo (UNMIK), Doc. E/C.12/UNK/CO/1, 1 December 2008, available at www.refworld.org/docid/493f94890.html.

¹¹⁶ *Ibid.*, paras 8, 20.

28.40 ¹¹⁷ *Ibid.*, paras 12–13, 15, 18, 32.

¹¹⁸ Marshall and Inglis, ‘The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo’, 16 *Harvard Human Rights Journal* (2003) 95, at 103; see, e.g., Stahn, ‘The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis’, 5 *MPYBUNL* (2001) 105; Everly, *supra* note 109; Pacquéé and Dewulf, *supra* note 108.

28.44 ¹¹⁹ S. Wills, *Protecting Civilians: The Obligations of Peacekeepers* (2009), at 227–228.

UNMIK’s immunity from public accountability was not only harmful to the Kosovar population, but it also nurtured an internal culture of corruption. In 2013, the UN Secretary-General filed an appeal against a judgment of the UN Dispute Tribunal (UNDT) in a case concerning a whistle-blower who had reported the complicity of senior UNMIK officials in a kickback scheme related to a controversial proposed power plant in Kosovo. In retaliation, the informer was detained, his home and person were searched, his post was abolished and he was subjected to criminal and administrative investigations. The UNDT criticized the ‘wholly unacceptable treatment in breach of his right to due process’.¹²⁰ It awarded the informer compensation, on the basis that ‘the [UN’s] conduct of the proceedings in deliberately and persistently refusing, without good cause, to abide by the orders of the Tribunal and not granting access to the ... investigation report constituted a manifest abuse of proceedings’.¹²¹ Instead of endorsing the decision, the Secretary-General appealed against it, arguing that the UNDT lacked jurisdiction over the matter. In a two-to-one judgment, the UN Appeals Tribunal accepted the Secretary-General’s appeal¹²² and, thereby, not only left the whistle-blower without remedy but also weakened the internal system of review.¹²³

This experience belies the belief that UN administrators would be impartial and effective and that regulating them would therefore be unnecessary and even over-burdensome. The experience in Kosovo is far from exceptional. As Emma Dunlop shows in her study of the administration of refugee camps and the determination of refugee status by the UN High Commissioner for Refugees (UNHCR), what characterizes these types of direct administration is a general lack of commitment to abiding by the same standards of accountability that these UN bodies expect from states. Dunlop notes that those procedural standards that the UNHCR adopts for itself establish guidelines that ‘diverge in significant respects from the standards UNHCR expects States to meet in their national RSD assessments’. She adds that ‘NGOs and commentators have questioned the due process afforded to applicants and the adequacy of review procedures under this regime’.¹²⁴

The instances of UN-led territorial administration highlight a simple truth with respect to the relationship between functionality and accountability: these are not necessarily opposing goals that need to be pitched against one another but, actually, complementary elements in the organization’s quest for success. Accountability is necessary for ensuring functionality because unfettered discretion for civil servants, even international civil servants, is prone to abuse by those who exploit their privileged position in the pursuit of goals that are incompatible with the organization’s

¹²⁰ UN Dispute Tribunal, *Wasserstrom v. Secretary-General of the United Nations*, Case no. UNDT/NY/2009/044/JAB/2008/087, 21 June 2012, para. 46.

¹²¹ *Ibid.*, para. 43.

¹²² UN Appeals Tribunal, *Wasserstrom v. Secretary-General of the United Nations*, Case no. 2014-UNAT-457 (2014). 29.40

¹²³ The internal review mechanisms in the UN were notorious for their limited protection of employees and were reluctantly reformed in 2008. See Reinisch and Knahr, *supra* note 89; Shockley, *supra* note 89.

¹²⁴ Dunlop, ‘A Globalized Administrative Procedure: UNHCR’s Determination of Refugee Status and Its Procedural Standards’, in Cassese *et al.*, *supra* note 28, 84. 29.44

30.5 mission. Increasing involvement by civil society in decision making and enhancing its perceived legitimacy contributes to the efficiency and the sustainability of the adopted decisions, and, hence, it is also cost-effective. The realization of this symbiotic relationship between functionality and accountability informed the advent of the second phase of the law of global governance, which is the subject of Part 3.

30.10 **3 Towards Accountability: The Pivotal Role of Bidirectional Communications in Addressing Information Asymmetry**

30.15 With the exponential proliferation of international organizations during the 1990s and the massive transfer of regulatory functions to them in all areas of life, ever more serious and fundamental questions about their performance came to the fore. Concerns about fair decision making within these organizations (such as the worry about 'democratic deficit' and capture by narrow interests), for example, combined with anxiety among democracies over losing their autonomy to authoritative international organizations led by powerful nations. Civil society protests against the World Bank's financing of dams along the Narmada River in India¹²⁵ and against the WTO in Seattle (1999)¹²⁶ reflected the growing understanding that those risks were too grave to be disregarded by civil society in both the global North and South.

30.20 These developments were soon echoed in academic writing. Scholarly attention to the increased opportunities for special interest groups to shape the policies of international organizations¹²⁷ and their domination by the North/Northern countries¹²⁸ shifted from focusing on the internal structures of international organizations and their external competences (discussed in Part 2) to defining the constraints that should be imposed on the decision-making processes within international organizations and how their powers could be checked. The theoretical insights about the information rationale that motivated the formation of international organizations now required reassessment in light of the growing realization among political scientists and activists that information asymmetry provided the foundation for corrupt or partisan politics and that special interests and corrupt politicians could use the auspices of these organizations to burden disparate voters by benefiting from an unequal ability to collect and disseminate information about policies.¹²⁹ The rich theoretical literature in political science and administrative law about the impact of information asymmetry on governance in the domestic sphere, furthermore, has highlighted (in the discourse on international organizations) the importance of disciplining the exercise of authority by administrative agencies and of the need to ensure accountability and participation through law.

30.40 ¹²⁵ Rajagopal, 'The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India', 18 *Leiden Journal International Law* (2005) 345.

¹²⁶ *World Trade Organization Protests in Seattle*, Seattle Municipal Archives, available at www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle.

¹²⁷ Benvenuti, *supra* note 22.

¹²⁸ Chimni, *supra* note 27.

30.44 ¹²⁹ See Lohman, *supra* note 22.

A The Assumptions Underlying the Rise of the Culture of Accountability

The efforts to design and develop norms of ‘global administrative law’ or ‘international administrative law’ reflected the realization that international organizations merit no more trust than domestic administrative agencies and that, just like domestic agencies, they are subject to Lord Acton’s famous observation that ‘power corrupts, and absolute power corrupts absolutely’. In fact, a more sinister outlook would regard global governance institutions as posing an even graver regulatory challenge than domestic agencies, given the assessment that the globalization-driven transfer of regulatory authority from the domestic to the international was a vehicle for a handful of powerful countries to escape the domestic structural checks and balances – such as the separation of powers, court independence and limited government – that have played an important role in safeguarding democratic deliberation and individual rights within states.¹³⁰

The implicit assumption of this accountability-based approach is that, by ensuring bidirectional communications between the governed and the governing body, it may be possible to eliminate the exercise of arbitrary administrative power and ensure policies that take into account the interests of all those affected by the decisions. This is an improvement on the Hammarskjöldian vision of the restraining power of law because it provides for an additional, crucial, institutional component; international civil servants will have to be impartial if they are to be accountable to independent and impartial mechanisms of review that can monitor them, communicate with them and review their decisions. The emphasis is on healthy contestations within and among agencies and on checks and balances where ‘ambition counteracts ambition’, as James Madison famously noted in ‘The Federalist no. 51’.¹³¹ Much depends, therefore, on the quality of information that circulates among the agencies (and the general public) and on the independence of the reviewers from the decision makers. Both are necessary conditions for effective monitoring of international civil servants. But there is no promise that the latter would ensure these conditions, of course.

The effort to develop a law that would instil a discipline of accountability in international organizations and other global governance bodies seeks first to identify the inherent weaknesses of these entities. Appropriate legal remedies can then be sourced to address such weaknesses, essentially by borrowing tools from domestic public law and adapting them to the global context. Potentially, there are flaws related to the organizations’ functionality – whether they serve the purposes they are set up to achieve – and flaws related to their ability to take into account the interests and rights of all affected stakeholders (the two questions being obviously interconnected).

¹³⁰ Benvenisti and Downs, *Between Fragmentation*, *supra* note 12, at 14–52.

¹³¹ Madison, ‘The Federalist, 51’, in *The Federalist* (2008) 251, at 252.

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32.5 Although international organizations are occasionally designed with the explicit goal of enhancing domestic democratic processes (the Aarhus Convention on access to domestic environmental decision making, for instance),¹³² and international tribunals possess the capacity to give voice to weak stakeholders on the domestic level (such as in the areas of human rights, trade or investment),¹³³ the bulk of the international organizations are not conceived to address democratic deficits at either the national or international level. In fact, many international organizations have further disempowered disparate domestic electorates by expanding the executive authority of powerful states and evading the traditional constitutional checks and balances found in many democracies.¹³⁴

1 *The Gist of Global Administrative Law*

32.15 The law that seeks to regulate the exercising of public authority by global governance bodies probes, at the initial stage, into whether the decision under scrutiny was issued by a body that has competence to issue such decisions. Although, theoretically, *ultra vires* acts or decisions should be rejected due to lacking legal effect, the legacy of the functionalist approach canvassed earlier would minimize the occurrence of such findings.¹³⁵ The law that regulates the process of decision making begins by regulating the identity of the decision maker and seeks to ensure as much as possible her independence and impartiality. The second stage focuses on the decision-making process itself, examining, in particular, the requirement to have a structured fact-finding and decision process as well as hearings of the affected parties, their right of access to information, participation and representation, and transparency of the process. The third stage covers the regulation of the decision, such as the obligation to pursue legitimate goals (and only those goals) and the need to respect and protect individual rights, balance conflicting interests and seek proportionality. The fourth and final stage of the law relates to the post-decision moment, focusing on the scope and depth of judicial review and other reviews of the decision.

32.30 The identity of the decision maker, her independence from others and her impartiality are addressed by certain doctrines of administrative law. These doctrines reflect an assumption that the empowering act seeks to ensure that the decider is competent to perform the required task and that her act reflects the wishes of those who appointed her for the task. The identity of the decider and the requirements of her

¹³² Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, 2161 UNTS 447.

¹³³ Keohane, Macedo and Moravcsik, 'Democracy-Enhancing Multilateralism', 63 *IO* (2009) 1.

¹³⁴ Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', 108 *AJIL* (2014) 211. See also Benvenisti and Downs, 'Empire's', *supra* note 12, for an analysis of this claim. Benvenisti, *supra* note 22 (arguing that by employing international organizations as venues for policymaking, state executives and interest groups manage to reduce the impact of domestic checks and balances). There may be additional reasons for the concentration of power in the executive and the decline of domestic checks. See B. Ackerman, *The Decline and Fall of the American Republic* (2010) (discussing what he regards as domestic factors that lead to the rise of unchecked US presidency).

¹³⁵ On this question, see Benvenisti, *supra* note 22, at 87–92.

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being independent and impartial are also part of the accountability requirements that identify those responsible for the decision.¹³⁶ This prevents the dilution of individual responsibility.¹³⁷ As Dennis Thompson states:

[p]ersonal responsibility ... can lay a foundation for democratic accountability of the officials who make objectionable decisions and policies. But it also supports accountability for harmful policies and decisions that are less attributable to any current officials as moral agents than to bureaucratic routines and structural defects of the organization in which the officials act.¹³⁸ 33.5

In the context of global governance, there is another important aspect highlighted in the advisory opinion *Constitution of the Marine Safety Committee*.¹³⁹ The specific identity of the decision maker (or the composition of the committee in charge) may reflect a concession granted by the powerful states parties to the weaker ones or reflect a carefully designed system of internal checks and balances that protects minority interests. Insisting on attention to such matters is as important for weaker states parties as it is for minorities and other disadvantaged groups in domestic constitutional systems. As the Administrative Tribunal of the International Labour Organization emphasized in the famous case of *Bustani v. Organisation for the Prohibition of Chemical Weapons*, 'the independence of international civil servants is an essential guarantee ... for the proper functioning of international organisations'.¹⁴⁰ The same goes for impartiality; while impartiality is considered a fundamental aspect of procedural fairness, it also has functional aspects since a biased agent can impede the proper functioning of the organization. 33.10

The regulation of the decision-making process serves four main goals. First, it is aimed at controlling the decision maker and ensuring that her decision aligns with the goals set by the principals who designed the system.¹⁴¹ The second goal is to provide individuals an opportunity, however minimal, to communicate on matters that shape their futures. Furthermore, to the extent that venues for deliberations are open to all, they can enable the formation of coalitions of weaker actors and NGOs representing civil society¹⁴² and facilitate their coordinated resistance to powerful parties 33.15

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¹³⁶ On the link between known identity and legitimacy, see Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale Law Journal* (YLJ) (2006) 1490, at 1528.

¹³⁷ Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* (MJIL) (2013) 359, at 376–377.

¹³⁸ Thompson, 'Moral Responsibility of Public Officials: The Problem of Many Hands', 74 *APSR* (1980) 905, at 914. 33.35

¹³⁹ *Constitution of the Maritime Safety Committee*, *supra* note 71.

¹⁴⁰ ILO Administrative Tribunal, *Bustani v. Organisation for the Prohibition of Chemical Weapons*, Case no. 2232, 16 July 2003, para. 16.

¹⁴¹ McCubbins, Noll and Weingast, 'Administrative Procedures as Instruments of Political Control', 3 *Journal of Law, Economics and Organization* (1987) 243; Gellhorn, 'Public Participation in Administrative Proceedings', 81 *YLJ* (1972) 359, at 359–362; Stewart, 'The Reformation of the American Administrative Law', 88 *Harvard Law Review* (HLR) (1975) 1669, at 1670, 1714; Stewart, 'Madison's Nightmare', 57 *University of Chicago Law Review* (1990) 335, at 341–345 (interests get more involved in notices and comments and especially in negotiated notices and comments). 33.40

¹⁴² On the link between transparency and non-governmental organizations (NGOs) involvement in the human rights area, see van Boven, 'The Role of Non-Governmental Organizations in International 33.44

and narrow interests, balancing them at least to a certain extent.¹⁴³ The fourth goal is the promotion of legitimacy to secure policy effectiveness.¹⁴⁴ For this purpose, the law seeks to ensure open channels of communication between the decision makers and the public and the bidirectional exchange of information through norms concerning transparency and participation. As Sabino Cassese notes, 'a fair procedure plays an important role in building social consensus. Process control or voice encourage people's cooperation with authorities and lead to legitimacy'.¹⁴⁵ As the literature on the emergence of cooperation in the management of common-pool resources suggests, institutions that provide for diverse actors' equal voice are more likely to resolve the collective action problems they face.¹⁴⁶

Transparency and participation lie at the heart of the bidirectional process of communications and deliberations that should take place. To facilitate this process, it is necessary to maintain open channels of communication between the different stakeholders and decision makers and to ensure that the communication is based on sufficient and reliable information. These requirements can be translated into several more concrete requirements. There is the demand that information be imparted to the public – providing access to existing information and preparing more digestible information where this is not yet available. There is also the demand that information be received from the public – based on the right to participate. Lastly, there is the demand that the decision be adequately reasoned.

The obligation to provide access to information is essentially a passive obligation; the assumption is that the public authority has the information in its files, and all it is required to do is to permit access to it. Issues of national security, intellectual property or trade secret protections may arise, and there may be costs involved with providing access. But the obligation to provide access also entails active responsibilities: to generate and maintain information about decision-making processes, such as by transcribing protocols of meetings that reflect the participants' considerations; to inform the public about planned measures and invite comments and to create and process the necessary data, including online, so that even non-professional members of the public

Human Rights Standard-Setting: A Prerequisite of Democracy', 20 *California Western International Law Journal* (1990) 207. See also Schweitz, Sullivan and Bell, 'NGO Participation in International Governance: The Question of Legitimacy', 89 *American Society of International Law Proceedings* 415 (1995).

¹⁴³ Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *MJIL* (1997) 183, at 275–277 (suggesting that many NGOs will also try to help small, underdeveloped states that lack influence).

¹⁴⁴ Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *AJIL* (1999) 596, at 602 (arguing that perceptions of legitimacy are an important basis of effectiveness and, consequently, legitimization plays an important role in the regime's long-term success); Lewinsohn-Zamir, 'Consumer Preferences, Citizen Preferences, and the Provision of Public Goods', 108 *YILJ* (1998) 377.

¹⁴⁵ Cassese, 'A Global Due Process of Law?', in G. Anthony *et al.* (eds), *Values in Global Administrative Law* (2011) 6. See also Esty, *supra* note 136, at 1527–1528.

¹⁴⁶ See E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990), at 182–216; Benvenisti, *supra* note 41, at 93.

can act upon it when responding to the authority.¹⁴⁷ We encounter once again the concept of the international civil service and the need to ensure its independence and impartiality – but this time as an objective that the law must fulfil by intervening in the bureaucracy of the organization¹⁴⁸ and in the exercising of authority by member states.¹⁴⁹

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The obligation to receive information from the public entails the duty to allow effective participation by creating the proper public venues and by allowing ample time to ensure that participation is effective. This obligation also raises related issues, such as who has the standing to comment and how to prevent participation from excessively burdening the decision-making process. Finally, there is the obligation to provide reasons for the decision taken. Availability of the text of the decision and the rationale on which it is based is crucial for ensuring accountability.

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The third and final step in evaluating the proper exercising of authority entails scrutiny of the stated reasons for the decision. Usually, it will not suffice to demonstrate that the administrative agency acted within its authority and followed the proper procedure. It is also necessary that the deciders weighed all of the relevant considerations and only the relevant considerations, and, if there were conflicting considerations, that they assigned proper weight to them and balanced them in a proper way.¹⁵⁰ The reviewing body is not authorized to step in and replace the agency's discretion with its own, but it is certainly authorized – indeed, required – to ensure that the agency has acted within the confines for which the law provided. It is immediately apparent that this third step is the most sensitive, as the boundary between the agency's discretion and that of the reviewing body becomes blurred and contentious. Questions of relative competence of the different bodies and of their legitimacy become pertinent. As the World Bank Administrative Tribunal outlined in its first-ever decision:

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Discretionary power is not absolute power and therefore should be subjected to the following limitations: non-retroactive deprivation of accrued rights; acting for reasons alien to the proper functioning of the organization ... [Decisions] must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups ... [and] must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff.¹⁵¹

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¹⁴⁷ Shkabatur, 'Transparency With(out) Accountability: Open Government in the United States', 31 *Yale Law and Policy Review* (2012) 79; Noveck, 'Is Open Data the Death of FOIA?' 126 *Yale Law Journal Forum* (2016) 273.

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¹⁴⁸ *De Merode*, *supra* note 92.

¹⁴⁹ ILO Administrative Tribunal, *Bustani v. Org. for the Prohibition of Chemical Weapons*, Case no. 2232, 16 July 2003, para. 16: '[T]he independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organisations. Unfettered discretion to terminate Bustani's appointment, would make him and others vulnerable to pressures and to political change.'

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¹⁵⁰ *Esty*, *supra* note 136, at 1529–1530; Benvenisti, *supra* note 22, at 192–196.

¹⁵¹ *De Merode*, *supra* note 92, ss 45–47; Benedetti, 'The Rise of International Administrative Tribunals: The Mendaro Affair', in Cassese *et al.*, *supra* note 145, 70; Olufemi Elias (ed.), *The Development and Effectiveness of International Administrative Law, on the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal* (2012).

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The fourth and final part of the law relates to the institutional need for review of the decisions. This review could be internal or external, by bureaucratic agents, judicial bodies or the court of public opinion.¹⁵²

36.5 2 *How Has the Law Evolved?*

As mentioned earlier, the rise of the culture of accountability can be linked back to the post-Cold War disillusionment with the ideal of an impartial international civil service and the growing clout of international regulation. Moreover, domestic public opinion and legislators became increasingly aware of the importance of global decision-making venues and the attendant heightened pressures on the domestic political space. The demand for accountability and for bidirectional communications with global governance bodies was channelled towards domestic judicial fora, primarily when affected individuals sought to resist supranational acts (such as the freezing of assets by UN bodies). These individuals found at least some of these domestic courts demonstrating a newfound willingness to address such petitions quite rigorously. Before the end of the Cold War, in matters related to international affairs, national courts tended to support their executive branches by giving them a free hand to do as they deemed fit. There was little domestic appetite for courts to ‘chain’ their executives to the law and thereby limit their discretion to act without restraint in the international arena. But several courts came to realize that the freedom they had granted the executive had – counter-intuitively – operated against the best interest of their country. This executive freedom, essentially creating a regulatory void, weakened the executive because it invited foreign actors to increase their pressure on the executive to accept concessions. In other words, the courts realized that judicial obduracy might actually strengthen the bargaining position of their executive in the international sphere.¹⁵³ The new judicial assertiveness provided legislators more opportunities to weigh in on global issues and thereby respond to the grassroots demand for voice. This has been the case not only in developed democracies in Europe but also in several developing countries. The famous judgment of the Indian Supreme Court in *Novartis v. State of India* (2013), which interpreted India’s trade-related obligations narrowly, was both a culmination of case law that ventured to intervene in matters affecting the state’s international commitments and also a model for other national courts to emulate.¹⁵⁴

36.35 ¹⁵² Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *APSR* (2005) 29, at 30.
 36.40 ¹⁵³ Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’, 102 *AJIL* (2008) 241; Benvenisti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts’, 4 *EJIL* (1993) 159.
 36.44 ¹⁵⁴ *Novartis AG v. Union of India*, (2013) 13(1) SCR 148 (India); see also *Bayer Corporation & Anr v. Union of India & Ors*, LPA 443 (Del., 2009). In 2003, the Supreme Court of Sri Lanka found that a bill that would have precluded compulsory licensing and parallel importing (regarded as important tools to ensure affordable access to pharmaceutical drugs) required a special majority in parliament because it infringed the principle of equality enshrined in the constitution. Case of S.C. Special Determination no. 14/2003, available at www.elaw.org/system/files/Sri+Lanka+SC+Determination+on+Intellectual+Property+Bill.doc. Courts in Bangladesh, India and Pakistan prevented the importation of contaminated food and blocked advertisement campaigns of foreign tobacco companies. *M. Farooque v. Bangladesh*, 48 DLR 438 (1996)

What characterizes domestic judging in developed democracies is the relative insulation of courts from the pressures of the executive branches. Such insulation could be a function of vibrant competition among political parties or between the legislature and the executive – competition that increases the demand for a reliable adjudicator.¹⁵⁵ Judicial independence may also be the result of the general public's demand for reliable information that comes from non-governmental sources, information that litigation generates directly or indirectly.¹⁵⁶ Obviously, since everything is relative, no court is completely independent of the other branches of government or of public opinion. But – again, relatively speaking – national courts in most democracies have come to enjoy significantly more independence from state executives than judges or arbitrators of international tribunals.¹⁵⁷

As theory suggests, the domination of powerful actors at the global level, as well as the lack of public demand for the information that international courts generate, almost guarantees that many international judiciaries will remain dependent on powerful states. This dependency is secured through executive control of the appointment and reappointment of judges or through various retaliatory measures to which losing states tend to resort if they can afford them.¹⁵⁸ Of course, not all international courts are equally dependent on powerful states parties, and some courts have found remarkable ways to evade this design flaw,¹⁵⁹ but most find it difficult to overcome the factors that thwart their independence.¹⁶⁰

(Ban.): *Vincent v. Union of India*, 1987 AIR 990 (India); *Islam v. Bangladesh*, 52 DLR 413 (2000) (Ban.) (referring to the similar decisions of the Indian court in *Ramakrishna v. State of Kerala*, 1968 AIR 1367 [Ker.]; *Chest Foundation v. Pakistan*, 1997 CLC 1379 [Pak.]).

¹⁵⁵ McNollgast, 'Conditions for Judicial Independence', 15 *Journal of Contemporary Legal Issues* (2006) 105; McNollgast, 'Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law', 68 *Southern California Law Review (SCLR)* (1995) 1631; Ramseyer, 'The Puzzling (In)dependence of Courts: A Comparative Approach', 23 *Journal of Legal Studies (JLS)* (1994) 721; Landes and Posner, 'The Independent Judiciary in an Interest-Group Perspective', 18 *Journal of Law and Economics (JLE)* (1975) 875.

¹⁵⁶ Stephenson, "'When the Devil Turns ...': The Political Foundations of Independent Judicial Review', 32 *JLS* (2003) 59. On the link between political competition and independent courts, see also T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003), at 21–33.

¹⁵⁷ Voeten, 'International Judicial Independence', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 421, at 431–434; Benvenisti and Downs, 'Prospects for the Increased Independence of International Tribunals', 12 *GLJ* (2011) 1057, at 1076.

¹⁵⁸ R. Mackenzie et al., *Selecting International Judges: Principle, Process, and Politics* (2010), at 174.

¹⁵⁹ For an analysis of the success of the Court of Justice of the European Union, see Benvenisti and Downs, 'The Premises, Assumptions, and Implications of Van Gend en Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions', 25 *EJIL* (2014) 85.

¹⁶⁰ S. Dothan, *Reputation and Judicial Tactics* (2014), at 15–18. See also J. Wouters and G. de Baere (eds), *The Contribution of International and Supranational Courts to the Rule of Law* (2015): '[I]nternational courts are generally not backed by a reliable enforcement procedure carried out by independent authorities, do not enjoy financial autonomy – on the contrary, they are largely dependent on the financing through the Member States, the Member States formally retain the power to withdraw from an international court or tribunal, to dissolve it or to change its mandate.' Benvenisti and Downs, *Between Fragmentation, supra* note 12, at 87–105.

This theory is supported by empirical findings. In the case of the most relevant international adjudications, in trade and investment disputes, the reticence of international judges and arbitrators to decide against influential states parties is clearly evident. In general, both the WTO dispute settlement tribunals and the various investment panels have promoted the interests of powerful states parties in trade liberalization¹⁶¹ and in enforcing agreements that favour investor–state arbitration rather than suing in the courts of the host states.¹⁶² At the same time, they have been keen to respect the discretionary space of the powerful states¹⁶³ and reduce the cost of their compliance with adverse rulings.¹⁶⁴ There is also evidence to suggest that their experience with the WTO dispute resolution led the key actors to be more careful in their nomination of candidates to be adjudicators and to punish those adjudicators found to be too independent by not extending their appointments.¹⁶⁵

¹⁶¹ See Colares, ‘The Limits of WTO Adjudication: Is Compliance the Problem?’, 14 *Journal of International Economic Law (JIEL)* (2011) 403 (showing that complainants’ systematically high rates of success in substantive adjudication – about 80% – can be attributed to the pro-trade liberalization preference of the World Trade Organization (WTO) adjudicators); see also Maton and Maton, ‘Independence under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement’, 10 *JIEL* (2007) 317.

¹⁶² Franck, ‘Empirically Evaluating Claims about Investment Treaty Arbitration’, 86 *North Carolina Law Review* (2007) 1, at 50. See also Schneiderman, ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes’, 30 *Northwestern Journal of International Law and Business* (2010) 383, at 404–407 (on strategic factors shaping arbitral awards in investment disputes).

¹⁶³ Dunoff, ‘Does the U.S. Support International Tribunals? The Case of the Multilateral Trade System’, in C. Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (2009) 322, at 346 (arguing that, as a complainant, the USA ‘has been successful in virtually all of the cases it has pursued seriously’ and explaining that the USA generally complies when it loses because the WTO maximizes its economic interests). With respect to the USA’s success in NAFTA arbitration, see the analysis of the strategic factors shaping arbitrators’ positions in Schneiderman, *supra* note 162, at 404–406.

¹⁶⁴ Brutger and Morse, ‘Balancing Law and Politics: Judicial Incentives in WTO Dispute Settlement’, 10 *IOLR* (2015) 179 (noting that WTO panellists invoke ‘judicial economy’ as grounds to refrain from deciding more often when the USA or the European Union (EU) are the losing parties, arguably to reduce the compliance burden for these two key actors).

¹⁶⁵ See Elsig and Pollack, ‘Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization’, 20 *European Journal of International Relations* (2014) 391 (arguing that the process for nominating arbitrators to the Appellate Body have become progressively more politicized as member states become far more concerned about judicial activism, systematically championing candidates whose views on key issues most closely resemble their own, and opposing candidates perceived to be activist or biased against their substantive preferences); Goldstein and Steinberg, ‘Regulatory Shift: The Rise of Judicial Liberalization at the WTO’, in W. Mattli and N. Woods (eds), *The Political and Global Regulation* (2009) 211, at 237: ‘[P]owerful members particularly the EC and the United States, have had a de facto veto over the appointment of Appellate Body members: in the WTO’s early years, these powerful members engage in a comparatively cursory review of Appellate Body nominees; in more recent years, as the Appellate Body’s capacity to make law became apparent, the United States began engaging in a thorough review and interview of Appellate Body nominees, blocking the appointment of some nominees who were seen as too activist. Similarly, members have not been shy about complaining when the Appellate Body engages in law-making they dislike, and proposals by powerful members to rewrite parts of the DSU in the Doha Round may have had a sobering effect on the Appellate Body.’ See also Dunoff, *supra* note 163, at 353 (discussing US proposals to increase party control over the dispute settlement process and provide ‘additional guidance to WTO adjudicative bodies’).

As this brief analysis of the evolution of the law suggests, and as the following discussion will confirm, the rise of global administrative law may be stunted by efforts by state executives and interest groups to insulate global governance processes from domestic scrutiny. With this in mind, we now turn to explore the challenges that the law on global governance faces.

39.5

B Challenges and Open Questions for the Accountability Approach

One can look back over the last two decades with satisfaction at the emerging 'culture of accountability' in global governance bodies.¹⁶⁶ Only four years ago, I concluded my special course at the Hague Academy of International Law on the law of global governance on a high note, suggesting that 'norms, standards and expectations that have crystalized in democratic domestic legal systems [were] migrating to the global sphere and beginning to frame perceptions about the legitimacy of global bodies'.¹⁶⁷ But several questions remain, and new challenges are on the rise. There are four fundamental difficulties that confront the law of global governance, relating to: (i) efforts to evade the law (through the delegation of authority to private actors or the circumvention of formal review procedures, for instance) or to use its procedures to slow regulation or intimidate the regulators; (ii) the inherent democratic deficits of global bodies, particularly the limited scope to vote out undesirable incumbents; (iii) the rise of the 'BRICS' states and (iv) the unsettled question of *locus standi*. The following sections elaborate on these deficiencies.

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1 Evasion or Deliberate Overloading of the Law

The limits of law as a tool to ensure accountability are well known to practitioners and scholars of administrative law, who have come to concede the ingenious, even Machiavellian, ways by which those under review seek to evade the reviewers. Decision makers can find myriad ways to maintain their discretionary space while appearing to follow the formal legal requirements of the process.¹⁶⁸ As scholars of domestic administrative law know all too well, the effort to regulate the regulators is an ongoing game of evasion and avoidance; there are numerous creative ways to invoke the language of accountability superficially, which 'allows the powerholders to claim that all sides were considered, but makes it possible for only some of those sides to benefit'.¹⁶⁹ The French students who protested in 1968 could not mistake the futility of participation in the proceedings of a bold administration that was going through the motions of administrative law. One of their posters reflected their grasp of both politics and grammar, stating: '[J]e participe, tu participes, il participe, nous participons, vous participez, ils profitent'.¹⁷⁰ As Sherry Arnstein observed in 1969, reflecting on the impact

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¹⁶⁶ See, e.g., M. Heupel and M. Zürn (eds), *Protecting the Individual from International Authority* (2017).

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¹⁶⁷ Benvenisti, *supra* note 22, at 287.

¹⁶⁸ See Morison, *supra* note 34.

¹⁶⁹ Arnstein, 'A Ladder of Citizen Participation', 35 *Journal of American Planning Association* (1969) 216, at 216.

¹⁷⁰ *Ibid.*: 'I participate, you participate, he participates, we participate, you [all] participate, they benefit.'

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of participation in municipal affairs on the American ‘have-nots’, ‘[t]here is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process’.¹⁷¹ These challenges are even starker in the global arena, due to the limited availability of independent review and the greater difficulty of overcoming information asymmetry problems. Moreover, it has proven problematic for individuals to exert electoral pressure on their elected officials to promote their interests in international organizations. Such electoral pressure must negotiate numerous layers of hierarchy that lie between individuals and international organizations, a multiplicity of actors that take part in international organizations’ decision making and decisions that are complex and highly technical in content.

Moreover, the existing mechanisms designed to support communications can be hindered and abused by both types of actors. Special interests have succeeded in burdening and slowing any adverse regulation by making excessive demands for information and for participation in decision-making processes, demands that at times were secured by US preferential trade agreements.¹⁷² The singular achievement of the tobacco companies in blocking domestic regulation¹⁷³ was only halted due to an effective civil society campaign to ensure, by means of a treaty, that the tobacco industry would be prevented from taking part in domestic regulatory processes.¹⁷⁴ Civil society activists also adopted partisan tactics by offering selective information to decision makers, who had tended to rely on them as trustworthy sources of information,¹⁷⁵ or

¹⁷¹ *Ibid.*

¹⁷² Abbott, ‘The Evolution of Public Health Provisions in Preferential Trade and Investment Agreements of the United States’, in P. Roffe and X. Seuba (eds), *Current Alliances in International Intellectual Property Lawmaking: The Emergence and Impact of Mega-Regionals* (2017) 45; Lopert and Gleeson, ‘The High Price of “Free” Trade: U.S. Trade Agreements and Access to Medicines’, 41 *Journal of Law, Medicine and Ethics* (2013) 199. See also Durkee, *supra* note 35. On the involvement of special interests in Notice and Comment proceedings related to the Montreal Protocol, see Berman, *supra* note 35.

¹⁷³ See generally Mitchell and Voon, *supra* note 35; Dimopoulos, Mitchell and Voon, *supra* note 35.

¹⁷⁴ World Health Organization Framework Convention on Tobacco Control, Doc. WHA56.1 (2003). The preamble of the Convention makes reference to ‘the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts’. On the motivation for the convention, see generally Mamudu, Hammond and Glantz, ‘Tobacco Industry Attempts to Counter the World Bank Report Curbing the Epidemic and Obstruct the WHO Framework Convention on Tobacco Control’, 67 *Social Science and Medicine* (2008) 1690; Mamudu and Glantz, ‘Civil Society and the Negotiation of the Framework Convention on Tobacco Control’, 4 *Global Public Health* (2009) 150; P. Cairney, D. Studlar and H.M. Mamudu, *Global Tobacco Control: Power, Policy, Governance and Transfer* (2011); Andia and Chorev, ‘Making Knowledge Legitimate: Transnational Advocacy Networks’ Campaigns Against Tobacco, Infant Formula and Pharmaceuticals’, 17 *Global Networks* (2017) 255. See also Mamudu, Hammond and Glantz, ‘Project Cerberus: Tobacco Industry Strategy to Create an Alternative to the Framework Convention on Tobacco Control’, 98 *American Journal of Public Health* (2008) 1630. Yach, ‘The Origins, Development, Effects, and Future of the WHO Framework Convention on Tobacco Control: A Personal Perspective’, 383 *Lancet* (2014) 1771. Grüning *et al.*, ‘Tobacco Industry Attempts to Influence and Use the German Government to Undermine the WHO Framework Convention on Tobacco Control’, 21 *Tobacco Control* (2012) 30.

¹⁷⁵ Tallberg *et al.*, *supra* note 36.

by seeking secluded venues for promoting standards below the radars of governments (regarding compensation for victims of violations of the laws of war, for instance).¹⁷⁶

The moment the law that regulates administrative agencies becomes effective, bureaucrats and interest groups seek out other modes of operation that fall outside the remit of the law. Just as in domestic settings, but perhaps even more pervasively, decision makers in global settings have been trying to evade the discipline of accountability and reduce interaction with affected stakeholders in two main ways. First, they organize themselves as private actors (or delegate such functions to private actors) and, as such, are not subject to the discipline of public authorities. In recent years, global governance has taken on an informal and even private façade, which makes it an even more challenging target for disciplining legal measures,¹⁷⁷ while reducing the space for reviewing institutions such as courts to review such actors.¹⁷⁸ As we shall see in Part 4, the growing disparities between governments and private Internet-based leviathans such as Google and Facebook have further accentuated this problem, as they reduce the appetite for constraining these technology giants and curtail the scope for doing so. 41.5
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The second route for evading accountability requirements has been to set up treaty regimes that reduce the involvement of national regulators and courts in decision making and review. This is exemplified in the turn to the so-called mega-regional trade agreements. As mentioned earlier,¹⁷⁹ what sustains the accountability discipline in domestic law is either inter-institutional competition between branches of government and regulators or an independent system of judicial review, which ensures a healthy deliberative environment.¹⁸⁰ For systemic reasons, such contestation is hardly seen in the supranational sphere.¹⁸¹ Instead, it was probably the resistance offered by national regulators and courts against global pressures that was able to invoke the language of legal accountability as a potent tool to justify the refusal to give effect to the organizations' policies, leading to their adoption of the discipline of accountability, at least on paper (or, rather, on their websites).¹⁸² Indirectly, the efforts by the mega-regional agreements to get rid of such domestic constraints may reflect the success of the domestic actors in limiting capture.¹⁸³ 41.20
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The negotiations over the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) and the Agreement on Trade in Services have

¹⁷⁶ See Benvenisti, 'Individual Remedies for Victims of Armed Conflicts in the Context of Mass Claims Settlements', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum* (2012), vol. 2, 1085, at 1098–1101. 41.35

¹⁷⁷ See, e.g., Benvenisti, *supra* note 22, at 37–41, 57–68.

¹⁷⁸ Lustig and Benvenisti, 'The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings', 15 *Theoretical Inquiries Law (TIL)* (2014) 125, at 139.

¹⁷⁹ See section 2 above.

¹⁸⁰ P. Cane, *Controlling Administrative Power: An Historical Comparison* (2016), at 8–10. 41.40

¹⁸¹ Benvenisti and Downs, *Between Fragmentation*, *supra* note 12, at 14–52; Dushman, 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture', 22 *EJIL* (2011) 1089.

¹⁸² Benvenisti and Downs, *Between Fragmentation*, *supra* note 12, at 105–149.

¹⁸³ See generally Joerges and Petersmann, *supra* note 33; Benvenisti, *supra* note 33, at 64. 41.44

signalled a new phase in the chain of international agreements that shrinks the domestic policy space of many, if not most, countries and threatens to render parts of it ineffectual.¹⁸⁴ This section will address the implications of these types of agreement for accountability and voice – the goals the law of global governance seeks to ensure.

42.5 To understand the challenges to these goals, some background is necessary. The mega-regional agreements have far-reaching aims.¹⁸⁵ In addition to reducing various barriers to trade beyond the current framework of the WTO, they aim to: harmonize regulation, customs and e-commerce; set standards for labour and environmental protection and for the protection of foreign investments, government procurement, medical devices, professional services, pesticides, information and communication technology, pharmaceuticals, textiles and vehicles; provide enhanced protection of intellectual property and set limits to state-owned enterprises.¹⁸⁶ As past US Vice President Joseph Biden candidly said, the general aim of the mega-regional agreements is ‘to help shape the character of the global economy’.¹⁸⁷ Past US President 42.10 Barack Obama put it even more revealingly when he stated that these ‘strong, high-standards trade agreements ... are vital to ... establishing rules for the global economy that help our businesses grow and hire’.¹⁸⁸

42.20 The tension between these agreements and the main goals of global governance law – accountability and voice – was already apparent in the negotiation strategy adopted by the USA, the agreements’ mastermind. The USA embarked on two parallel, essentially similar, tracks, the TPP and the TTIP, rather than on an inclusive one and insisted on strict confidentiality. The parallel tracks acted as a ‘divide-and-rule’ strategy that weakened the USA’s negotiating partners; the secrecy precluded open deliberations that could ensure accountability and voice. It was only the persistent 42.25 revelations published by Wikileaks that enabled lawmakers and the general public to

42.30 ¹⁸⁴ Transatlantic Trade and Investment Partnership (TTIP) (draft dated 12 November 2015); Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam 2016, [2006] ATNIF 2; General Agreement on Trade in Services 1994, 1869 UNTS 183.

¹⁸⁵ EU Trade Commissioner Karel De Gucht, Transatlantic Trade and Investment Partnership, 30 September 2013, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=969>.

42.35 ¹⁸⁶ European Commission, EU Textual Proposal: Possible Provisions on State Enterprises and Enterprises Granted Special or Exclusive Rights or Privileges, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf (tabled during the TTIP negotiations): ‘There is a clear need to understand the behaviour and practices of [state-owned enterprises] in the international trading system, to identify the key concerns and to develop ambitious common rules to discipline the harmful effects of SOEs stemming from undue advantages which would contribute to creating and maintaining a level playing field between public and private market participants.’

42.40 ¹⁸⁷ Dan Mullaney, Opening Remarks by U.S. and EU Chief Negotiators for the Transatlantic Trade and Investment Partnership (T-TIP) Round Nine Press Conference, 24 April 2015, available at <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/april/opening-remarks-us-and-eu-chief#>. See also Bickel, ‘Harmonizing Regulations in the Financial Services Industry through the Transatlantic Trade and Investment Partnership’, 29 *Emory International Law Review* 557 (2014).

42.44 ¹⁸⁸ White House, Statement by the President on Senate Passage of Trade Promotion Authority and Trade Adjustment Assistance, 22 May 2015, available at <https://obamawhitehouse.archives.gov/the-press-office/2015/05/22/statement-president-senate-passage-trade-promotion-authority-and-trade-a>.

become aware of the negotiations and their content and mount a campaign against the proposed text.¹⁸⁹

The two main institutional innovations of the agreements also limited the scope for accountability and voice. The first innovation was the effort to secure ‘regulatory convergence’ (or similar concepts such as ‘regulatory harmonization’, ‘mutual recognition’, ‘mutual equivalence’, ‘regulatory cooperation’ and ‘regulatory coherence’) that would pressure national regulators to conform to standards set by the more sophisticated or the first mover (who was likely to be the more powerful state party), leaving little space for public deliberation.¹⁹⁰ Such regulatory convergence would continually be used to modify the original agreement, in the absence of scrutiny by domestic institutions. The second innovation that would similarly diminish the scope for accountability was the adoption of investor-to-state dispute settlement (ISDS) mechanisms, by means of which foreign investors could circumvent domestic regulatory bodies and administrative court review by instituting arbitration proceedings before ad hoc arbitral tribunals when they sought to challenge national regulations they deemed incompatible with the international agreement. This turn to privatized dispute settlement mechanisms has generated concerns around the unfair advantage given to foreign parties to challenge regulations enacted by democratically elected officials before private arbitrators in a process insulated from democratic input and not subject to review.¹⁹¹ Furthermore, only the foreign investor can initiate such proceedings, thereby creating a ‘regulatory chill’ that can limit the space for policymaking by those fearing costly and insufficiently impartial dispute resolution proceedings.¹⁹² The key concern with any alternative to national courts whose judges are relatively independent of state executives is the relative dependence of arbitrators on the state executives who promote and elect them. In the space between judicial dependence and independence lies not only the individual’s right to effective judicial remedy¹⁹³ but also the possibility of a meaningful democracy.

¹⁸⁹ Benvenisti, *supra* note 33, at 58.

¹⁹⁰ Stewart, ‘State Regulatory Capacity and Administrative Law and Governance under Globalization’, ILLJ Working Paper no. 2016/1 (2016); Messerlin, ‘The Transatlantic Trade and Investment Partnership: The Services Dimension’, CEPS Special Report no. 106 (2015), at 13–15, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613340.

¹⁹¹ Leading Legal Scholars on TPP: We Write Out of Grave Concern, *Reader Supported News* (9 May 2015), available at <http://readersupportednews.org/opinion2/277-75/30076-focus-5-leading-legal-scholars-on-tpp-we-write-out-of-grave-concern>; Letter from Erwin Chemerinsky and others to the U.S. Senate, 11 March 2015, available at www.citizen.org/documents/lawyers-isds-letter-march-2015.pdf. See also Skovgaard Poulsen, Bonnitcha and Yackee, ‘Costs and Benefits of an EU-USA Investment Protection Treaty’, LSE Paper (2013), at 26, available at www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (memo on the potentially skewed allocation of costs (states parties incur costs, private actors enjoy the benefits): ‘[W]e assume that, all else equal, it would be significantly more costly for the UK to defend itself against an ISDS claim than an equivalent domestic court/domestic law claim.’)

¹⁹² For a rebuttal, see Letter from International Law Experts to Alliance for Justice, 8 April 2015, available at www.mcgill.ca/fortier-chair/files/fortier-chair/isds_press_release_april_2015.pdf.

¹⁹³ This right is grounded in the constitutional law of several countries as well as in regional or international law. As the Kadi judgment recognized, individuals under EU law and European human rights law

It may well be that the recent assertiveness of national courts, discussed earlier, is the ‘problem’ that the mega-regional agreements and, especially, the ISDS system hoped to resolve. What seemed to policymakers and their constituencies to be assertiveness that promoted democratic deliberations was surely viewed by foreign stakeholders as a barrier to trade. No doubt, the *Novartis v. India* judgment must have added to the determination of northern pharmaceutical companies to offer the ISDS as a system that would nullify the *Novartis* precedent and curb its potential ramifications around the developing world.¹⁹⁴

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44.10 2 *The Inherent Democratic Deficits of Global Bodies*

In the domestic context, institutional accountability mechanisms are supplemented by electoral accountability – the ability of individuals to vote their representatives out of office and thus exert (even an indirect) pressure on unelected public officials, who are typically subordinate to these representatives. The electoral process also offers an opportunity to change the public agenda and challenge the status quo. Conversely, in the international context, the degree of separation between individuals and international organizations is too large, and the lack of electoral accountability is potentially fatal to meaningful accountability towards wider, more disparate, constituencies. Whereas, in democracies, elections complement the legal accountability tools, these are lacking in most global venues where decision makers cannot be removed from power at the insistence of dissatisfied voters. While the legal tools of accountability provide a semblance of civic participation in decision making, the lack of real voice leaves the participants in the eternal position of mere reactive observers, questioning the real effect of their input and incapable of initiating changes to the prevailing agenda.

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Moreover, as the German Federal Constitutional Court pointed out in the important Lisbon Treaty case, direct elections are crucial for providing democratic legitimacy to the power holders.¹⁹⁵ Therefore, the efforts of the European Union (EU) to ‘strengthen[] citizens’ and associations’ rights aimed at participation and transparency ... [to facilitate] procedural participation’ would not be sufficient, as ‘[m]ere participation of the citizens in political rule which would take the place of the representative self-government of the people cannot be a substitute for the legitimising connection of elections and other votes and of a government supported by it’.¹⁹⁶ The lack of real voice in the phase of policy modification is acutely felt when new institutions are designed. The mega-regionals example shows not only how state executives and interest groups seek to evade accountability for specific policies but also their ability to design the fora for

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are entitled to ‘effective judicial protection [which] is a general principle of Community law stemming from the constitutional traditions common to the Member States’. *Kadi v. Council*, *supra* note 26, para. 6; see generally S. Trechsel, *Human Rights in Criminal Proceedings*, edited by Stephan Trechsel and Sarah J. Summers (2005), at 61–80.

¹⁹⁴ Kapczynski, ‘Engineered in India – Patent Law 2.0’, 369 *New England Journal of Medicine* (2013) 497.

¹⁹⁵ BVerfG, 2 BvE 2/08, 30 June 2009, available at www.bverfg.de/e/es20090630_2bve000208en.html.

¹⁹⁶ *Ibid.*, paras 290(1), 295.

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decision making without public participation. The opacity of the negotiation processes demonstrates the need for global administrative law scholarship to pay attention to the need for voice in the process of negotiating new global bodies.¹⁹⁷ The most general comment to make in this regard, perhaps, is that the negotiation phase should be conducted in a transparent and inclusive manner to reflect the significance and potential impact of the agreements on almost everyone. Transparency and participation might cause some delay in the maturation of an agreement and may make it more costly to achieve, but it will ultimately reflect a more informed and sensitive balancing of the interests and rights of all affected stakeholders, while the likelihood that it will offer more sustainable policies is greater.¹⁹⁸

The failure of the Anti-Counterfeiting Trade Agreement (ACTA) demonstrates the crucial role of inclusive participation in the phase of institutional design.¹⁹⁹ As Margot Kaminski observes in her analysis of the impact of special interests in writing global intellectual property law, public pressure proved effective in convincing the US trade regime (USTR) to disclose the draft text of the ACTA to several public interest groups.²⁰⁰ Armed with this information, the groups could request specific modifications that benefited wider constituencies and that the USTR was willing to accommodate. This experience led her to conclude: 'A balanced membership requirement coupled with the latent threat of public digital protests may be uniquely powerful in the case of intellectual property and trade policymaking.'²⁰¹ The European Parliament has played a major role in rejecting the ACTA.²⁰² Its vote against ratification was preceded by what was officially described as 'unprecedented direct lobbying by thousands of EU citizens who called on it to reject ACTA, in street demonstrations, e-mails to MEPs and calls to their offices. Parliament also received a petition, signed by 2.8 million citizens worldwide, urging it to reject the agreement.'²⁰³

However, the process of ratification offers a meaningful opportunity for voice only to the handful of powerful states whose participation in the proposed global institution is at stake. The EU Parliament is indeed strong enough to reject a treaty on behalf of all Europe, and the German Constitutional Court can be confident enough that its instructions to the German Bundestag will not be sidestepped by the rest of the European partners.²⁰⁴ But this privilege is not the province of all stakeholders. Having the opportunity to voice opposition of the policies of the institution but not to vote

¹⁹⁷ Saliternik, 'Reducing the Price of Peace: The Human Rights Responsibilities of Third-Party Facilitators', 48 *Vanderbilt Journal of Transnational Law* (2015) 179.

¹⁹⁸ *Ibid.*, at 187.

¹⁹⁹ Anti-Counterfeiting Trade Agreement, 1 October 2011.

²⁰⁰ Kaminski, 'The Capture of International Intellectual Property Law through the U.S. Trade Regime', 87 *SCLR* (2014) 977.

²⁰¹ *Ibid.*, at 1051.

²⁰² *Ibid.*; 'European Parliament Rejects ACTA', *European Parliament News* (4 July 2012), available at www.europarl.europa.eu/news/en/news-room/content/20120703IPR48247/html/European-Parliament-rejects-ACTA.

²⁰³ *Ibid.*

²⁰⁴ 2 *BvE 2/08*, *supra* note 195.

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against it may limit the function of communications, and it certainly undermines the sense of ownership of the outcome of the policymaking process.

3 *The Rise of the Five BRICS States*

46.5 The Asian Infrastructure Investment Bank (AIIB) is a China-led international financial institution created to offer finance to infrastructure projects as part of China's Silk Road initiative.²⁰⁵ It directly competes with the USA-led World Bank and the Asian Development Bank (ADB), a Manila-based institution dominated by Japan and the USA. The New Development Bank, formerly referred to as the BRICS Development Bank, is another multilateral development bank established by the five BRICS states (Brazil, Russia, India, China and South Africa). Given the prevailing criticism among developing countries (that is, the clients of such multilateral development banks) of the slowness and rigidity of those institutions, one worry could be that the discipline of accountability, reflected in institutions such as the World Bank Inspection Panel (WBIP),²⁰⁶ could be forsaken in the name of a streamlined, more efficient decision process that is also less rigorously held to account. It has been said that the Chinese view the World Bank and the ADB as 'overly bureaucratic, overstaffed and cumbersome. ... The Chinese government wants the AIIB to be nimbler and use electronic communications more'.²⁰⁷ For example, the fact that the AIIB has a non-paid, non-residential board and has no equivalent to the WBIP means that the bank's Chinese-dominated management has greater discretion to approve loans, without being rigorously reviewed by a WBIP-like body for compliance with the bank's policies.²⁰⁸ The competition created among the different banks is likely to put pressure on existing accountability mechanisms in the Western-dominated banks whose loan procedures could be regarded by potential borrowers as slow and burdensome.

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With the influence of the BRICS, in general (and China, in particular) on the up, the spectre of unaccountable global governance rises as well. It would seem that only a 'Seattle Moment' – civil society protests against certain development projects – could turn global public opinion against the members of these development banks. But the extent to which China and its allies are sensitive to such criticisms remains unclear.

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4 *The Unsettled Question of Locus Standi*

While international organizations are subject to multiple obligations that make them accountable to the institutions that support them and to influential political and legal actors, they are at the same time not accountable to other stakeholders who are

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²⁰⁵ B. Hofman, 'China's One Belt One Road Initiative: What We Know Thus Far', *World Bank* (12 December 2015), available at <http://blogs.worldbank.org/eastasiapacific/china-one-belt-one-road-initiative-what-we-know-thus-far>.

46.40 ²⁰⁶ J. Tyson, 'Is the World Bank's Inspection Panel Working the Way It Should?', *Devex* (10 Nov. 2015), available at www.devex.com/news/is-the-world-bank-s-inspection-panel-working-the-way-it-should-86973.

²⁰⁷ M. Wan, *The Asian Infrastructure Investment Bank: The Construction of Power and the Struggle for the East Asian International Order* (2016), at 77–78; Ong, 'The Asian Infrastructure Investment Bank: Bringing "Asian Values" to Global Economic Governance?', 20 *Journal of International Economic Law* (2017) 535.

46.44 ²⁰⁸ On this point, see Bin, 'MDBs' Accountability Mechanism: A Perspective of AIIB', 51 *Journal of World Trade* (2017) 409, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962793.

affected by their acts and omissions. As a result, the latter are – or perceive themselves to be – systematically ignored by international organizations. This is ‘the problem of disregard’, as Richard Stewart has labelled it.²⁰⁹ In the global context, three major questions are yet to be settled. First, how might the relevant individuals and communities whose input is pertinent be identified? This problem is sometimes reflected in domestic public law discourse as the question of *locus standi* or ‘standing’, which singles out those individuals who are entitled to demand judicial review of administrative action.²¹⁰ The second question is how much weight should be assigned to their interests, as opposed to the (often conflicting) interests of others? This second question only rarely arises in domestic settings when foreign interests compete in court against domestic ones, and the doctrine is usually silent on it.²¹¹ The third and final question in this context relates to the possible ways of facilitating access to information among those disregarded who are also strangers to the relevant decision makers. While domestic law does have a doctrine – albeit vague – for identifying those who have ‘standing’, the law of global governance is yet to develop a similar approach.

These questions go to the heart of the law on global governance because they require an exploration of the normative goals of the law – the purposes it should serve. For example, the functionalist approach discussed in Part 2 had no need to address this question as it was based on the assumption that there was no requirement to communicate with distant strangers. But, in the era of accountability, such matters require serious discussion. Philosophers of global justice must be credited for their attempt to elaborate on these questions, although the propositions they put forward – focusing on the ‘all affected principle’²¹² or the ‘all subjected principle’²¹³ or using the

²⁰⁹ Stewart, *supra* note 134.

²¹⁰ P. Cane, *Administrative Law* (2011), at 281–298.

²¹¹ A rare statement was made in ECtHR, *James & Others v. United Kingdom*, Appl. no. 8793/79, Judgment of 21 February 1986, Art. 63: ‘Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor will have been consulted on its adoption. Secondly, although the taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals, and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.’ See Benvenisti, ‘The Margin of Appreciation, Subsidiarity, and Global Challenges to Democracy’, Global Trust Working Paper Series no. 05/2016 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047237.

²¹² Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’, 35 *Philosophy and Public Affairs* (2007) 40; Goodin, ‘Enfranchising All Subjected, Worldwide’, 8 *International Theory (IT)* (2016) 365; Koenig-Archibugi, ‘How to Diagnose Democratic Deficits in Global Politics: The Use of the “All-Affected Principle”’, 9 *IT* (2017) 171; Stewart, *supra* note 134, at 225. See also the Organisation for Economic Co-operation and Development (OECD), *Guiding Principles for Regulatory Quality and Performance* (2008), available at <http://dx.doi.org/10.1787/9789264056381-en> (states should ‘[c]onsult with all significantly affected and potentially interested parties, whether domestic or foreign’); draft OECD, *Best Practices Principles on Stakeholder Engagement* (2017), available at <http://dx.doi.org/10.1787/9789264056381-en>: ‘It is necessary that foreign-based stakeholders are given notice sufficiently in advance and are also given a sufficient period of time to submit their inputs. It might be useful in cases when regulations have impacts on foreign parties to translate these regulations.’

²¹³ N. Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (2009), at 65–66.

‘influenceability’ lens²¹⁴ – have tended to collapse the two questions: who is entitled to be heard and what weight should be given to foreign versus domestic stakeholders?²¹⁵

48.5 Similarly, domestic doctrines of standing also followed the implicit assumption that judicial review will be equally rigorous, regardless of the identity of the petitioner. For example, when foreigners petitioned against EU policies before the Court of Justice of the European Union (CJEU) – a Canadian Inuit association and the POLISARIO front representing the Saharawi people – the Court did not seem to assign less weight to the foreigners’ interest. The equal weight given to foreign petitioners has its costs; it might be the reason for limiting the foreigner’s standing too narrowly. For example, 48.10 the Aarhus Convention’s Compliance Committee has criticized the EU for interpreting the requirement of standing under the Treaty on the Functioning of the European Union too narrowly and in violation of the requirements of the Convention.²¹⁶ A general theory of standing and of the relevant weight the foreigner is entitled to needs to be developed. It is beyond the scope of this Foreword to do so, but an outline of an 48.15 argument can be made.

We tend to accept that one has standing to demand accountability from one’s own government, from those who speak in one’s name²¹⁷ or from those subject to the territorial jurisdiction of that authority. But why should one, located abroad, have standing to demand account from a foreign state or from an international organization? 48.20 The law of international organizations cannot offer any basis for a theory that sets out the scope of accountability towards strangers. As we saw in Part 2, the law of international organizations imposes minimal duties on them in their external relations and certainly does not provide for any underlying duties towards non-members, be they states or individuals. The attempt to base the demand for *locus standi* on the 48.25

²¹⁴ Several political philosophers are satisfied with a grounding that is based simply on human interaction; individuals owe account to others for the effects of their behaviour on society. See, e.g., A. Sen, *The Idea of Justice* (2009), at 46: ‘The basic general obligation here must be to consider seriously what one can reasonably do to help the realization of another person’s freedom, taking note of its importance and influenceability, and of one’s own circumstances and likely effectiveness. There are, of course, ambiguities here and scope for disagreement, but it does make a substantial difference in determining what one should do to acknowledge an obligation to consider this argument seriously.’

48.30 ²¹⁵ This proposition is famously contested. See, e.g., Miller, ‘National Responsibility and Global Justice’, 11 *Critical Review of International Society and Political Philosophy* (2008) 383 (proposing a theory of global justice that limits the global concern to the protection of only basic human rights); Nagel, ‘The Problem of Global Justice’, 33 *Philosophy and Public Affairs* (2005) 113, at 138 (claiming that there is no burden of justification between national communities).

48.35 ²¹⁶ Treaty on the Functioning of the European Union, OJ 2012 C 326/47, Art. 263: ‘Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.’ As interpreted by the Aarhus Convention’s Compliance Committee, in Findings and Recommendations with Regard to Communication ACCC/C/2008/32 (Part I) Concerning Compliance by the European Union, Doc. ECE/MP.PP/C.1/2011/4/Add.1, 14 April 2011, para. 80: ‘The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a “direct or individual concern”, provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to domestic environmental laws.’

48.40 ²¹⁷ A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), 48.44 at 210.

concept of the rule of law begs the question:²¹⁸ Why are foreigners entitled to benefit from the rule of law of a particular community?²¹⁹ To argue that international organizations decide ‘in my name’ or are otherwise accountable to me for complying with their law requires an additional theoretical link that current rule-of-law literature has not made.²²⁰

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Arguments based on the human rights of those affected must explain why foreigners have rights towards which an international organization has a corresponding duty to respect or protect. While the Universal Declaration of Human Rights articulates the rights of ‘all human beings’ (or ‘everyone’), it conspicuously evades the assignment of the respective obligations and stops short of identifying those who are responsible for protecting those rights.²²¹ This latter question is addressed in the various human rights conventions: the obligation to secure and respect the enumerated rights is assigned to the states parties with respect to individuals ‘subject to their jurisdiction’.²²² This criterion serves to allocate the global obligations towards individuals among states. When importing international human rights obligations from states to global governance bodies, two questions emerge, which are both related to this concept of ‘jurisdiction’. First, can global bodies ever be regarded as having ‘jurisdiction’ over those (individuals) affected by their policies? And, second, if so, what is the space within which international organizations may be regarded as having ‘jurisdiction’? When they effectively control territory, as in the case of UNMIC (discussed in Part 2), it is clear that they have ‘jurisdiction’ over the people they effectively control.²²³ Similarly, it is obvious that the UN Security Council has ‘jurisdiction’ over individuals directly subject to its targeted sanctions regime in the counter-terrorism context.²²⁴ The same could easily apply also to employees of international organizations, who are entitled to expect their employer to respect and ensure their labour rights.²²⁵ But this still leaves out many more types of stakeholders who are indirectly affected by international organizations: in what sense are these individuals ‘subject’ to their ‘jurisdiction’? For example, does the World Bank subject individuals to its jurisdiction when it decides to offer loans to a local government, which then uses the loans to evict those individuals from their homes?²²⁶ And what about private bodies, such as the International Olympic

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²¹⁸ The concept of the rule of law has served as the inspiration for the evolution of accountability obligations in domestic administrative law in all major legal systems. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *EJIL* (2006) 187, at 190; L. Neville Brown and John Bell emphasize the French principle of *légalité* – ‘the idea that the administration must be compelled to observe the law’. L.N. Brown and J.S. Bell, *French Administrative Law* (4th edn, 1993), at 202.

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²¹⁹ Fuller and Winston, ‘The Forms and Limits of Adjudication’, 92 *HLR* (1978) 353, at 374–379.

²²⁰ Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’, 22 *EJIL* (2011) 315, at 325 (focusing on the rule-of-law demands on states towards those subject to their control).

²²¹ Universal Declaration of Human Rights, GA Res. 217, 10 December 1948.

²²² See, e.g., International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Art. 2(1).

²²³ Human Rights Committee, Concluding Observations of the Human Rights Committee Kosovo (Republic of Serbia), UN Doc. CCPR/C/UNK/CO/1, 14 August 2006, para. 4. This position is based on its General Comment no. 26 (1977) on the continuity of obligations.

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²²⁴ SC Res. 1267, 15 October 1999; SC Res 1373, 28 September 2011; SC Res. 2174, 24 September 2014.

²²⁵ ECtHR, *Waite and Kennedy v. Germany*, *supra* note 99.

²²⁶ Circi, ‘The World Bank Inspection Panel: The Indian Mumbai Urban Transport Project Case’, in Cassese *et al.*, *supra* note 28, 100; Benvenisti, *supra* note 21, at 172–173.

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Committee, which requires athletes to waive their privacy and other rights as a condition of participation in competitions?

We lack a rationale with which to outline the substantive and spatial scope of the human rights-based obligations that international organizations owe to affected individuals who are not subject to their jurisdiction in the traditional, state-based sense reflected in contemporary international law. Contemporary human rights law does not provide such a theory. To overcome these conceptual gaps in the pursuit of accountability from international organizations and other global standard-setting bodies, it is possible to resort to the concept of trusteeship, an old explanation for the accountability of administrative agencies.²²⁷ The concept of trusteeship is no stranger to administrative law. It provided the basis for John Austin's definition of administrative law, long before Albert Dicey's approach gained prominence: 'Administrative law determines the ends and modes to and in which the sovereign powers shall be exercised: shall be exercised directly by the monarch or sovereign number, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are delegated or *committed in trust*.'²²⁸

Austin's view reflected a long-established practice of common law judges, who, since the early 17th century, had invoked and refined the concept of trust to limit the authority of office holders.²²⁹ This traditional concept also informed the democratic vision of state authority, derived from the people and, therefore, acting as the people's trustee, as exemplified in the writings of John Locke²³⁰ and James Madison in *The Federalist*.²³¹ The 1776 Virginia Declaration of Rights asserted that 'all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them'.²³² Even monarchic France recognized the concept of trusteeship as limiting the authority of the king.²³³ The trusteeship vision

²²⁷ Easterbrook and Fischel, 'Contract and Fiduciary Duty', 36 *JLE* (1993) 425, at 425.

²²⁸ J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, edited by Robert Campbell (5th edn, 1885), at 465 (my emphasis).

²²⁹ Mabry Rogers and Young, 'Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard', 63 *Georgetown Law Journal (GLJ)* (1975) 1025, at 1028–1030 (citing English cases from as early as 1592 which 'embraced the private law concept of trust and extended its application even further in regulating public offices'). Note that Dicey also emphasized delegation but from the law, embedded in the logic of delegation ('authority given him by the law').

²³⁰ J. Locke, *Second Treatise of Civil Government* (1690), para. 149: 'But this is only a fiduciary power to act for certain ends, so that the people retain a supreme power to remove or alter the legislature when they find it acting contrary to the trust that had been placed in it. All power that is given with trust for attaining a certain end is limited by that purpose; when the purpose is obviously neglected or opposed by the legislature, the trust is automatically forfeited and the power returns into the hands of those who gave it': see also para. 160 on discretion.

²³¹ Madison, 'The Federalist, 46', in *The Federalist*, *supra* note 131, at 233: 'The federal and State governments are in fact but different agents and trustees of the people'; Hamilton, 'The Federalist, 65', in *The Federalist*, *supra* note 131, at 320, 321: 'The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves.'

²³² G. Mason, *The Virginia Declaration of Rights* (1776), para. 2.

²³³ Troper, 'Sovereignty and Natural Law in the Legal Discourse of the Ancien Regime', 16 *TIL* (2015) 315.

- continued to inform the evolution of domestic administrative law in several countries. Conceptualizing the government as a trustee offered courts grounds for extending the scope of administrative law obligations to encompass the management of property owned by the state or other public agencies. As the Israeli Supreme Court declared in 1962, administrative agencies must manage property registered under their name as trustees of the citizens.²³⁴ The same concept explained why an agency could not irrevocably bind its own discretion and had to exercise it ‘for the common good’.²³⁵ Interestingly, the concept of trusteeship as the basic concept of administrative law has garnered renewed attention in recent years from domestic administrative and constitutional law scholars.²³⁶
- That the concept of trusteeship has been abused is well known. Institutions such as the Special Trustee for American Indians²³⁷ or the Mandate System of the League of Nations²³⁸ immediately come to mind. But these examples only serve to emphasize the fundamental point that the concept of trusteeship should not be based on the assumption that the trustee can be trusted. In fact, it is just the opposite; as Niklas Luhmann suggests, the rise of the concept of trusteeship was prompted by a sense that the confidence – the faith – that people had for each other in their closely knit communities had been lost and that the law had to offer a substitute.²³⁹ According to Adam Seligman, the concept of ‘trust’ was created in ‘an attempt to posit new bonds of general trust in societies where primordial attachments were no longer “goods to think with.”’²⁴⁰ In other words, trust, as opposed to confidence or faith, ‘involves one in a relation where the acts, character, or intentions of the other cannot be confirmed. ... [O]ne trusts or
- ²³⁴ H CJ 262/62, *Israel Peretz v. The Municipality of Kfar Shmaryahu*, 16 PD 2101 [1962], at 2115 (Isr.) (Justice Sussman). 51.25
- ²³⁵ *Stone v. Mississippi*, 101 U.S. 814 (1879), at 820: ‘The power of governing is a trust committed by the people to the government’; *Black River Regulating Dist. v. Adirondack League Club*, 121 N.E.2d 428, 433 (NY 1954) (approving ‘the theory that the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good’). 51.15
- ²³⁶ See, e.g., E. Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (2012); Theodore Rave, ‘Politicians as Fiduciaries’, 126 *HLR* (2013) 672. Leib, Ponet and Serota, ‘A Fiduciary Theory of Judging’, 101 *California Law Review (CLR)* (2013) 699; Leib and Ponet, ‘Fiduciary Representation and Deliberative Engagement with Children’, 20 *Journal of Political Philosophy* (2012) 178; Ponet and Leib, ‘Fiduciary Law’s Lessons for Deliberative Democracy’, 91 *Boston University Law Review* (2011) 1249; see also Criddle, ‘Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking’, 88 *Texas Law Review* (2010) 441; Criddle, ‘Fiduciary Foundations of Administrative Law’, 54 *University of California Los Angeles Law Review* (2006) 117. 51.20
- ²³⁷ *Cobell v. Salazar*, 573 F.3d 808, 809 (DC Cir. 2009). 51.30
- ²³⁸ Anghie, ‘Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations’, 34 *New York University Journal of International Law and Politics* (2002) 513, at 604–605: ‘My argument has been that the economic and social policies actively endorsed by the PMC had profoundly damaging consequences for mandate peoples. The Mandate System, however, failed to provide any formal mechanism by which the native could communicate meaningfully with, and represent herself before, the PMC.’ 51.35
- ²³⁹ N. Luhmann, *Trust and Power* (1979). See also Jalava, ‘From Norms to Trust: The Luhmannian Connections between Trust and System’, 6 *European Journal of Social Theory* (2003) 173. I thank Neil Walker for elaborating on this point. 51.40
- ²⁴⁰ A.B. Seligman, *The Problem of Trust* (1997), at 15. 51.44

is forced to trust – perhaps led to trust would be better – when one cannot know, when one has not the capabilities to apprehend or check on the other and so has no choice but to *trust*'.²⁴¹ It has been said that 'trust is most required exactly when we least know whether a person will or will not do an action'.²⁴² We should not trust our trustees; we have neither confidence nor faith in them and therefore we are entitled to an account from them because they are inherently worthy of suspicion. In short, 'to trust is to take a risk'.²⁴³ And, since trustees are inherently suspect, they carry the burden of having to prove that they serve our interest.²⁴⁴

(a) Trusteeship beyond the state

In an earlier article, I offered a reading of sovereignty as trusteeship for humanity.²⁴⁵ I argued that the way to justify the sovereign state and its endowment with exclusive jurisdiction within its boundaries is by regarding it as a trustee on behalf of all humans. This section suggests that international organizations are subject to the same discipline of trusteeship and that discipline is the source of the obligation of accountability. In that article, I submitted that the idea of sovereignty as exclusive authority (and, hence, trustee of its citizens only) was congruent with democratic notions as long as there was a perfect or almost-perfect fit between the sovereign and the citizens – those affected by its policies.²⁴⁶ Such a vision made eminent sense when sovereigns ruled discrete economies, separated from each other by rivers, deserts and other natural barriers, making cross-border externalities, such as pollution, a relatively rare event, to be resolved on the inter-sovereign level, negotiated by emissaries, ambassadors and, later, within international organizations. This solipsistic vision of sovereignty was enhanced by the notion of national self-determination that erected barriers to the demands of non-citizens to weigh in on domestic policymaking processes and shielded the domestic body politic from the obligation to internalize the rights and interests of non-citizens in their policymaking.

But today's realities are significantly different. In our global condominium, the 'technology' of global governance that operates through discrete sovereign entities no longer fits. Sovereigns today cannot be likened to the owners of isolated mansions; they are more analogous to owners of small apartments in one densely packed high-rise in which about 200 families live. This calls for a more encompassing vision of state sovereignty as embedded in a global order, which is a source not only of powers and rights but also of obligations that essentially position states – and international

²⁴¹ *Ibid.*, at 21.

²⁴² Held, 'On the Meaning of Trust', 78 *Ethics* (1968) 156, at 157.

²⁴³ Jalava, *supra* note 239, at 174.

²⁴⁴ See Benvenisti, 'The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks', 16 *TIL* (2015) 535, at 547–548.

²⁴⁵ Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 *AJIL* (2013) 295.

²⁴⁶ For such a functional justification of sovereignty, see also H. Sidgwick, *The Elements of Politics* (4th edn, 1919), at 252: '[T]he main justification for the appropriation of territory to governments is that the prevention of mutual mischief among the human beings using it cannot otherwise be adequately secured.'

organizations to which states delegate authority – as trustees of all of humanity. Under this vision, they would be therefore accountable to all those affected by their policies, even if the affected were non-citizens living in faraway lands (or non-members, in the case of private bodies that exercise public functions).²⁴⁷

There is obviously a danger associated with invoking the concept of trusteeship in the global context. Cynics will say that the notion of ‘trusteeship for humanity’ was invented to justify colonialism. Obviously, its underlying rationale was asserted when European powers apportioned African territory among them in the scramble for Africa,²⁴⁸ and the League of Nations used trusteeship to justify a new form of colonialism.²⁴⁹ The problematic relationship between occupier and occupied has also been referred to as ‘grounded in trusteeship’.²⁵⁰ But the version of trusteeship of humanity advocated in this Foreword does not justify more powers over foreign stakeholders. In fact, it calls for just the opposite. It aims inwardly, as it requires global actors to assume burdens under their own autonomy rather than endorsing their access to others’ resources.

These considerations lead to a revival of a venerable tradition concerning sovereignty that responds adequately to contemporary challenges. To paraphrase James Madison, global governance bodies are, in fact, but different trustees of all human beings because the ultimate, inherent authority resides in humanity.²⁵¹ It is humanity at large that assigns certain groups of citizens the power to form national governments (and, indirectly, to form international institutions).²⁵² Stated otherwise, it is

²⁴⁷ Benvenisti, *supra* note 245; Benvenisti, ‘Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?’, in R. Liivoja and J. Petman (eds), *International Law-making, Essays in Honour of Jan Klabbers* (2014) 3.

²⁴⁸ General Act of the Conference of Berlin, 26 February 1885: ‘[C]oncern, as to the means of furthering the moral and material well-being of the native populations.’

²⁴⁹ Covenant of the League of Nations 1919, 13 *AJIL Supp.* 128 (1919), Art. 22: ‘[T]he principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.’

²⁵⁰ E. Benvenisti, *The Law of Occupation* (2nd edn, 2012), at 6; Wilson, ‘The Laws of War in Occupied Territory’, 18 *Transactions of the Grotius Society* (1933) 17, at 38: ‘[E]nemy territories in the occupation of the armed forces of another country constitute ... a sacred trust’; Roberts, ‘What Is Military Occupation?’ 55 *British Yearbook of International Law* (1985) 249, at 295: ‘[T]he idea of trusteeship is implicit in all occupation law’; G. von Glahn, *Law among Nations* (5th edn, 1986), at 686 (the ‘occupant ... exercises a temporary right of administration on a sort of trusteeship basis’).

²⁵¹ As Madison noted in *The Federalist Papers*: ‘The federal and State governments are in fact but different agents and trustees of the people [because] the ultimate authority ... resides in the people alone.’ Madison, *supra* note 231, at 228.

²⁵² See also Kelsen, ‘Foundations of Democracy’, 66 *Ethics* (1955) 1, at 33–34. Kelsen prefers the ‘[t]heory according to which the state is not a mysterious substance different from its members, i.e., the human beings forming the state ... This doctrine ... finds this existence in the validity and efficacy of a normative order and consequently in the minds of the human beings who are the subjects of the obligations and rights stipulated by this order. ... By demonstrating that absolute sovereignty is not and cannot be an essential quality of the state existing side by side with other states, it removes one of the most stubborn prejudices which prevent political and legal science from recognizing the possibility of an international legal order constituting an international community of which the state is a member, just as corporations are members of the state.’

possible to reconceptualize Max Huber's famous vision of a global legal order that 'divides between nations the space upon which human activities are employed'²⁵³ and allocates to each the responsibility towards other nations for activities transpiring in its jurisdiction that violate international law, in a relationship of trusteeship.

54.5 According to Huber's viewpoint, given the precedence of human rights, sovereigns can – and should – be viewed as organs of a global system that allocates competences and responsibilities for promoting the rights of all human beings and their interest in the sustainable utilization of global resources. As trustees of this global system – to paraphrase another statement of Huber's²⁵⁴ – the competency of contemporary
54.10 sovereigns to manage public affairs within their respective jurisdictions carries with it a corollary duty to take account of external interests and even to balance internal against external interests. The foreigner remains a foreigner, but she is not a total alien. She has a stake in any public decision and has standing at least to demand to have her interests taken into account and also to demand an account for any policy that directly or indirectly affects her.²⁵⁵

As trustees of humanity, then, national decision makers and those to whom they delegate authority have an obligation to take into account the interests of others when devising policies (or reviewing them, in the case of courts).²⁵⁶ Although sovereigns are entitled to prioritize their own citizens' needs, they must weigh the interests of other
54.20 stakeholders and consider internalizing them into their balancing calculus. This obligation to foreign stakeholders does not necessarily imply an obligation to respond to those interests and does not even require full legal responsibility for ultimately preferring domestic interests in balancing the opposing claims. Nor does it necessarily imply that sovereign discretion should be subject to review by third parties such as foreign
54.25 or international courts that would replace the sovereign's discretion with their own. What it does imply as a minimum, however, is that sovereigns consider whether the policies they adopt and pursue can be made less detrimental to foreign stakeholders or even improve their condition and otherwise promote global welfare.

This concept of trusteeship applies with even greater force to international
54.30 organizations whose design or intended impact is to shape the behaviour of individuals across political boundaries. The implication is that intergovernmental organizations, informal governance bodies coordinated by state executives and other national agencies, as global trustees, need to render account to affected foreign stakeholders and allow them voice in their decision-making processes. The question, then, is not whether
54.35 administrative law norms would be suitable for international organizations and other

²⁵³ *Island of Palmas (Netherlands v. US)*, reprinted in 2 UNRIAA (1928) 829, at 839.

54.40 ²⁵⁴ Huber's statement in the *Award re. British Claims in the Spanish Zone of Morocco (Gr. Brit. v. Spain)*, reprinted in 2 UNRIAA (1925) 615, at 641: 'Responsibility is the necessary corollary of rights. All international rights entail international responsibility.' See Khan, 'Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations', 18 *EJIL* (2007) 145, at 156.

²⁵⁵ Benvenisti, *supra* note 245.

54.44 ²⁵⁶ Frishman and Benvenisti, 'National Courts and Interpretative Approaches to International Law: The Case Against Convergence', GlobalTrust Working Paper no. 8/2014 (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504988.

global governance bodies in their diverse areas of regulation but, rather, which laws would be fit for purpose. Such rules should be tailored to the various organizations to fit their nature, their functions and their potential impact on individuals.

Given the still dominant legacy of the international law of international organizations that regards each and every organization as a ‘legal island’ subject almost exclusively to its own internal norms and to the obligations it explicitly adopted (as we saw in Part 2), it has been a challenge to convince critics that the emerging norms that regulate the exercising of discretion have by now become part of customary international law applicable to international organizations. However, it may only be a matter of time until the culture of accountability is integrated into the legal doctrine,²⁵⁷ as more and more courts and other bodies invoke – as the World Bank Administrative Tribunal did – the emergence of ‘a common law of international organization [or] general principles of international civil service law or of a body of rules applicable to the international civil service’.²⁵⁸ If the culture of accountability persists, it is likely that comparable judgments and other decisions with ‘similar features [will eventually] amount to a true *corpus juris*’.²⁵⁹ What is less clear is whether the tools of this *corpus juris* will ultimately prove effective enough to confront the new modalities of governance, which is the subject of the next part of this article.

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4 Beyond Communications: Access to Data in the Age of ICT-based Governance

While the bidirectional communications approach analysed in Part 3 has broadly been accepted as the way to promote trust in the global governance sphere, and work to further develop it is ongoing, it is already under threat of becoming obsolete if it is not readjusted to face new challenges. New technologies of governance, new actors involved in governance and new efforts by traditional actors to recreate information asymmetry by polluting or clogging the available channels of communication expose the limits of ‘the more communication, the better’ approach of the traditional accountability school. Part 4 looks to the future of global governance in an attempt to identify the emerging challenges associated with these channels becoming congested, contaminated, too slow or simply redundant. This part will also begin to outline some of the possible legal responses to these scenarios.

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At the heart of such challenges lie the new ICTs, which change the power dynamics between traditional actors (primarily state executives) and new entrants (primarily social media companies) and almost render superfluous the utility of bidirectional communications. ICTs generate big data – vast swaths of metrics about human activities and natural occurrences that enable humans and machines to learn about the

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²⁵⁷ For an attempt in this vein, see International Law Association, *Accountability of International Organisations* (2004).

²⁵⁸ *De Merode*, *supra* note 92.

²⁵⁹ *Ibid.*, para. 28.

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state of the world, human behaviour and the human condition to shape and enforce public policies. The availability of big data and the fast and relatively cheap means to process it are prompting public and private governance bodies to regard the traditional bidirectional communications process as unnecessarily burdensome, if not superfluous. In addition, the same ICTs are enabling traditional actors (politicians, even heads of state) to spread confusion over the new and the traditional channels of communication and recreating information asymmetries that mislead disparate voters and lead them to mistrust government and vote against their own interests. Finally, the few for-profit private companies that own some of the key ICTs are also taking part in the global regulation of major human activities but, at the same time, contributing to nudging their users to unwittingly modify their behaviour, even against their best interests. As a consequence, the utility of the bidirectional communications approach is diminishing. With the rise of ICT-driven governance, grounded in the amassing and processing of big data by machines, the key to transparency and accountability of public and private governance instead lies in securing access to the same precious resource – big data – independently of the governance bodies; protecting the channels of communications against manipulation and pollution and insisting on the involvement of humans in computerized decision-making processes.

Accordingly, this part of the article explores the following issues: (i) governance by machines, namely predetermined algorithms or neural networks that form or implement public policies by learning from big data rather than by relying on the input of stakeholders; (ii) the prevalence of efforts to pollute, overload and fragment the marketplace of ideas, thereby recreating information asymmetries and promoting new social divisions; (iii) the rise of governance by private social media providers and other ICT companies that combine the data they accumulate, and their ability to manipulate the information to which they expose their users, to increase their profits and enhance their political power and (iv) the potential role of international law in promoting trust in the new modalities of global governance and the case for the global recognition of the rights to access and use big data.

A Governance by Machines

PredPol is a program that uses US police data to provide predictions on where and when to expect spikes in crime.²⁶⁰ The program is based on an algorithm that anticipates where and when crimes are most likely to occur and assists the police in allocating their resources optimally to prevent crime. A post on PredPol’s blog explains the advantages of its algorithm over that of its competitors: ‘The worry is that predictive policing

²⁶⁰ For a description of PredPol’s algorithm, see Demortain and Benbouzid, ‘Evaluating Predictive Algorithms’, in *Algorithmic Regulation* (2017) 13, at 14: ‘PredPol imported a geo-physical theory of “loading” of earthquake potential, into the analysis of crime, through the notion of “contagion”. Crime occurrence can be predicted by jointly calculating hotspots, and a potential of contagion from one crime to the next. The particularity of this method is that it is a very “lean” model, with a minimal number of parameters in the equation. The quality of the predictions depends on the theory of contagion, rather than on the completeness of parameters and of the data entered into the system.’

could amplify biases and lead to unequal outcomes for individuals and communities.²⁶¹ Hence, the post continues: '[P]redictive policing should be subject to high standards of accountability and openness.' What the post misses, however, is a description of these standards and how they are implemented. It does not address, for example, the extent to which such predictive policing programs (in 2016, 20 of the USA's 50 largest police forces were using them) ensure that indications for crimes in poor neighbourhoods are weighed equally to the risks for wealthy and politically influential suburbs or the fact that racial profiling might justify stricter enforcement measures in communities of colour even without proof of actual wrongdoing.²⁶² Beyond policing, US state governments use algorithms to determine eligibility for benefit programs such as food stamps²⁶³ and to make the case for dismissing those teaching professionals deemed to be less effective.²⁶⁴ All of these examples – policing crimes, allocating social benefits and monitoring employee performance – point to the challenges of a future in which governance is shaped by algorithms.²⁶⁵

Big data is heavily relied upon in international efforts to prevent crime and is increasingly being used by international organizations as the basis for regulation.²⁶⁶ The use of big data spreads beyond law enforcement and the determination of individual entitlements, reaching other functions of global governance. The UN Global Pulse project uses big data derived from Twitter and other social networks to detect 'changes in human well-being'²⁶⁷ and 'to support efforts to achieve the Sustainable Development Goals'.²⁶⁸ The rationale for this partnership with Twitter reflects an understanding

- ²⁶¹ 'Not All Predictive Policing Is Created Equal: Here's Why', *PREDPOL* (8 August 2017), available at <http://blog.predpol.com/not-all-predictive-policing-is-created-equal-heres-why>. 57.25
- ²⁶² J. Jouvenal, 'Police are Using Software to Predict Crime. Is it a 'Holy Grail' or Biased against Minorities?', *Washington Post* (17 November 2016), available at www.washingtonpost.com/local/public-safety/police-are-using-software-to-predict-crime-is-it-a-holy-grail-or-biased-against-minorities/2016/11/17/525a6649-0472-440a-aae1-b283aa8e5de8_story.html?utm_term=.0512fbaf1067. 57.25
- ²⁶³ Brauneis and Goodman, 'Algorithmic Transparency for the Smart City', *YIJ* (forthcoming); see also Instituto de Tecnologia and Sociedade do Rio, *Algorithm Transparency and Governance: A Case Study of the Credit Bureau Sector* (2017), available at <https://itsrio.org/wp-content/uploads/2017/05/algorithm-transparency-and-governance-eng-short1.pdf> (assessing how credit bureaus make use of personal data). 57.30
- ²⁶⁴ Z. Capo and J. Bass, 'Federal Suit Settlement: End of Value-Added Measures for Teacher Termination in Houston', *American Federation of Teachers* (10 October 2017), available at www.aft.org/press-release/federal-suit-settlement-end-value-added-measures-teacher-termination-houston (a federal judge rules that use of the Educational Value Added Assessment System program may violate teachers' civil rights). 57.35
- ²⁶⁵ Just and Latzer, 'Governance by Algorithms: Reality Construction by Algorithmic Selection on the Internet', 39 *Media, Culture and Society* 238 (2017); Johns, 'Global Governance through the Pairing of List and Algorithm', 34 *Environment and Planning D: Society and Space* 126 (2016).
- ²⁶⁶ M. Ward, 'Crime Fighting with Big Data Weapons', British Broadcasting Corporation (18 March 2014), available at www.bbc.com/news/business-26520013. See also Finemore and Hollis, 'Constructing Norms for Global Cybersecurity', 110 *AJIL* (2016) 425; Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law', 111 *AJIL* (2017) 57. 57.40
- ²⁶⁷ United Nations Global Pulse, available at www.unglobalpulse.org/.
- ²⁶⁸ 'Twitter and UN Global Pulse Announce Data Partnership', *United Nations Global Pulse*, available at www.unglobalpulse.org/news/twitter-and-un-global-pulse-announce-data-partnership. 57.44

of the importance of big data for diverse communities: ‘Every day, people around the world send hundreds of millions of Tweets in dozens of languages. This public data contains real-time information on many issues including the cost of food, availability of jobs, access to health care, quality of education, and reports of natural disasters’.
 58.5 The partnership ‘will allow the development and humanitarian agencies of the UN to turn these social conversations into actionable information to aid communities around the globe’.²⁶⁹

Another UN Global Pulse initiative sought to measure socio-economic conditions such as food security and poverty indicators in developing countries, using phone usage data, including call detail records and airtime credit purchases.²⁷⁰ The results suggest that governments and international organizations concerned with food security and poverty could collaborate with mobile providers to generate an early warning system of sudden changes in individuals’ ability to access food.²⁷¹ Similar approaches could be used by health agencies such as the WHO to analyse the source and spread of epidemics and respond to them by addressing actual and potential affected individuals with tailored messages regarding potential mitigation measures (such as the location of temporary health clinics or advice on effective treatments).²⁷²

However, the operation of algorithms is never neutral. Governance by machines has wide-ranging implications for the promotion of inclusive policies with important egalitarian consequences. Much depends on the predisposition of the algorithm designers and on the specific data the machines use in their learning process. Decisions on which types of data and queries would feed into the algorithm, what would be excluded from it and how the data would be analysed are highly political.²⁷³ The American Civil Liberties Union and other civil society groups have criticized opaque algorithms that ‘threaten to undermine the constitutional rights of individuals’ and pointed to the selective use of such programs.²⁷⁴ The police, these critics have pointed out, are not using predictive technologies to learn how to allocate social service resources more effectively or to anticipate which officers might engage in misconduct.²⁷⁵ Even if machines are left to learn by themselves, using neural networks that sift through data,
 58.20 they will replicate the biases they find – for example, by replicating traditional gender-job associations (such as doctors being male and nurses being female).²⁷⁶

²⁶⁹ *Ibid.*

²⁷⁰ F.E. Johns, ‘Data Mining as Global Governance’, UNSW Law Research Paper no. 2015–61 (2016), at 12.

²⁷¹ *Ibid.*, at 13.

²⁷² C. Bryne, ‘How the UN’s New Data Lab in Indonesia Uses Twitter to Preempt Disaster’, Fast Company (19 March 2013), available at www.fastcompany.com/3007178/how-uns-new-data-lab-indonesia-uses-twitter-preempt-disaster.

²⁷³ See Gillespie, ‘The Politics of ‘Platforms’, 12 *New Media and Society* (2010) 347; Gillespie, ‘The Relevance of Algorithms’, in T. Gillespie et al. (eds), *Media Technologies* (2014) 167.

²⁷⁴ Civil Rights Groups, ‘Predictive Policing Today: A Shared Statement of Civil Rights Concerns’, Press Release, 31 August 2016, available at http://civilrightsdocs.info/pdf/FINAL_JointStatementPredictivePolicing.pdf.

²⁷⁵ *Ibid.*; see also Shapiro, ‘Reform Predictive Policing’, 541 *Nature* (2017) 458, at 458–460.

²⁷⁶ Caliskan, Bryson and Narayanan, ‘Semantics Derived Automatically from Language Corpora Contain Human-like Biases’, 356 *Science* (2017) 183.

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For their operation, algorithms require big data. As Jack Balkin writes, ‘[a]lgorithms and AI [artificial intelligence] are the machines; Big Data is the fuel that makes the machines run. Just as oil made machines and factories run in the Industrial Age, Big Data makes the relevant machines run in the Algorithmic Society.’²⁷⁷ The recourse to big data by public and private actors has raised concerns about the protection of individual privacy and other personal rights. Some of these concerns have been addressed in legislation and litigation. For example, the 2016 EU Data Protection Directive has imposed pseudonymization requirements on all data processing undertaken by member states.²⁷⁸ The right to ‘personal self-determination’ that protects individuals ‘against unlimited collection, storage, use and disclosure of his/her personal data’ was recognized by the German Constitutional Court in 1983²⁷⁹ and in French legislation as early as 1978.²⁸⁰ The same right, derived from the right to privacy, was recently emphasized by the Indian Supreme Court in 2017.²⁸¹ The right to be forgotten has also been recognized by the CJEU.²⁸² Similar attention to privacy and other individual rights can be expected from global governance bodies in the future.

While the rights to ‘informational self-determination’ or to privacy address the concerns about the recourse to big data, they fail to highlight the positive demand for data by individuals and communities. Following Isaiah Berlin’s famous distinction between negative liberty (freedom from) and positive liberty (freedom to),²⁸³ the freedom to obtain data is crucial for voters (often relegated to the status of ‘users’) who wish to understand the functioning of the various global governance bodies and to promote their interests and values within those bodies or to react to them. The availability of algorithms to assess human action raises two types of challenges. The first relates to concerns about simplistic assumptions or biases in the design and use of algorithms, which calls for accountability in algorithmic decision making. The second challenge relates to the stereotyping of individuals, the potential elimination of

²⁷⁷ Balkin, ‘Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation’, 51 *University of California Davis Law Review (UCDLR)* (2018) 1149.

²⁷⁸ See Council Directive (EU) 2016/680 on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data, and Repealing Council Framework Decision, OJ 2016 L 119.

²⁷⁹ BVerfGE, 1 BvR 209/83, 1 BvR 484/83, a BvR 420/83, 1 BvR 362/83, 1 BvR 269/883, 1 BvR 440/83, 15 December 1983, available at <https://openjur.de/u/268440.html>.

²⁸⁰ Hu *et al.*, ‘The Regulation of Commercial Profiling – A Comparative Analysis’, 2 *European Data Protection Law Review* (2016) 535, at 551.

²⁸¹ ‘Right to Privacy a Fundamental Right, Says Supreme Court in Unanimous Verdict’, *The Wire* (24 August 2017), available at <https://thewire.in/170303/supreme-court-aadhaar-right-to-privacy/>; M. Guruswamy, ‘India’s Supreme Court Expands Freedom’, *I-CONnect* (27 September 2017), available at www.iconnectblog.com/2017/09/indias-supreme-court-expands-freedom/; ‘Essentially, under the Aadhar project, a citizen’s data now belongs to the Indian government and not to the individual. There are fears that the project would endow the Indian government with enormous knowledge that could be deployed against minority communities and individuals who disagree with its politics and policies.’

²⁸² Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (es) and Mario Costeja González* (EU:C:2014:317).

²⁸³ Berlin, ‘Two Concepts of Liberty’, in Isaiah Berlin, *Four Essays on Liberty* (1969) 16, at 16–34. I thank Doreen Lustig for this insight.

interpersonal communications and the demise of human discretion in either making or reviewing decisions. The following subsections address these challenges and outline the responses that could be adopted by those committed to achieving accountable global governance.

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1 *The Biased, Skewed Algorithm*

The use of algorithms in governance raises a host of doubts about their assessment of various inputs and their ability to weigh and balance those inputs. There are concerns that algorithms could amplify biases;²⁸⁴ could process too little information or indeed too much (that is, consider information that is irrelevant to the decision); could judge individuals not according to their merit but, rather, according to certain group affiliations; could skew the weight assigned to certain factors and could otherwise lead to the arbitrary or unlawful exercising of discretion. One response to this difficulty has invoked the concept of ‘algorithmic transparency’: exposing the design of the algorithm to public scrutiny.²⁸⁵ However, algorithm developers and users retort that the algorithm is protected by trade secrecy rules and, furthermore, that access to the algorithm would enable those monitoring to game the system. In May 2014, the demand for transparency was endorsed by a federal district court in Houston, Texas, when it accepted a lawsuit brought by the Houston Federation of Teachers to end the reliance on a statistical system of evaluating teachers’ performance. The Court found that the algorithm-based tests had left the professionals with ‘no meaningful way to ensure correct calculation of their ... scores’ and that, as a result, they were ‘unfairly subject to mistaken deprivation of constitutionally protected property interests in their jobs’.²⁸⁶

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But, in certain contexts, transparency will be less meaningful, as in the case of algorithms that use neural networks (that is, machine learning) whose thought processes are rarely understood.²⁸⁷ Nevertheless, these difficulties with transparency are not insurmountable because the functioning of algorithmic decision making can

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²⁸⁴ See *AI Now 2017 Report* (2017), at 16–17: ‘Bias can also emerge in AI systems because of the very narrow subset of the population that design them. AI developers are mostly male, generally highly paid, and similarly technically educated. Their interests, needs, and life experiences will necessarily be reflected in the AI they create.’

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²⁸⁵ Brauneis and Goodman, *supra* note 263, at 11–23.

²⁸⁶ *Houston Federation of Teachers v. Houston Independent School District*, Civil Action H-14–1189, Amended Summary Judgment Opinion (S.D. Tx. 4 May 2017), at 18.

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²⁸⁷ Burrell, ‘How the Machine “Thinks”: Understanding Opacity in Machine Learning Algorithms’, 3 *Big Data and Society* (2016) 1; B. Wagner, *Study on the Human Rights Dimensions of Algorithms* (2017), at 22: ‘Machine learning techniques complicate transparency to a point where provision of all of the source codes of an algorithm may not even be sufficient, and instead there is a need for an actual explanation of how the results of an algorithm were produced’; Scherer, ‘Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies’, 29 *Harvard Journal of Law and Technology* (2016) 353, at 363: ‘One important characteristic of AI that poses a challenge to the legal system relates to the concept of foreseeability. We have already seen numerous instances of AI that are designed to act in a manner that seems creative, at least in the sense that the actions would be deemed “creative” or as a manifestation of “outside-the-box” thinking if performed by a human.’

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be measured externally by focusing on the outcomes of the decisions and assessing their compliance with relevant criteria such as the disparate impact of the policies.²⁸⁸ A mildly optimistic view goes so far as to suggest that carefully designed algorithms could even include corrective mechanisms against bias. As Anupam Chander posits, ‘[w]e must design our algorithms for a world permeated with the legacy of discriminations past and the reality of discriminations present’.²⁸⁹ In the global context, this approach is particularly appealing, with potential positive outcomes for those stakeholders that tend to be disregarded.²⁹⁰ Algorithms that are programmed to integrate relevant inputs including from potentially affected foreigners, and neural networks that are fed the big data on foreigners, are likely to ensure greater attention to all those affected by governmental policies. 61.5
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An additional response would be to design and put to regular use ‘monitoring machines’ – machine-learning tools and other algorithmic tools that would sift through and process data about public policies and their outcomes and thereby monitor government for functionality (or neglect and corruption).²⁹¹ The demand for accountability may also suggest that algorithms should be used to tackle a variety of future risks, including those the government might be less keen to address for various reasons, such as crime within minority communities, social dependency or illiteracy. The decision to develop such algorithms, or to allow their development and employment, is a regulatory one that requires scrutiny in and of itself. The immediate concern that comes to mind is the possibility of access by monitoring agencies, public and even private, to the data pools owned by public and private regulators. Hence, access to big data becomes a key concern for governance and also for reviewing governance. 61.15
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2 The End of Meaningful Communication 61.25

Even if problems of accountability can be adequately resolved, more complex questions arise regarding non-human decision makers that, by necessity, categorize individuals into groups based on predetermined factors – in other words, based on the 61.30

²⁸⁸ See Brauneis and Goodman, *supra* note 263, at 2: ‘It will not usually be necessary to release the code used to execute predictive models in order to dramatically increase transparency.’ See also Kroll *et al.*, ‘Accountable Algorithms’, 165 *University of Pennsylvania Law Review* (2017) 633. In *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016), the Wisconsin Supreme Court found that although the algorithm used to assess an offender’s risk, its use did not violate the offender’s due process rights as he could ‘at least review and challenge the resulting risk scores set forth in the report’. 61.35

²⁸⁹ Chander, ‘The Racist Algorithm?’, 115 *MLR* (2017) 1023, at 1025–1026: ‘What we need instead is transparency of inputs and results, which allows us to see that the algorithm is generating discriminatory impact. If we know that the results of an algorithm are systematically discriminatory, then we know enough to seek to redesign the algorithm or to distrust its results.’ (Chander’s piece reviews F. Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (2015)). 61.40

²⁹⁰ Krause Hansen and Porter, ‘What Do Big Data Do in Global Governance?’, 23 *Global Governance* (2017) 31 (discussing whether ‘increased transparency suggests that big data can be an accountability tool for the less powerful’ given the ‘asymmetric relationship between those who collect, store, and mine large quantities of data, and those whom data collection targets’). 61.40

²⁹¹ Scherer suggests establishing an agency responsible for certifying artificial intelligence programs safe. Scherer, *supra* note 287, at 395–398. 61.44

stereotyped objectifying of human beings.²⁹² Using algorithms to recognize or deny rights and duties among individuals is directly at odds with the very notion of human dignity – the understanding that the law must treat each individual as being unique. Correspondingly, automated decision making raises tensions in the realm of administrative law, as it goes against the grain of its two most fundamental tenets – the requirement that the public authority exercise discretion when making a decision and the public authority’s duty to hear the affected person’s complaint with an open mind.²⁹³ How can these tenets be reconciled using an automated system designed to replace the human thought process?

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62.10 Such concerns are triggered by the employment of algorithms to determine, for example, people’s entitlements (such as the Diversity Visa Lottery operated by the US Department of State)²⁹⁴ or in processing incoming comments from the public about regulations (an example of which is the US Department of Health and Human Services’ use of machine learning and natural language processing).²⁹⁵ Sooner rather than later, algorithms will be employed to generate and process the public’s reactions to planned measures and respond to criticism,²⁹⁶ and, unless prohibited by international law, it is predicted that algorithmic decision making will instruct autonomous weapon systems whom to target.²⁹⁷

62.20 (a) Human dignity and the stereotyping, objectifying algorithm

The legendary US television personality Mister Rogers used to end his immensely popular children’s television show by reminding his young viewers: ‘You always make each day a special day. You know how: By just your being you/yourself. There’s only one person in the whole world that’s like you, and that’s you. And people can like you just/exactly the way you are.’²⁹⁸ If Mister Rogers was right, it is impossible to reduce individuals to a set of stereotypes. Moreover, as Hannah Arendt suggests, the objectification of individuals is morally wrong, constituting the epitome of totalitarian regimes that turn

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²⁹² On these systems, see Hu *et al.*, *supra* note 280, at 535–538.

²⁹³ T. Endicott and A. Orville, *Administrative Law* (2nd edn, 2011), at 129, 269.

²⁹⁴ Kroll *et al.*, *supra* note 288, at 674–675.

²⁹⁵ WP BrandStudio, ‘Future-Proof: How Today’s Artificial Intelligence Solutions Are Taking Government Services to the Next Frontier’, *Washington Post* (22 August 2017), available at www.washingtonpost.com/sf/brand-connect/wp/2017/08/22/accenture/future-proof/.

²⁹⁶ Office of the Chief Technology Officer, *Increasing Efficiency in Rule Making with Natural Language Processing*, available at www.hhs.gov/idealab/projects-item/increasing-efficiency-in-rule-making-with-natural-language-processing. See also Fountain, ‘Prospects for Improving the Regulatory Process Using E-Rulemaking’, 46 *Communications of the Association of Computer Machinery (CACM)* (2003) 63; Moxley, ‘E-Rulemaking and Democracy’, 68 *Administrative Law Review* (2016) 661, at 683–685.

²⁹⁷ Heyns, ‘Autonomous Weapons Systems: Living a Dignified Life and Dying a Dignified Death’, in N. Bhuta *et al.* (eds), *Autonomous Weapons Systems: Law, Ethics, Policy* (2016) 3, at 3–19. Liebllich and Benvenisti, ‘The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapon Systems are Unlawful’, in *ibid.*, 244.

²⁹⁸ *Mister Rogers’ Neighborhood Quotes*, IMDb, available at www.imdb.com/title/tt0062588/quotes.

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human affairs into matters of administrative control.²⁹⁹ As Arendt insists, ‘dignity ... pertain[s] to a man in so far as he is more than what he does or creates’.³⁰⁰ A true commitment to the principle of human dignity – the foundation for human rights in both international law³⁰¹ and the domestic constitutional law of several countries³⁰² – requires algorithm users to allow for the exercising of discretion by humans. This emphasis on ‘a human being in the loop’ of decision making also derives from principles of democracy, to which I turn now. 63.5

Jürgen Habermas’ *Theory of Communicative Action* emphasizes the fundamental importance of communication between the decision maker and the citizen.³⁰³ According to Habermas, democratic decisions must be based on communicative action (that is, a discussion in which the participants hear each other out and seek to convince each other by valid arguments and following specific discursive procedures about the desirability of certain public policies). For the discussion to be truly communicative rather than strategic, all participants should have an equal voice and be free from coercion or deception. The same goes for the execution of specific administrative directives or other administrative orders that have to follow the proper communicative process. Needless to say, no such exchange will be able to take place if the individual’s interlocutor is a machine whose predetermined instructions are to ignore their opportunity to communicate their preferences and concerns. 63.10 63.15

(b) The duty to exercise discretion with an open mind 63.20

The idea of an ad hoc assessment of every individual dealt with by public authority also extends to the basic requirement of any administrative agency in democracy: the duty to exercise discretion. But increasingly sophisticated recourse to artificial intelligence as part of governance poses a challenge to that principle. While reliance on algorithms might lead human decision makers to absolve themselves from the task of exercising discretion, the next step could be to directly delegate the discretion to the algorithm.³⁰⁴ Here, the challenge runs much deeper than issues of transparency and accountability – it is about the very essence of decision making, which is founded on discretion. It is one thing to assign robots to assess the likelihood of certain risks; it is quite another to allow computers to manage risks. The act of weighing and balancing the different risks society faces is based on a political decision that must be made accountable to those affected by those risks. 63.25 63.30

²⁹⁹ See Tr. Tchir, *Who’s on Stage? Performative Disclosure in Hannah Arendt’s Account of Political Action* (2009), at 181, available at https://era.library.ualberta.ca/files/cc08hg206/Tchir_Trevor_Fall2009.pdf. I thank Doreen Lustig for this point. 63.35

³⁰⁰ *Ibid.*, at 63.

³⁰¹ ICCPR, *supra* note 222, preamble.

³⁰² See, e.g., Basic Law: Human Dignity and Liberty, SH No. 1454 (Isr.), at 90, Art. 1; Grundgesetz (Basic Law), Art. 1. 63.40

³⁰³ J. Habermas, *Theory of Communicative Action: Reason and the Rationalization of Society*, translated by Thomas McCarthy (1984), at 1.

³⁰⁴ Coglianese and Lehr, ‘Regulating by Robot: Administrative Decision-Making in the Machine-Learning Era’, 105 *GLJ* (2017) 1147, at 1178. 63.44

The obligation to exercise discretion imposes on the administrative agency a duty to consider, within the confines of its legal authority, in each and every exercise of power, the specific goals of the norm that the agency is bound to promote, including the relevant rights and interests affected in the case at hand.³⁰⁵ This obligation calls for a duty to constantly exercise discretion. Of course, this duty implies a prohibition on – and, indeed, the invalidity of – deliberately relinquishing or delegating the duty to exercise discretion. The agency must be willing to listen to ‘anyone with something new to say’ and to alter or waive its policies in appropriate cases.³⁰⁶ The very purpose of delegating decision-making authority to administrative agents is to enable them to exercise their discretion in individual cases, taking into account the specific circumstances. If there were no need to pay attention to the specific circumstances and to allow for fresh thinking, the authorizing organ could have made the decision itself. While some pre-commitment by administrative agencies is indeed a legitimate tool to promote transparency and equal treatment, such pre-commitment seeks to stipulate the boundaries of discretion, not to negate it altogether; moreover, the pre-commitment must be of such a nature that it can be altered in real time if circumstances so require.³⁰⁷

The assumption of administrative law has always been that, in the long run, ‘good’ executive decisions cannot be taken in a complex world without making ongoing adjustments.³⁰⁸ These adjustments, which require discretion to be constantly exercised, are necessary due to epistemological human limitations, which H.L.A. Hart identifies as comprising ‘relative ignorance of fact’ and ‘relative indeterminacy of aim’.³⁰⁹ These ‘handicaps’ limit any attempt to regulate decision making in advance.³¹⁰ As Hart emphasizes, ‘the distinguishing feature of the discretion case is that there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand, although the factors which we must take into account and conscientiously weigh may themselves be identifiable’. He continues:

[W]e must ask why in a legal system we do accept such a mode of decision. ... I think the short answer is: *because we are men not gods*, and as part of the human predicament we may find ourselves faced with situations where we have to choose what to do under two handicaps. The first I will call Relative Ignorance of Fact, and the second I will call Relative Indeterminacy of Aim. These two factors may face us in a given sphere alone or jointly: in any sphere in which we may want to regulate in advance by general principles or rules to be invoked in successive particular occasions as they arise, we find our capacity limited by them.³¹¹

³⁰⁵ Lieblich and Benvenisti, *supra* note 297, at 264.

³⁰⁶ See, e.g., *British Oxygen v. Minister of Technology*, [1971] AC 610, HL (UK). See generally J. Jowell *et al.*, *De Smith’s Judicial Review* (6th edn, 2007), at 493–495.

³⁰⁷ See Magill, ‘Agency Self-Regulation’, 77 *George Washington Law Review* (2009), at 101, 104, 117.

³⁰⁸ See, e.g., Barth and Arnold, ‘Artificial Intelligence and Administrative Discretion’, 29 *American Review of Public Administration* (1999) 332, at 338, 348–349.

³⁰⁹ Hart, ‘Discretion’, 127 *HLR* (2013) 652, at 661–664.

³¹⁰ *Ibid.*, at 661.

³¹¹ *Ibid.*

The same type of difficulty arises from the duty to provide each affected individual with an adequate hearing. An argument can be made that any executive authority is bound to give 'due respect' to individuals by considering the effects of a specific act on them in light of prevailing circumstances.³¹² This is the essence of the right to be heard with an open mind.³¹³ It is also an essential characteristic of the trust relations that form the basis of administrative power, one that is especially significant in the context of regulatory decisions with significant impact on the citizen, such as the limitation of human rights.³¹⁴ Even if a hearing were held in front of a human agent following a computer's decision, the right to be heard may still suffer because of the hearing officer's 'automation bias' – that is, the inclination to unquestioningly follow a computer's recommendation.³¹⁵

3 Legal Responses

What could be the proper legal responses to concerns about biased algorithms, the disregard for human dignity, the denial of communications and the demise of discretion? Thus far, the EU has been the vanguard in setting limits to automated decision making, apparently motivated by concerns about illegitimate profiling of people.³¹⁶ In 1995, it issued a directive enshrining the right of every person 'not to be subject to a decision which produces legal effects concerning him ... which is based solely on automated processing of data'.³¹⁷ In April 2016, the European Parliament revisited this matter and replaced this directive with its General Data Protection Regulation (GDPR), which includes Article 22 on '[a]utomated individual decision-making, including profiling'.³¹⁸ The article prohibits a 'decision based solely on automated processing, including profiling', that 'significantly affects' a data subject. Exceptions based on authorization by a 'Union or Member State law' or 'based on the data subject's explicit consent' are permitted but are subject to the rights of the individual, *inter alia*, 'to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision'.³¹⁹ Essentially, Article 22 of the EU's GDPR trades away the right

³¹² Benvenisti, *supra* note 245, at 314.

³¹³ For an opposite view that emphasizes efficiency, see Coglianese and Lehr, *supra* note 304; B. Alarie *et al.*, *Regulation by Machine* (2016), available at <https://ssrn.com/abstract=2878950>.

³¹⁴ Compare Benvenisti, *supra* note 247, at 316.

³¹⁵ Keats Citron, 'Technological Due Process', 85 *Washington University Law Review* (2008) 1249, at 1270–1271.

³¹⁶ See Recital 71 of Council Regulation (EU) 2016/679 on the Protection of Natural Persons With Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1: "The data subject should have the right not to be subject to a decision, ... which is based solely on automated processing ... Such processing includes "profiling" ...")

³¹⁷ Council Directive (EU) 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (EU Directive on Data Protection), OJ 1995 L 281, Art. 15(1).

³¹⁸ General Data Protection Regulation, *supra* note 316.

³¹⁹ *Ibid.*, Art. 22(3). But see Bygrave, 'EU Data Protection Law Falls Short as Desirable Model for Algorithmic Regulation', in *Algorithmic Regulation*, *supra* note 260, at 31, 32–33. Bygrave states that Article 22 of the General Data Protection Regulation will not increase the power of EU data protection law over the

to a human decision maker in exchange for maintaining the right to a human hearer. This trade-off will make sense only if the human hearer understands her role as an *ex-ante* decision maker rather than *ex-post* as the bare minimum for ensuring the correct implementation of public authority. This minimum includes the provision of 'suitable safeguards, which should include *specific information* to the data subject and the right ... to obtain an explanation of the decision reached after such assessment'.³²⁰

The GDPR's applicability beyond the EU is likely to influence global standards.³²¹ Some experts have argued that algorithms that follow these requirements are likely to 'not only make more accurate predictions, but offer increased transparency and fairness over their human counterparts'.³²² But there may be differing views, and, therefore, a victory for the human decision maker, or at least the human reviewer, is not secured. US law, for example, does not seem to be concerned about automated decision making and review. The law in Australia seems to be the least concerned about non-human involvement. Australian law explicitly provides for the delegation of discretion to computer programs in several areas of public regulation. For example, social security decisions in Australia may be made by computer³²³ as well as decisions entrusted to the minister of education under the Australian Education Act 2013.³²⁴

We can therefore anticipate debates about the appropriateness of, and necessary limits to, the use of machines in global governance and on the need to retain a human 'in the loop', exposing the various sensitivities of the different communities. It is beyond the scope of this article to offer a full-fledged argument for the human right for retaining "a human in the loop" of global (and local) public decision making, although the discussion above clearly supports the recognition of such a right.

generation and application of algorithms for several reasons: clumsy syntax that muddies its interpretation, the weight given to consent, uncertainty regarding a right to explanation and dependence on the specifics of member states legislation.

³²⁰ Recital 71, *supra* note 316 (emphasis added).

³²¹ For a discussion on such influence made by the EU Directive on Data Protection, *supra* note 317, see Birnhack, 'The EU Data Protection Directive: An Engine of a Global Regime', 24 *Computer Law and Security Review* (2008) 508, at 512; see, e.g., S.M. Kerner, 'HPE Explains What European GDPR Privacy Regulations Mean to U.S. Firms', *eWeek* (1 May 2017), available at www.eweek.com/security/hpe-explains-what-european-gdpr-privacy-regulations-mean-to-u.s.-firms; 'The GDPR applies to anyone that is doing business in the EU, so [that includes] anyone selling into it or [who] has employees there.'

³²² B. Goodman and S. Flaxman, *European Union Regulations on Algorithmic Decision-Making and a "Right to Explanation"* (28 June 2016), at 8 (unpublished manuscript), available at <https://arxiv.org/pdf/1606.08813.pdf>.

³²³ Social Security (Administration) Act 1999 (Cth), s. 6A. Machinery provisions are contained in sections 83 and 103 of this Act. See also S. Elvery, 'How Algorithms Make Important Government Decisions – and How that Affects You', American Broadcasting Corporation (21 July 2017), available at www.abc.net.au/news/2017-07-21/algorithms-can-make-decisions-on-behalf-of-federal-ministers/8704858.

³²⁴ Australian Education Act 2013 (Cth) s. 124: 'Secretary may arrange for use of computer programs to make decisions: (1) The Secretary may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Minister may make decisions under this Act; (2) A decision made by the operation of a computer program under such an arrangement is, for the purposes of this Act (except section 120 and paragraph 122(1)(a) (review of decisions)), taken to be a decision made by the Minister personally.'

B The Efforts to Pollute, Overload and Fragment the Channels of Communication

The advent of the Internet brought with it the concept of 'e-democracy' – the technology that promised to make information asymmetry a thing of the past and lower the barriers for civil engagement. Several governments responded by adopting various types of so-called 'e-governance' tools, from the provision of readily accessible information to 'e-decision making' (mechanisms giving stakeholders the opportunity to participate in voting).³²⁵ Global bodies such as the UN, the Organisation for Economic Co-operation and Development (OECD) and the World Bank celebrated the potential of 'e-government' and 'digital government' and pressed states to embrace these new technologies. The UN envisioned 'e-participation' – composed of 'e-information', 'e-consultation' and 'e-decision making' – as an important way to promote the 2030 Agenda for Sustainable Development.³²⁶ The EU also turned to direct public participation with its Your Voice in Europe web portal, inviting the public to comment on a variety of pending decisions.³²⁷ And the European Commission appeared to be actively listening to public feedback; in 2016, the EU trade commissioner modified her position on trade talks with the USA, referencing broad public criticism of the proposed agreement.³²⁸

However, the potential for genuine 'e-democracy' seems increasingly limited. In its stead, we witness the growing manipulation of the various media. Of course, pollution of the channels of communication is rampant and always has been. Propaganda and outright lies have always been part and parcel of communications. But the new ICTs provide more opportunities than ever to pollute or manipulate the chains of communication in cyberspace. These derive and thrive thanks to the combination of four principal phenomena: (i) the deliberate spread of confusion by certain state and non-state actors; (ii) the increasing competition for users' limited attention span; (iii) the fragmentation of the previously inclusive marketplace of ideas into discrete sounding boards of increasingly insular sub-communities and (iv) the big data divide.

³²⁵ Fung *et al.*, 'Six Models for the Internet', 15 *International Studies Review* (2013) 30; Chadwick, 'Web 2.0: New Challenges for the Study of E-Democracy in an Era of Informational Exuberance', in S. Coleman, P.M. Shane (eds), *Connecting Democracy: Online Consultation and the Flow of Political Communication* (2012) 45; Shkabatour, 'Cities @ Crossroads: Digital Technology and Local Democracy in America', 76 *Brooklyn Law Review* (2011) 1413; Freeman and Quirke, 'Understanding E-Democracy: Government-led Initiatives for Democratic Reform', 5 *Journal of E-Democracy and Open Government* (2013) 141.

³²⁶ Sustainable Development Solutions Network, *Data for Development: A Needs Assessment for SDG Monitoring and Statistical Capacity Development* (2015), available at <http://unsdsn.org/wp-content/uploads/2015/04/Data-for-Development-Full-Report.pdf>.

³²⁷ The Your Voice in Europe portal has been replaced by a list that gathers the European Commission public consultations. European Commission, *Consultations*, available at https://ec.europa.eu/info/consultations/public-consultation-operations-european-supervisory-authorities_en.

³²⁸ A. Eriksson, 'EU Admits "Unrealistic" to Close TTIP Deal this Year', *EUobserver* (23 September 2016), available at <https://euobserver.com/economic/135217>: 'In the face of public criticism, the European Commission had already bowed to pressure from member states, giving them power to ratify the deal, rather than leaving it only to EU institutions' approval.'

1 The Deliberate Spread of Confusion

The new ICTs have become strategic tools for some state and non-state actors, used for both internal political influencing (through messages such as the claim that Brexit will save the United Kingdom's National Health Service £350 million a week) and to influence foreign constituencies.³²⁹ They have been used most conspicuously by Russia, which has long seen 'information warfare' as a necessary component in its quest for global power.³³⁰ In the words of Russian media analyst Vasily Gatov, '[i]f the 20th century was defined by the battle for freedom of information and against censorship, the 21st century will be defined by malevolent actors, states or corporations, abusing the right to freedom of information'.³³¹ Other observers of Russia's policy have noted that 'by comparison with the pre-internet era, the effective seeding of disinformation is now vastly simpler'.³³² A primary objective of Russian disinformation campaigns is to cause confusion and doubt by providing multiple, contradictory accounts of events, thereby deepening social cleavages in democratic states and undermining trust in professional reporting by traditional media sources, especially in official statements.³³³

³²⁹ *Social Media Influence in the 2016 U.S. Elections: Hearing before the Senate Select Comm. on Intelligence* (2017) (testimony of Colin Stretch, General Counsel, Facebook), available at www.intelligence.senate.gov/sites/default/files/documents/os-cstretch-110117.pdf: 'The foreign interference we saw is reprehensible and outrageous and opened a new battleground for our company, our industry, and our society. That foreign actors, hiding behind fake accounts, abused our platform and other internet services to try to sow division and discord – and to try to undermine our election process – is an assault on democracy, and it violates all of our values.' *Social Media Influence in the 2016 U.S. Elections: Hearing Before the Senate Select Comm. on Intelligence* (2017) (testimony of Kent Walker, Senior Vice President and General Counsel, Google), available at www.intelligence.senate.gov/sites/default/files/documents/os-kwalker-110117.pdf: 'While we did find activity associated with suspected government-backed accounts, that activity appears to have been limited on our platforms. Of course, any activity like this is more than we would like to see. Starting with our ads products, we found two accounts that appear to be associated with this effort. These accounts spent approximately \$4700 dollars in connection with the 2016 presidential election. On YouTube, we did find 18 channels on YouTube with roughly 1,100 videos, a total of 43 hours of content, uploaded by individuals who we suspect are associated with this effort and which contained political content.' *Social Media Influence in the 2016 U.S. Elections: Hearing Before the Senate Select Comm. on Intelligence* (2017) (testimony of Sean J. Edgett, Acting General Counsel, Twitter), available at www.intelligence.senate.gov/sites/default/files/documents/os-sedgett-110117.pdf: 'Twitter is familiar with problems of spam and automation, including how they can be used to amplify messages. The abuse of those methods by sophisticated foreign actors to attempt state-sponsored manipulation of elections is a new challenge for us – and one that we are determined to meet. Among other things, we noticed accounts that Tweeted false information about voting in the 2016 election, automated accounts that Tweeted about trending hashtags, and users who abused their access to the platform we provide developers.'

³³⁰ Bartles, 'Russia's Indirect and Asymmetric Methods as a Response to the New Western Way of War', 2 *Special Operations Journal* (2016) 1.

³³¹ P.Pomerantsev and M. Weiss, *The Menace of Unreality: How the Kremlin Weaponizes Information, Culture, and Money* (2014), at 14, available at https://cdn.mashregnews.ir/old/files/fa/news/1393/12/26/950303_869.pdf.

³³² K. Giles, *The Next Phase of Russian Information Warfare* (2016), at 8.

³³³ K. Giles, *Russia's 'New' Tools for Confronting the West: Continuity and Innovation in Moscow's Exercise of Power* (2016), at 37. The Russian information warfare theorist Colonel P. Koayesov explains how this works, both during and before open conflict: 'Information warfare consists in making an integrated impact on the opposing side's system of state and military command and control and its military-political leadership – an impact that would lead even in peacetime to the adoption of decisions favourable to the party initiating the information impact, and in the course of conflict would totally paralyze the functioning of the enemy's command and control infrastructure' (at 41–42, citing Koayesov).

2 Information Overload

Even without deliberate manipulation, the optimistic expectation that more information will make voters better informed is probably inaccurate. Research shows that it remains beyond voters' capacity to assess and act upon the wealth of available data. Instead, just as in the past, people tend to rely on proxies in forming their opinions.³³⁴ Individuals unconsciously process information in ways that fit their predispositions, a process known in psychology as motivated reasoning.³³⁵ People's ability to remain involved citizens is also challenged by commercial actors. Tim Wu has emphasized the growing competition among new ICT companies to attract users' attention.³³⁶ He describes how Google and Facebook, 'the de facto diarchs of the online attention merchants', driven by the desire to increase revenues from advertisements, have used their unparalleled capacity to acquire the best data on their users with the aim of prolonging the time spent online and thereby increasing exposure to their advertisements.³³⁷ Since people's attention is a limited resource, these social media companies' increasing knowledge of how to discern and exploit human vulnerabilities helps them divert users' attention, almost like the Pied Piper of Hamelin, away from pressing social and political issues.³³⁸

3 Fragmentation: The Disappearance of the Inclusive Marketplace of Ideas

Social media and technology scholar danah boyd has noted the tendency of people 'typically [to] revert to situations where they can be in homogeneous environments. They look for "safe spaces" and "culture fit," ... and, increasingly, the technologies and tools around [them] allow [them] to self-segregate with ease'.³³⁹ This ICT-induced social segregation is harmful not only to the ability of a society to deliberate and adopt the better policies but also to its very existence. In 'The Federalist no. 10', James Madison warned against 'the violence of faction'.³⁴⁰ He observed that '[t]he friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. ... The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal

³³⁴ Downs, *supra* note 13, at 139–140 (on the reliance on persuaders and proxies such as the charismatic pastor or politician).

³³⁵ Kahan, 'Ideology, Motivated Reasoning, and Cognitive Reflection', 8 *Judgment and Decision Making* (2013) 407; Hahn and Harris, 'What Does It Mean to be Biased: Motivated Reasoning and Rationality', 61 *Psychology, Learning and Motivation* (2014) 41.

³³⁶ T. Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (2016).

³³⁷ *Ibid.*, at 325.

³³⁸ 'Once Considered a Boon to Democracy, Social Media Have Started to Look Like Its Nemesis', *The Economist* (4 November 2017), available at www.economist.com/news/briefing/21730870-economy-based-attention-easily-gamed-once-considered-boon-democracy-social-media?fsrc=dg%7Ce; d. boyd, 'Hacking the Attention Economy', *Points* (5 January 2017), available at <https://points.datasociety.net/hacking-the-attention-economy-9fa1daca7a37>.

³³⁹ d. boyd, 'Why America Is Self-Segregating', *Points* (5 January 2017), available at <https://points.datasociety.net/why-america-is-self-segregating-d881a39273ab>.

³⁴⁰ Madison, 'The Federalist, No. 10', in *The Federalist: With Letters of Brutus* (2003) 40, at 40.

diseases under which popular governments have everywhere perished'.³⁴¹ John Stuart Mill emphasized the positive societal effects of inclusive democratic institutions. He pointed out that it is through deliberation that a political community builds and sustains itself.³⁴² Cass Sunstein elaborates on Mill's observation, noting the critical role of the social media giants: a functioning democracy depends on a vibrant exchange of views and opinions and on an inclusive marketplace of ideas that compete against each other – a marketplace where truth prevails over falsehood.³⁴³ Sunstein makes an impassioned plea to these corporations to modify their algorithms, thereby exposing their users to more diverse viewpoints and encouraging inclusive deliberations. But danah boyd is pessimistic on this point. In her view, exposure to the views of others:

cannot be fixed by Facebook or news media. Exposing people to content that challenges their perspective doesn't actually make them more empathetic to those values and perspectives. To the contrary, it polarizes them. What makes people willing to hear difference is knowing and trusting people whose worldview differs from their own. Exposure to content cannot make up for self-segregation.³⁴⁴

4 *The Global Context: The Big Data Divide*

Beyond the fragmentation of the marketplaces of ideas, the new communication tools have created new gaps, particularly among groups of voters, empowering those who have access to social media and who can easily rally behind specific causes or form almost virtual political parties.³⁴⁵ In the global context, there is also the problem of the 'big data divide' – the gap between those who have access to large-scale data and the means to analyse this data and those who do not.³⁴⁶ This divide results in an 'asymmetric relationship between those who collect, store, and mine large quantities of data and those whom data collection targets'.³⁴⁷ Indeed, claims have already been made against Facebook and Google that they are acting as 'the new colonial

³⁴¹ *Ibid.* I thank Doreen Lustig for this source.

³⁴² J.S. Mill, *Considerations on Representative Government* (1861, reprinted 1962), at 168: 'It is by political discussion that the manual laborer, whose employment is a routine, and whose way of life brings him in contact with no variety of impressions, circumstances, or ideas, is taught that remote causes, and events which take place far off, have a most sensible effect even on his personal interests.'

³⁴³ C. Sunstein, *#Republic: Divided Economy in the Age of Social Media* (2017), at 138–139.

³⁴⁴ boyd, *supra* note 339.

³⁴⁵ Chadwick, *supra* note 325.

³⁴⁶ boyd and Crawford, 'Critical Questions for Big Data', 15 *Information, Communication and Society* (2012) 662; McNeely and Hahm, 'The Big (Data) Bang: Policy, Prospects, and Challenges', 31 *Review of Policy Research* (2014) 304; Puschmann and Burgess, 'Metaphors of Big Data', 8 *International Journal of Communication (IJC)* (2014) 1690.

³⁴⁷ Andrejevic, 'Big Data, Big Questions: The Big Data Divide', 8 *IJC* (2014) 1673, at 1673; Lerman, 'Big Data and Its Exclusions', 66 *SLR Online* (2013) 55 (discussing the threats that big data poses to those who remain at its periphery); C. Gordon, 'Big Data Exclusions and Disparate Impact: Investigating the Exclusionary Dynamics of the Big Data Phenomenon' (2015) (unpublished MSc dissertation, London School of Economics and Political Science) (on file with author) (exploring digital exclusion in the private sector); J. Schradie, 'Big Data Not Big Enough? How the Digital Divide Leaves People Out', *MediaShift* (31 July 2013), available at <http://mediashift.org/2013/07/big-data-not-big-enough-how-digital-divide-leaves-people-out/> (highlighting the 'big data gap' and its relation to socio-economic status).

powers'.³⁴⁸ The social media giants are aware of this problem, but their response reflects their effort to increase revenues from users rather than expanding the agency of citizens. We need only look as far as Facebook's 'Free Basics', conceived for developing markets, which was flatly rejected by India because the program would offer free access to only a few Internet services, among them Facebook but not Google.³⁴⁹ 71.5

Can social media companies and other private initiatives be part of the solution for any of these problems, by assuming certain responsibilities towards their users and by reaching out to potential users in faraway regions? Unfortunately, it turns out that these private ICT providers are more part of the problem. Analysing this contention is the task of the next section. 71.10

C The Privatization and Monopolization of the Communicative Space: De Facto Governance by Private Social Media Providers 71.15

The private social media providers and other ICT companies shape the contemporary governance sphere due to their possession of two major resources: their control of our channels of communication and, from this, their ability to accumulate vast amounts of data that is necessary for commercial and governance purposes. Whereas governments in the past have traditionally invested in the gathering and management of information as a way to ensure compliance with the law and to plan ahead,³⁵⁰ they are nowadays increasingly dependent on a handful of private ICT companies that regard the services they provide and the data that they amass as their private property and subject to their own discretion.³⁵¹ Voters, in turn, are relegated to the role of users, whose rights are determined by non-negotiable boilerplate service agreements and whose bounded rationality is closely studied and exploited by the service providers. These companies invoke their private status and their right to exclusive use of their data and their algorithms as grounds to remain unaccountable and otherwise unencumbered by the discipline of public law. 71.20 71.25

In light of the growing public and political role of these private actors, several scholars have argued that they can no longer be regarded as neutral commercial platforms, where users simply search for, post and view content. Jack Balkin has suggested treating companies 71.30

³⁴⁸ J. Taplin, *Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy* (2017).

³⁴⁹ R. Agrawal, 'Why India Rejected Facebook's "Free" Version of the Internet', *Mashable* (9 February 2016), available at <http://mashable.com/2016/02/09/why-facebook-free-basics-failed-india/#PEYozL4XZuqB>. 71.35

³⁵⁰ R. Kitchin, *The Data Revolution: Big Data, Data Infrastructures and Their Consequences* (2014), at 114–115: 'The state is a prime generator and user of data. Since the Enlightenment it has sought to create more systematic ways of, on the one hand, managing and governing populations, and on the other of delivering services to citizens. One of the key ways. ... Is through the auditing and quantification of society ... Across all state institutions data generation, management, storage and analysis are fundamental tasks, used to assess the liabilities and entitlements of sovereign and non-sovereign subjects, and to detect non-compliance, evasion and fraud.' See generally W. Alonso and P. Starr, *The Politics of Numbers* (1987); A. Desrosieres, *The Politics of Large Numbers: A History of Statistical Reasoning* (1998). 71.40

³⁵¹ Rozenshtein, 'Surveillance Intermediaries', 70 *SLR* (2018) (describing Apple's refusal to allow the Federal Bureau of Investigation to access the San Bernardino attacker's iPhone); Schultz, 'The Internet of Things We Don't Own?', 59 *CACM* (2016) 36. 71.44

such as Google and Facebook as ‘information fiduciaries’.³⁵² Fiduciaries, according to this account, are entities that have ‘special obligations of loyalty and trustworthiness towards another person. The fiduciary must take care to act in the interests of the other person, who is sometimes called the principal, the beneficiary, or the client. The client puts their trust or confidence in the fiduciary, and the fiduciary has a duty not to betray that trust or confidence’.³⁵³ In the context of human rights protection, Chander makes a related argument, suggesting that global information service providers be legally required to protect the rights of their users in oppressive regimes by refusing to share their personal data with local authorities or through other means.³⁵⁴ Both Balkin and Chander’s arguments are limited to the domain of data privacy – the idea that information fiduciaries should not use the information their users share against the interests of these users. However, while this obligation is clearly important, it does not take full account of the capacities of these corporations and the public role they assume. Since these service providers actually exercise ‘private governance’ functions in cyberspace and in the real world, their role as fiduciaries covers these functions as well.³⁵⁵ But can the need for regulation be met by voluntary regulation among ICT service providers?

Perhaps in an effort to curb growing pressure to undergo public scrutiny, ICT service providers such as Facebook, Twitter and Google have adopted measures of self-regulation to ensure that their services are not abused by rogue users – for example, by responding to the dissemination of ‘fake news’³⁵⁶ or the targeting of users with political ads.³⁵⁷ Facebook regulates online content to eliminate hate speech,³⁵⁸ as do Twitter, Google, Tumblr and others.³⁵⁹ Some service providers have reacted to hate speech by expelling certain users from their domain services³⁶⁰ and by refusing to protect their websites from online malware attacks.³⁶¹ In the wake of the 2016 US presidential election and in light of widespread concerns regarding the role of social media in spreading fake news, Facebook has introduced a range of features to help address the problem. For instance,

³⁵² Balkin, ‘Information Fiduciaries and the First Amendment’, 49 *UCDLR* (2016) 1183.

³⁵³ *Ibid.*, at 1207.

³⁵⁴ Chander, ‘Googling Freedom’, 99 *CLR* (2011) 1.

³⁵⁵ Balkin, *supra* note 277, at 36: ‘Private governance means that the infrastructure provider governs the flow of information through the infrastructure that it owns, and it governs the behavior of the end-users and customers who employ the digital infrastructure.’

³⁵⁶ J. Vanian, ‘Facebook’s Fight Against Fake News Hits Pages and Business Listings’, *Fortune* (28 August 2017), available at <http://fortune.com/2017/08/28/facebook-fake-news-pages/>.

³⁵⁷ I. Lapowsky, ‘Facebook’s Election Ad Overhaul Takes Crucial First Steps’, *Wired* (21 September 2017), available at www.wired.com/story/facebook-election-ad-reform/: ‘Going forward, Facebook will require political advertisers to disclose the pages that have paid for the ad. Today, no law requires political advertisers to do this online, even though such disclosures are required on television. Facebook was unable to clarify whether this new rule applies only to official campaign organizations and PACs, or if it will apply more broadly to all political content.’

³⁵⁸ N. Hopkins, ‘Revealed: Facebook’s Internal Rulebook on Sex, Terrorism and Violence’, *The Guardian* (21 May 2017), available at www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence.

³⁵⁹ Ammori, ‘The “New” *New York Times*: Free Speech Lawyering in the Age of Google and Twitter’, 127 *HLR* (2014) 2259.

³⁶⁰ M. Sheffield, ‘Big Tech, The “Alt-Right” and the Unknown Future of the Internet’, *Salon* (21 August 2017), available at www.salon.com/2017/08/21/big-tech-the-alt-right-and-the-unknown-future-of-the-internet/.

³⁶¹ *Ibid.*

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the social network enables users to flag content as fake and then to direct flagged items for fact checking by a coalition of organizations such as PolitiFact, the Associated Press, FactCheck.org and ABC News.³⁶² The company is also part of the First Draft Coalition, an initiative among technology and media companies including Twitter, Google, the *New York Times* and CNN to combat the spread of fake news online. During the 2017 French elections, Facebook announced that it would work with eight French news organizations to minimize the risk of fake news on its platform.³⁶³ 73.5

However, private regulation is fraught with difficulties that render it wanting in several aspects. Above all, it offers no public accountability, raising concerns about threats to freedom of speech by unscrutinized private decision makers³⁶⁴ 73.10 and about unequal treatment of users.³⁶⁵ Concerns regarding visibility, information asymmetry and hidden influence have also been voiced.³⁶⁶ Facebook's algorithms remain formally confidential (albeit they were leaked to *The Guardian*).³⁶⁷ Although algorithmic gatekeeping may seem to operate like news editors in newspapers, the outcomes differ significantly between the two processes. While, in the case of print newspapers, the result of the editing process is identical for everyone buying them, in Facebook's Trending section, the result of the algorithm-governed editing process is tailor-made.³⁶⁸ In addition, the clear chain of command in newspapers' editorials facilitates accountability, while Facebook's newsfeed algorithm cannot be held accountable for choices made.³⁶⁹ Beyond these instrumental concerns, there is also a matter of principle; private entities cannot claim to act in the name of the polity, but acting in the name of the polity is a precondition for limiting citizens' political rights.³⁷⁰ 73.15

Beyond questions of feasibility and appropriateness of private governance, there is also the matter of commitment. The extent to which the big ICT service providers are seriously committed to regulating their respective services in ways that would conform with public goals (however defined) and expectations is questionable. The reason 73.20

³⁶² M. Isaac, 'Facebook Mounts Effort to Limit Tide of Fake News', *New York Times* (15 December 2016), available at www.nytimes.com/2016/12/15/technology/facebook-fake-news.html. 73.30

³⁶³ 'Facebook, Google Join Drive against Fake News in France', *Reuters* (6 February 2017), available at www.reuters.com/article/us-france-election-facebook-idUSKBN15L0QU.

³⁶⁴ 'How Facebook Moderates your Content', *The Big Issue* (22 May 2017), available at www.thebigissue.co.ke/index.php/2017/05/22/facebook-moderates-content/.

³⁶⁵ Sheffield, *supra* note 360: 'For his part, Anglin complains that the systematic dismantling of his online presence has made him an "unperson." He also suggested that his site would not be the last one targeted for removal from the internet for expressing unpopular opinions' (regarding the takedown of *The Daily Stormer* website). 73.35

³⁶⁶ Tufekci, 'Algorithmic Harms beyond Facebook and Google: Emergent Challenges of Computational Agency', 13 *Journal of Telecommunications and High Technology Law* (2015) 203, at 207–209; Diakopoulos, 'Algorithmic Accountability', 3 *Digital Journalism* (2015) 398, at 410 (noting that 'journalistic standards for transparency of algorithms will need to be developed'). 73.40

³⁶⁷ Hopkins, *supra* note 358.

³⁶⁸ Tufekci, *supra* note 366, at 208.

³⁶⁹ *Ibid.*

³⁷⁰ Dorfman and Harel, 'Against Privatisation As Such', 36 *OJLS* (2016) 400. 73.44

for doubt lies in their business models that seek profit maximization through expansion of market share and advertising revenue. Perhaps even more disconcerting is the ever-growing political clout of these companies, which increases their practical ability to deflect pressures of regulation. The proven power of social media giants such as Facebook, Twitter and Google to shape voters' preferences is arguably a more effective threat (or promise) to politicians than the hordes of lobbyists that the media giants and other commercial actors hire to influence politics.³⁷¹ During the 2016 presidential race in the USA, for instance, it became clear that the algorithms of Google or Facebook could prioritize some types of political content over others and thus influence the results of the election.³⁷² There is no doubt that these social media companies can tap their vast data resources to selectively inform domestic and global policymaking and thereby shape domestic and global regulation.

It is also uncertain whether unilateral state regulation could prove effective in reining in these media giants.³⁷³ Armed with national laws that protect their sophisticated algorithms and data as private property, these corporations remain highly resilient to the threat of national and international regulation.³⁷⁴ It is unclear whether traditional competition law, which focuses only on harms to competition, would be suitable for addressing other harms such as asymmetric access to data or the regulation of political speech.³⁷⁵ State law intervention also raises the opposite concern of overly drastic regulation that might suppress freedoms. Free speech questions have arisen, for example, in the context of suppressing hate speech or libel, with Germany's 2017 Network Enforcement Act requiring social networks with more than 2 million German users to take down 'blatantly illegal' hate speech within 24 hours of it being

³⁷¹ It has become apparent that private actors such as Facebook can manipulate information and affect elections results. See, e.g., Zittrain, 'Engineering an Election', 127 *Harvard Law Review Forum* (2014) 335.

³⁷² See, e.g., S. Fiegerman, 'Facebook Is Well Aware That It Can Influence Elections', *CNN Tech* (17 November 2016), available at <http://money.cnn.com/2016/11/17/technology/facebook-election-influence/>; T. Timm, 'You May Hate Donald Trump. But Do You Want Facebook to Rig the Election Against Him?', *The Guardian* (19 April 2016), available at www.theguardian.com/commentisfree/2016/apr/19/donald-trump-facebook-election-manipulate-behavior. In the case of Facebook, for instance, concerns were raised that the social network prioritizes liberal over conservative news items in its 'trending news' section – a major source of information for millions of Americans. See M. Nunez, 'Former Facebook Workers: We Routinely Suppressed Conservative News', *Gizmodo* (9 May 2016), available at <http://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006>. Google has also been accused of making its 'autofill' function positively biased towards liberal political candidates. See A. Akthar, 'Google Defends its Search Engine against Charges It Favors Clinton', *USA Today* (10 June 2016), available at www.usatoday.com/story/tech/news/2016/06/10/google-says-search-isnt-biased-toward-hillary-clinton/85725014/.

³⁷³ Chander, *supra* note 289 (imposing mandatory disclosure requirements on them or attempting to regulate the inputs or outputs of their algorithms).

³⁷⁴ US law offers social media providers immunity from libel (47 USC, § 210 [2000]) and copyright infringement (17 USC §§ 512 [1998]). See also K.P. Vogel, 'Google Critic Ousted From Think Tank Funded by the Tech Giant', *New York Times* (30 August 2017), available at www.nytimes.com/2017/08/30/us/politics/eric-schmidt-google-new-america.html.

³⁷⁵ Kahn, 'Amazon's Antitrust Paradox', 126 *YJL* (2017) 710; Drexler, 'Designing Competitive Markets for Industrial Data – Between Propertisation and Access', Max Planck Institute for Innovation and Competition Research Paper no. 16-13 (2016), at 43–44, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862975; Lynskey, 'Regulating "Platform Power"', LSE Legal Studies Working Paper no. 1/2017 (2017).

reported.³⁷⁶ Obviously, collective state action through a global governance body could have reined in those ICT providers, just as it was effective in the anti-tobacco efforts,³⁷⁷ but any such cooperation would require the meeting of minds on several policy matters that affect the potential parties. So what could the international law on global governance contribute in this context? The next section offers some initial thoughts.

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D The Potential Contribution of International Law

The previous discussion highlighted the need to ensure that, by default and subject to exceptions (such as state security, trade secrets or privacy) and conditions (such as reasonable charges),³⁷⁸ all individuals should have access to, and use of, big data. These rights must be respected by public and private actors. Access to data that is held by states, key private actors and global institutions, and its protection from pollution, have significant implications for ensuring accountability of these actors, respecting the human dignity of individuals and sustaining political communities by promoting public deliberation.

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In *World Order 2.0: The Case for Sovereign Obligation*, Richard Haas proposes the regulation of cyberspace by 'international arrangements that encourage benign uses of cyberspace and discourage malign uses. Governments would then have to uphold and act consistently within this regime as part of their sovereign obligations.'³⁷⁹ He calls for 'a single, integrated global cyber network [that could] limit what governments could do to stop the free flow of information and communication within it, prohibit commercial espionage and the theft of intellectual property, and limit and discourage disruptive activities in cyberspace during peacetime'.³⁸⁰ He even suggests the need 'to develop a cyberspace annex to the laws of war specifying which actions in this domain are considered permissible and which are prohibited'.³⁸¹ Of course, Haas' concern is cyber security and the potential proliferation of cyber attacks and terrorism. But the logic can easily be extended further to encompass the crucial matters of access to information that is accumulated by public and private databanks.

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Even if desirable, such international arrangements are unlikely to materialize in the foreseeable future. As we will see next, states have widely differing visions of cyberspace and its regulation. But disagreements should not detract from the effort to assess

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³⁷⁶ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Netzwerkdurchsetzungsgesetz] [NetzDG] [Network Enforcement Act], Deutscher Bundesrat: Drucksachen, 30 June 2017, at 536/17; P. Evans, 'Will Germany's New Law Kill Free Speech Online?', *BBC News* (18 September 2017), available at www.bbc.com/news/blogs-trending-41042266: 'Critics argue the short timeframes coupled with the potentially large fines will lead social networks to be overly cautious and delete huge amounts of content – even things that are perfectly legal. But the law's supporters, and the German government, argue that it will force social media companies to proactively deal with online incitement and hate speech.' In contrast, the USA is relatively hands off when it comes to regulating data and data flows. See Vogel, *supra* note 374.

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³⁷⁷ See Mamudu, Hammond and Glantz, 'Tobacco Industry', *supra* note 174.

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³⁷⁸ On these conditions, see Rosenbaum, 'Data Governance and Stewardship: Designing Data Stewardship Entities and Advancing Data Access', 45 *Health Services Research* (2010) 1442, at 1449–1451.

³⁷⁹ Haas, 'World Order 2.0: The Case for Sovereign Obligation', 96 *Foreign Affairs* (2017) 2.

³⁸⁰ *Ibid.*, at 5.

³⁸¹ *Ibid.*, at 6.

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the doctrinal claims that seek to resist a global approach to the question nor from the recognition that international law serves as a relevant framework for recognizing certain rights and duties with respect to access to cyberspace. This next section (i) refutes the claim that cyberspace is a ‘fifth dimension’ that is beyond the reach of international law; (ii) explores the scope of cyberspace as international, domestic or private and (iii) offers normative grounds for treating data as a shared global resource whose access should be, in principle, secured for all and protected by all.

1 Does Cyberspace Constitute an Unregulated Fifth Dimension?

In 2016, the UNGA created the fifth working group of governmental experts – the 2016–2017 UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security’ (GGE). The GGE was tasked with studying ‘how international law applies to the use of information and communications technologies by States’.³⁸² Strikingly, the GGE’s fourth meeting in June 2017 was also its last; the participants failed to endorse even the basic premise that international law applies to cyberspace. This disappointing development exposed a debate that had been brewing for some time. Although a previous GGE did endorse the premise that international law was applicable in cyberspace, and even acknowledged that international law was ‘essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible [ICT] environment’, some states, most notably China and Russia, put forward an alternative approach.³⁸³ Together with a few other states, they twice proposed ‘codes of conduct’³⁸⁴ that implicitly denied the formal applicability of international law and, instead, invited ‘each state voluntarily subscribing to the code’ to make certain ‘pledges’.

The question – does international law apply to cyberspace – was asked ‘in the context of international security’. If it does, then existing customary and treaty norms concerning international security in the ‘real world’ apply *mutatis mutandis* to state action in the ‘virtual world’. For some, a positive answer is self-evident. As the experts who produced the *Tallinn Manuals on the International Law Applicable to Cyber Warfare* (2013) and *Cyber Operations* (2017), explain, cyberspace is located neither in outer space nor in an imaginary fifth dimension but, rather, in infrastructure located in states’ territory and operated by human beings subject to state authority and responsibility.³⁸⁵ As Martha Finnemore and Duncan Hollis recently noted: ‘States can and do control cyberspace when it suits them – and often with a heavy hand.’³⁸⁶ Cyber

³⁸² GA Res. 70/237, 23 December 2015, Art. 5.

³⁸³ UN Secretary-General, Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc. A/69/98, 24 June 2013. For an analysis of the foreign policies of BRICS from 1995 to 2013, see Ebert and Maurer, ‘Contested Cyberspace and Rising Powers’, 34 *Third World Quarterly* (2013) 1054. The authors conclude that ‘[c]yberspace is obviously only one realm where US preeminence is being severely contested’ (at 1069).

³⁸⁴ Letter from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General (Code of Conduct), UN Doc. A/69/723, 9 January 2015, available at <http://undocs.org/A/69/723>.

³⁸⁵ Finnemore and Hollis, *supra* note 266, at 460 (noting that ‘[s]ervers and undersea cables, for example, have a tangible physical existence; cables are anchored, and servers are located in some state somewhere. States use these physical features of cyberspace, among other tools, to exert power’).

³⁸⁶ *Ibid.*

activity can produce harms that are similar in nature if not in magnitude to offline activity. What legitimate reason is there to deny the extension of international law to state action and inaction with respect to cyberspace?

For some diehard legal positivists, this almost self-evident proposition that international law governs cyberspace might seem too hasty; cyberspace, they would say, is a unique dimension, and not enough state practice has accumulated with respect to it (certainly no *opinio juris*).³⁸⁷ This response reminds me of the curious decision of the ILC back in the early 1990s to exclude ‘confined aquifers’ (underground lakes whose waters do not flow into a sea or ocean) from the definition of an ‘international watercourse’ that is subject to international regulation.³⁸⁸ The reasoning – the dearth of state practice with respect to such aquifers – baffled hydrologists and environmentalists and left them wondering about the logic of international law. Such a position calls attention to which state practice is relevant for the purpose of identifying custom. Why not extrapolate from international rivers to international aquifers if the only – hydrologically irrelevant – difference between the two is that the one is above ground and the other underground? Every first year student in a tort law class grasps the power of abstraction when reading how the successful lawsuit by Miss Donoghue, whose drink contained the remains of a snail, developed into a general theory of negligence instead of a theory about responsibility for drowned snails.³⁸⁹

Obviously, insistence on exactly the same practice would inhibit the evolution of international law and its ability to adapt to new challenges, particularly when the pace of technological change is so swift. Without resorting to abstraction and generalization from specific practices,³⁹⁰ without using analogies to assess compatibility of precedents and without reliance on deeper concepts such as the principle of good neighbourliness³⁹¹ or of humanity,³⁹² it would not have been possible to judicially endorse liability for cross-boundary environmental harm,³⁹³ to conceptualize the

³⁸⁷ See Hathaway, ‘When Violating the Agreement Becomes Customary Practice’, in F. Osler Hampson and M. Sulmeyer (eds), *Getting beyond Norms: Approaches to International Cyber Security Challenges* (2017) 5, at 6: ‘Even worse, not only has there been intentional disruption and damage to critical infrastructures and services of states since the approval of this agreement, none of the signatories have publicly objected to the wrongful use of ICTs and harm caused to nations. This silence is contributing to a new de facto norm – “anything goes” – and this is dangerous because it increases the risks to international peace, security and stability. Disrupting or damaging critical infrastructures that provide services to the public has become customary practice – the new normal.’

³⁸⁸ ‘Resolution on Confined Transboundary Groundwater’, 2 *ILC Yearbook* (1994) 135.

³⁸⁹ *Donoghue v. Stevenson*, [1932] UKHL 100.

³⁹⁰ Finnemore and Hollis, *supra* note 266, at 468 (supplying examples of efforts to ‘import’ cybernorms from existing organizational arrangements): ‘Before it pronounced its own set of norms, the GGE sought to situate its norms for military operations in cyberspace within existing normative regimes in international law. Similarly, when states wanted norms on cybersecurity exports, they turned to the preexisting Wassenaar Arrangement. And, of course, in the Internet governance context, calls persist to shift the relevant norms from their current dispersed multistakeholder locations to the (intergovernmental) ITU framework.’

³⁹¹ Boisson de Chazournes and Campanelli, ‘Neighbour States’, in *Max Planck Encyclopedia of International Law* (2006) 1072.

³⁹² Fast, ‘Unpacking the Principle of Humanity: Tensions and Implications’, 97 *IRRC* (2015) 111, at 112–113.

³⁹³ *Trail Smelter Case (United States v. Canada)*, reprinted in (1941) 3 UNRIIA 1905.

doctrine of state responsibility³⁹⁴ or to identify the laws of war as reflecting customary international law.³⁹⁵ From the perspective of the protection of state interests and of individual human rights, there can be no relevant distinction between online and offline state action. The lack of state practice with respect to online activity is simply irrelevant for the applicability of all 'offline duties' to states' online activity.

2 Is Cyberspace International, Domestic or Private?

A different question arises with respect to the spatial dimension. Can we retain a distinction between 'international' cyberspace and 'domestic' cyberspace and assign international law rights and duties only to the former sphere? Such a distinction is implicit in the US position. On the one hand, it supports the recognition of cyberspace as being subject to international law 'in the context of international security'.³⁹⁶ But, at the same time, the USA insists that questions related to the architecture of communication protocols and their distributional consequences (such as the question of 'net neutrality'),³⁹⁷ and the issue of Internet governance,³⁹⁸ should remain matters for US law.³⁹⁹ Indeed, the spatial distinction between the international and the local proves difficult to maintain, as states even disagree about the definition of their domestic space and the reach of their laws. While, for the USA, the free flow of online information is a matter of constitutionally protected speech,⁴⁰⁰ other countries, most notably China and Russia, insist on their sovereign discretion to protect their internal affairs against information that could 'undermin[e] their political, economic and social stability'.⁴⁰¹ States are also reluctant to acknowledge their significant influence on distant strangers, while those that conduct surveillance of online communications regard their activity as subject only to domestic law constraints – with minimal, if any, protections of the privacy of foreigners.⁴⁰²

³⁹⁴ Miller, 'Trail Smelter Arbitration', in *Max Planck Encyclopedia of Public International Law* (2017) 1612.

³⁹⁵ Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *AJIL* (1996) 238, at 242–244.

³⁹⁶ GA Res. 70/237, 23 December 2015, Art. 5.

³⁹⁷ On the need for net neutrality, see Wu, 'Network Neutrality, Broadband Discrimination', 2 *Journal of Telecommunications and High Technology Law* (2003) 141. For developments in the USA in this context, see 'Fed. Comm'n Comm'n, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet', Press Release, 26 February 2015, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0226/DOC-332260A1.pdf. But see C. Kang, 'F.C.C. Repeals Net Neutrality Rules', *New York Times* (14 December 2017), available at www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html; T. Wu, 'Why the Courts Will Have to Save Net Neutrality', *New York Times* (22 November 2017), available at www.nytimes.com/2017/11/22/opinion/courts-net-neutrality-fcc.html?emc=eta1.

³⁹⁸ See, e.g., Raustiala, 'Governing the Internet', 110 *AJIL* (2016) 491 (describing US control over ICANN).

³⁹⁹ Other countries regard this matter as belonging to the international sphere and therefore are calling for 'international governance of the Internet'. See Code of Conduct, *supra* note 384.

⁴⁰⁰ *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168 (ND Cal. 2001).

⁴⁰¹ Code of Conduct, *supra* note 384, s. 2(3).

⁴⁰² See Schullhofer, 'An International Right to Privacy? Be Careful What You Wish For', 14 *International Journal of Constitutional Law* (2016) 238; Austin, 'Technological Tattletales and Constitutional Black Holes: Communications Intermediaries and Constitutional Constraints', 17 *TIL* (2016) 451, at 468–476. But see C. Kuner and M. Marelli (eds), *Handbook on Data Protection in Humanitarian Action* (2017).

Similarly, the US administration regards the territorial scope of US law as covering also data stored in overseas servers.⁴⁰³

Social network and other Internet service providers, such as Facebook and Google, stake an even stronger claim. Invoking their private nature and their contractual relations with their users, they expect to be exempted even from the discipline of domestic public law and envision a private cyberspace where they, and only they, make the rules. 79.5

3 *The Arguments for Treating Cyberspace as an Accessible Global Commons*

There is no impediment to the parallel applicability of domestic and international law to the same object or activity; as much as soldiers are subject to domestic and international constraints and the use of watercourses is regulated simultaneously by internal and international law, so too is cyberspace – or so it should be. There are questions for domestic law, such as who owns the data and who controls the communication networks, and there are questions for international law, such as where the responsibility lies for polluting contents, for intrusive surveillance or for adversely affecting strangers. It is entirely possible to argue that cyberspace is not only a private or domestic space but also simultaneously a global space and, hence, subject to international law. 79.10

From the perspective of international law, the issue is whether data generated or stored within state territory should be regarded as a national resource to be freely at the disposition of the state (or even private property, privately managed) and perhaps subject to discriminatory export/import rules or whether it should be regarded also as fully or partly shared, entitling other states and foreign actors to demand a fair opportunity to access it.⁴⁰⁴ The prevailing assumption seems to be that matters of ownership of, and access to, cyber communications and data are subject only to domestic regulation and that international law is silent on such issues. A similar state of affairs existed with respect to international watercourses before issues of scarcity and pollution necessitated concerted regional efforts and international regulation. Until that point, transboundary rivers and lakes used to be governed only by the riparian domestic laws. Have we reached a turning point that calls for global attention to be paid to cyberspace, if not an articulation of basic rights and duties, under international law? 79.15

Invoking again the analogy from water resources law, I suggest that questions of ownership under domestic law, whether private or public, should not preclude the characterization of data as shared under international law in much the same way that the private ownership of a well or a stream, according to state law, does not detract from the status of the entire international river of which the stream is part as shared 79.20

⁴⁰³ See *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation* (concerning the reach of the 1986 Stored Communications Act to servers in Ireland) (pending before the Supreme Court). 79.25

⁴⁰⁴ Executive Office of the [US] President, *Big Data: Seizing Opportunities, Preserving Values* (2014), at 67 (stating that '[g]overnment data is a national resource, and should be made broadly available to the public' – presumably the US public). 79.30

under international law.⁴⁰⁵ What is important from the point of view of international law is that that state's duties towards its neighbours are fulfilled.⁴⁰⁶

80.5 There are four separate grounds for regarding the big data that is stored on private and public servers and utilized by private and public actors as a shared access resource recognized as such by international law, in the sense that access to an aggregate and anonymized version of it must be, in principle, readily available and free from manipulation and pollution. The first justification rests on utilitarian considerations. The benefits of access to national data have been recognized by several governments, and the rationale applies with equal force in the global context. In an executive order issued 80.10 in 2013, President Obama acknowledged that 'making information resources easy to find, accessible, and usable can fuel entrepreneurship, innovation, and scientific discovery that improves Americans' lives and contributes significantly to job creation'. He therefore ordered that 'the default state of new and modernized Government information resources shall be open and machine readable'.⁴⁰⁷ The OECD, in 2015, and the 80.15 EU, in 2017, also recognized the collective benefits arising from shared access to data. The EU has embarked on an effort to create a digital single market that is designed 'to fully unleash the data economy benefits'.⁴⁰⁸ This utilitarian perspective recalls Hugo Grotius' justification for opening the high seas to all:

80.20 If any person should prevent any other person from taking fire from his fire or light from his torch, I should accuse him of violating the law of human society, because that is the essence of its very nature ... why then, when it can be done without any prejudice to his own interests, will not one person share with another things which are useful to the recipient, and no loss to the giver?⁴⁰⁹

80.25 Principles such as good neighbourliness⁴¹⁰ or trusteeship for humanity⁴¹¹ strengthen this argument. Even the business model of social media providers such as Facebook and Google, which is based on selling users' data to advertisers, does not limit its sharing for other purposes, such as for public uses including the monitoring of government action or for academic research.

80.30 The second premise is authorship. While some databases are purely local, containing, for example, information about the inhabitants of a specific municipality or the local

80.35 ⁴⁰⁵ Finnemore and Hollis, *supra* note 266, at 260: 'If states do not own the ICT resources, does that situation pose an obstacle to regulation or norm creation in cyberspace? It is hard to see why it would. States regulate privately owned resources all the time, including resource flows that cross national boundaries. Law, norms, and rules are dense around maritime issues, transboundary trade, extractive industries, and human trafficking, to name just a few.'

⁴⁰⁶ *Ibid.*, at 458 (comparing the pervasiveness of information and communication technologies (ICTs) to that of carbon emissions, concluding that the widespread use of ICTs does not present unique challenges for norms construction).

⁴⁰⁷ Executive Order no. 13642, 78 Fed. Reg. 93, 28111, 9 May 2013, s. 1.

80.40 ⁴⁰⁸ European Commission, *Building a European Data Economy*, 9 September 2017, available at <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>.

⁴⁰⁹ H. Grotius, *The Freedom of the Seas*, translated by Ralph van Deman Magoffin, edited by James Brown Scott (1622, reprinted 1916), at 38.

⁴¹⁰ Chazournes and Campanelli, *supra* note 391.

80.44 ⁴¹¹ Benvenisti, *supra* note 245.

fans of a soccer team, most are likely to consist of data collected from numerous local and foreign sources. Again, just as in the freshwater analogy, there are local brooks and there are mighty international rivers. The data has accumulated over years thanks to the input of billions of users, domestic and foreign alike. Each click, like each drop of rain filling up a reservoir, adds to immense reserves of human knowledge. Just like a giant global lake or a vast international river of knowledge, private and public databanks constitute a new manifestation of the common heritage of humankind.⁴¹² As common heritage, collectively created, they should, as a matter of principle, be accessible to all. To ensure this, the burden must be placed on the holders of the information to justify its withholding from all those who have participated in creating it. 81.5
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The third justification relates to democratic values that inform individual and collective rights. Access to data is fundamental to the exercising of meaningful 'positive liberty', in Berlin's terms.⁴¹³ It empowers voters and compensates for their remoteness from decision-making venues. Access to the accumulated data holds the key to ensuring informed and equal access to local and global markets, for monitoring national and international public authorities, for participating in their decision-making processes and for seizing opportunities to shape our future life trajectory. The rise of 'separate ideological bunkers' created unexpected consequences, such as the ubiquity of fake news,⁴¹⁴ which thrive when the global marketplace of ideas becomes fragmented and depletes the space for democratic deliberation – the key for thriving democracy.⁴¹⁵ 81.15
81.20 As Sunstein points out, the flow of information to an inclusive marketplace of ideas is also an important resource for the identity and vitality of the community.⁴¹⁶ He rightly invokes John Stuart Mill, who had presciently observed that 'it is from political discussion and collective political action that one whose daily occupations concentrate his interests in a small circle round himself learns to feel for and with his fellow-citizens, and becomes consciously a member of a great community'.⁴¹⁷ 81.25

The fourth rationale for recognizing the right to access data as a shared global resource is global justice. Such access can contribute significantly to bridging the 'big data divide'. Instead of propositions such as Thomas Pogge's global resources dividend,⁴¹⁸ which is reminiscent of offering fish to the poor, extending the opportunity to access big data and to use the latest ICT technology is likely to offer resources that will empower individuals and communities in the developing world over the long term.⁴¹⁹ 81.30

⁴¹² See Ranganathan, 'Global Commons', 27 *EJIL* (2016) 693.

⁴¹³ Berlin, 'Two Concepts', *supra* note 283, at 22–26. 81.35

⁴¹⁴ Lanchester, 'You Are the Product', 39 *London Review of Books* (2017) 3, available at www.lrb.co.uk/v39/n16/john-lanchester/you-are-the-product?utm_source=newsletter&utm_medium=email&utm_campaign=3916&utm_content=ukrw_nonsubs.

⁴¹⁵ Sunstein, *supra* note 343, at 138–139.

⁴¹⁶ *Ibid.*, at 141–144.

⁴¹⁷ Mill, *supra* note 342, at 168. 81.40

⁴¹⁸ T. Pogge, *World Poverty and Human Rights* (2002).

⁴¹⁹ Hilbert, 'Big Data for Development: A Review of Promises and Challenges', 34 *Development and Policy Review* (2016) 135; Breuer and Groshek, 'Assessing the Potential of ICTs for Participatory Development in Sub-Saharan Africa with Evidence from Urban Togo', 30 *International Journal of Politics, Culture and Society* (2017) 349; S. Livingston and G. Walter-Drop (eds), *Bits and Atoms: Information and Communication Technology in Areas of Limited Statehood* (2014). 81.44

5 Conclusion

82.5 We have come a long way since the days of blind trust in the impartiality and skilfulness of international organizations. Global governance bodies are no longer regarded as remote institutions with limited effect on our daily lives. We now understand the need to communicate with decision makers, to deliberate collectively and to access data. However, the law of global governance is still framed by the initial approach that reflects blind trust in an impartial international civil service – an approach that hampers the evolution of general law binding all international organizations. And just as we realize the need to require national and international regulators to secure the inclusiveness and openness of our collective channels of communication and sources of knowledge, we face partisan efforts among commercial and political actors to manipulate these crucial resources. Such efforts are either driven by old-fashioned profit seeking or they are offensive manoeuvres to undermine public trust in those same public institutions that seek to protect open and reliable channels of communication. The very possibility of domestic and international cooperation for confronting collective challenges – which by its very nature depends on informed interaction – is thus threatened. For this reason, at the same time as it becomes increasingly clear what the major tasks of the law of global governance are, it also becomes questionable whether this law can, in fact, be further developed to fulfil those tasks. New technologies of governance that rely on raw data rather than on communicated information raise their own challenges to the law’s efficacy, but at the same time they offer new horizons for data-driven accountability.

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The need for an international law that is capable of addressing the new modalities of governance and regulating the fundamental problems of information asymmetry, the clogging or polluting of channels of communications and the access to data is more pressing than ever. Due to the growing influence of global governance bodies, private actors and rogue states on our daily lives and the shape of our communities, the primary task of the law of global governance is not only to ensure the accountability of global governance bodies but also to protect human dignity and the very viability of the democratic state.