GoJIL | Goettingen Journal of International Law

Vol. 7, No. 1 (2016)

Special Issue: The Exercise of Public Authority by International Organizations

GoJIL | Goettingen Journal of International Law

Goettingen Journal of International Law (GoJIL)
c/o Institute for International and European Law
Platz der Göttinger Sieben 5
37073 Göttingen
Germany
info@gojil.eu
www.gojil.eu
ISSN 1868-1581

The Goettingen Journal of International Law is published Open Access and two to three times per year by Goettingen Law School students.

Submissions: The General Call for Papers focuses on topics of international law including related fields such international criminal law, international humanitarian law and international economic law. A submission's eligilibility is not contingent upon its specific legal methodology, meaning that e.g. historical or economic approaches are welcome. Submissions are classified as a general article consisting of about 15,000 words, an article on current developments consisting of about 6,000 to 15,000 words, or a report (e.g. on judgments or recent case law).

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Editorial

Dear Readers,

we are glad to present you the current issue, a special issue on the exercise of International Public Authority. It emerges from a fruitful collaboration with scholars who participated in workshops on this topic at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.
Many thanks are due to Matthias Goldmann without whom this issue would not have been possible and who will in the following introduce you to this special issue's topic in a foreword.
We hope the thoroughly selected articles provide for yet another worthwhile read to our readership.

The Editors

Foreword to the Special Issue on the Exercise of International Public Authority

Matthias Goldmann

This special issue assembles articles by a group of young scholars in international law interested in how globalization transforms the activities of international institutions, as well as the ways we think about them. Globalization is constantly progressing, albeit not in a linear fashion. Rather, it seems to adapt its course in accordance with the specific challenges of the time or an issue. Thus, whether one thinks of the developments following September 11 or the financial crisis, the concern about climate change, worldwide epidemics, or migration – each of these issues has left its mark on the institutions that govern public interests at the supranational level. In this respect, international institutions seem to answer

to demands in world public opinion for more international regulation in order to cope with problems requiring international solutions. At the same time, each of these changes has triggered controversies in just that very same world public opinion which generated them. Power causes opposition as there is no "natural" way of regulating public policies. Hence, international institutions increasingly face questions concerning the legitimacy of their activities.[1]

The contributions of this special issue show the interplay of these two dimensions – the call for international regulation, which prompts new activities of international institutions taking hitherto unknown shapes, and the call for legitimacy, which has – or should have – induced certain international institutions to rethink their substantive and procedural standards. To engage with both aspects of the debate, the contributions to this special issue rely on the concept of "international public authority" (IPA). This concept serves as a focus for the identification of crucial acts of international institutions by which they seek to advance public interests on the international level, whether through traditional international law or new, often informal, governance instruments. It also claims that attention should be paid to the legal structures embedding such acts. Legal structures constitute the backbone of both the effectiveness and the legitimacy of such acts.[2] In these respects, the IPA approach resembles scholarly endeavors such as global administrative law[3] or global constitutionalism.[4]

The authors of the contributions to this special issue show how international institutions look for innovative ways to regulate global issues effectively, even though their competencies, hence their capacity to do so through binding international law, are often rather limited. Thus, in a study of "post-treaty instruments" in international environmental law, Tim Staal shows how the Conferences of the Parties implicitly modify treaty obligations, expanding or

1 On the dual call on international institutions for more regulation and more legitimacy, see M. Zürn, 'The politicization of world politics and its effects: Eight propositions', 6 *European Political Science Review* (2014) 1, 47, 52-53.

2 A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 11, 1375; on international courts, see A. von Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *European Journal of International Law* (2012) 1, 7.

3 E.g. B. Kingsbury, N. Krisch & R. Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005), 15.

4 E.g. M. Kumm, A. F. Lang, J. Tully & A. Wiener, 'How large is the world of global constitutionalism?', 3 *Global Constitutionalism* (2014) 1; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 579.

restricting their scope in the aftermath of treaty negotiations. Biel Company discusses how the regulatory needs of the internet lead to a reliance on private actors and informal instruments for the definition of technical standards. The World Health Organization (WHO) uses information as a regulatory instrument when it declares public health emergencies in case of a global pandemic, as Pedro Villarreal sets out in his article. Mona Sonnen and myself argue that the Committee for the Elimination of All Forms of Racial Discrimination (CERD Committee) combines quasi-judicial reasoning with public naming-and-shaming when it decides about individual complaints against racial discrimination. Ultimately, Clemens Feinäugle shows that global governance does not necessarily react to efficiency problems of governmental authority, but also to their legitimacy deficits. The impact of anti-terror measures after September 11 prompted the United Nations General Assembly to adopt a declaration on the rule of law on the domestic and international levels.

The latter example shows how the authority of international institutions is closely interwoven with questions regarding their legitimacy. Each of the contributions elaborates how institutions have, or have not, reacted to legitimacy challenges. Tim Staal considers the consensus procedure prevailing in Conferences of the Parties as a problem. It neither allows for courageous decisions promoting environmental interests, as it allows states to veto a decision. Nor does it necessarily strengthen the legitimacy of the respective acts, as it does not require transparent, participatory decision-making structures. The organizations involved in internet standard setting, however, have been more responsive to calls for transparency and participation. Biel Company argues that this has caused private standard-setting adopt a more public character. The WHO had tried to justify its decisions by reference to its technical expertise. However, when facing backlash after declaring a controversial public health emergency because of the 2009 influenza, the WHO adopted new procedures that recognize the political dimension of its work. This would also benefit the CERD Committee. As it exercises quasi-judicial authority, it should understand itself less as an expert body and more like a court. This would require adopting doctrines like the margin of appreciation which allow international courts to enforce international standards in the face of diverging standards in the member states. These developments point towards the emergence of a common core of standards for the legitimacy of international public authority. However, as Clemens Feinäugle shows, the UN Declaration on the Rule of Law adopts a minimum standard that is confined to due process rights, falling short of the more substantive understandings of the rule of law which a comparative law perspective might reveal.

It emerges from the papers of this special issue that the spread of international institutions is enormous and the variety of their authority thriving. They show great ability to meet increasing demands for international regulation. By contrast, it is more difficult for hard-fought, controversial legitimacy questions to impact the structures and processes prevailing in international institutions. Albeit this special issue presents only a small sample of cases, there seems to be a trend that international institutions rethink their legitimacy only if an issue ceases to fly below the radar and becomes the subject of politicization.[5] If international institutions do not react more broadly and consider legitimacy challenges as just as demanding as regulatory challenges, they might have to face further backlash against their power – with potentially disastrous consequences for the solution of some of the most pressing global problems.

The authors are grateful to the student editors of the Goettingen Journal of International Law for hosting this issue and their hard work. The Max Planck Institute for Comparative Public Law and International Law kindly sponsored two workshops which allowed for thorough discussion of the articles.

5 On the concept of politicization, see Zürn, *supra* note 1.

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Acknowledgments

Without the incredible support and help of the following people and institutions, we would not have been able to accomplish this project. We would like to thank:

- Matthias Goldmann
- All members of the Journal's Advisory Board
- All members of the Journal's Scientific Advisory Board
- The Law Faculty of the University Goettingen
- The Institute for Public International Law and European Law of the University of Goettingen
- The Goettingen University Press
- The Goettingen Society for the Promotion of International Law

Universitätsverlag Göttingen

Goettingen Journal of International Law 7 (2016) 1, 9-48

Exercising or Evading International Public Authority? The Many Faces of Environmental Post-Treaty Rules

Tim Staal*

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* LL.M. (Universiteit van Amsterdam), LL.M (Vrije Universiteit Brussel, PILC). PhD Candidate of André Nollkaemper, Amsterdam Center for International Law (ACIL), University of Amsterdam. This article owes much to discussions with Ingo Venzke and Anne van Mulligen. The final version is indebted to comments by Matthias Goldmann, Armin von Bogdandy, and the participants of the IPA 3+ Workshop on International Public Authority at the MPI on 25 October 2013, as well as extensive commentary by Dana Burchardt. Comments are very welcome at t.s.g.staal@uva.nl.

doi: 10.3249/1868-1581-7-1-staal

Abstract

Post-treaty instruments (PTIs) are informal instruments adopted by consensus of the treaty parties as follow-up decision to a particular provision in a treaty. PTIs are potentially significant instruments for advancing environmental global governance, as the treaty parties may use them to transform indeterminate treaty provisions into more specific environmental rules and decisions. While a number of PTIs are rightly characterized as exercises of authority, this article seeks to demonstrate how certain environmental PTIs with rule-setting character ('PTRs') amount to evasions of authority by reducing international authority over States' environmental policies, or alleviate rather than tighten the treaty parties' obligations, through their content or legal status. First, some PTRs avoid authoritative language, requiring little or no concrete action by the treaty parties. Some treaty-based assignments to adopt PTRs are never even acted upon. Other PTRs simply water down the obligations of the treaty parties compared to the underlying treaty provisions. Second, PTRs possess an ambiguous legal status both in legal doctrine and in the practice of domestic and EU courts. The article further argues that consensual decision-making may well be at the root of this ambivalent practice. As a broader contribution to the debate about International Public Authority (IPA), the proposition is advanced that we need to scrutinize more carefully what kind and degree of authority an instrument exercises exactly – or not. Evasions of authority and alleviations of obligations – which can be conceived as a special type of exercising authority through inaction – have important implications for what future legal frameworks of international public law must deliver in terms of effective and legitimate procedural design.

A. Introducing Environmental Post-Treaty Instruments

In international environmental governance, it has become common practice over the past decades to adopt multilateral treaties (formally binding international agreements) that constitute 'incomplete contracts',[1] or more precisely, *incomplete regulation*. Well known examples of such Multilateral Environmental Agreements (MEAs) are the *Montreal Protocol on Substances that Deplete the Ozone Layer*, the *Kyoto Protocol to the UN Framework Convention on Climate Change*, the *Cartagena Protocol on Biosafety to the Convention on*

[1] Cf. T. Gehring, *How to Circumvent Parochial Interests without Excluding Stake-holders: The Rationalizing Power of Functionally Differentiated Decision-making*, BACES Discussion Paper (2004) 22, citing O.E. Williamson, *The Economic Institutions of Capitalism. Firms, Markets, Relational Contracts* (1987).

Biological Diversity, the *Convention on International Trade in Endangered Species* and the *Ramsar Convention on Wetlands*.[2] As they do not contain much in terms of substantive obligations requiring specific conduct,[3] these MEAs become the basis for the adoption of what may appropriately be labeled environmental 'post-treaty instruments' (PTIs).[4]

Post-treaty instruments can be roughly defined as instruments adopted as a follow-up decision to a particular provision in a formal international agreement (a treaty or protocol), while themselves not meeting the threshold of formal agreements.[5] They are usually adopted by consensus or occasionally by large majority among all treaty parties in quasi-institutionalized treaty bodies called Conferences or Meetings of the Parties (COPs, COP/MOPs or MOPs).[6] Hence, they are descriptively known as 'COP Resolutions', 'COP/MOP decisions', etc.[7] Because PTIs are not adopted by bodies of international organizations with

2 There are however more than a thousand less well known MEAs. See R. B. Mitchell's *International environmental agreements database project*, available at http://iea.uoregon.edu/page.php?query=home-contents.php (last visited 19 May 2016).

3 Cf. S. J. Toope, 'Formality and Informality' in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of Environmental Law* (2008), 107, 121 ("[…] a treaty […] may contain […] imprecise norms not designed to condition specific conduct."); B. Simma, 'Consent: Strains in the Treaty System' in R. St.J. MacDonald & D.M. Johnston (eds), *The Structure and Process of International Law* (1983), 485 (already noting this increasing tendency in the 1980s generally for multilateral treaties on cooperative issues).

4 Cf. e.g. *Natural Resources Defense Council v. Environmental Protection Agency*, (2006) United States Court of Appeals For the District of Columbia Circuit, Judgement after rehearing, Case No. 04-1438, 464 F3d 1 (DC Cir 2006), 29 August 2006 [*NRDC v. EPA*], ('post-ratification side agreements'). Other authors have used 'consensual COP activity', 'COP decisions' or 'decisions of treaty bodies'.

5 An annex is part of a treaty, and a protocol is itself a treaty. Both thus fall outside the concept of post-treaty instrument.

6 G. Handl, 'International "Lawmaking" by Conferences of the Parties and Other Politically Mandated Bodies' in R. Wolfrum & V. Röben (eds), *Developments of International Law in Treaty Making* (2005), 128 [Handl, International "Lawmaking"] defines the object of research as: "law-making settings in which individual State consent is either non-existent or extremely attenuated and where notwithstanding this fact the measures or decisions adopted are nevertheless "effective" in the sense of producing "legal effects", i.e. affecting rights and obligations of States parties."

7 The practice of COP decisions under two MEAs previously received attention from the project on international public authority in the form of contributions by C. Fuchs, 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – Conservation Efforts Undermine The Legality Principle', 31 *German Law Journal* (2008) 9, 1565; P. L. Láncos, 'Flexibility and Legitimacy – The Emissions Trading System under the Kyoto Protocol', 9 *German Law Journal* (2008) 11, 1625.

some degree of institutional autonomy, but by States acting within a loosely institutionalized forum,[8] the treaty-resembling terminology of 'post-treaty instrument' is preferable to a concept such as treaty 'body decision'. The PTI concept assists in examining general characteristics of this broad category of instruments, as well as variations, with regard to their regulatory role, their authority, and the legitimacy of processes of adoption. This article critically observes and discusses some of these general patterns.

Although PTIs could be divided in accordance with various criteria into multiple sub-categories, there is one main separation relevant to this article at the outset. This is the distinction of general versus specific instruments that some proponents of the concept of international public authority also apply.[9] COPs occasionally take specific decisions or resolutions relating to one particular country, or a substance or species originating from it[10] – and this is much more so, of course, in the case of (non-) compliance decisions, which are by their very nature specific to the country under review. This article, however, concentrates exclusively on decisions of a general nature, that is, decisions of a rule-setting, rule-changing or rule-specifying character.[11] This type of PTIs is usefully described as 'post-treaty *rules*' (i.e. PTRs).

The *potential* significance of these PTRs for advancing international environmental governance can be swiftly noted by pointing at: 1) their higher specificity compared to the 'overt' indeterminacy[12] of their underlying treaty provisions; 2) their capacity for taking the regime into a new regulatory

8 Cf. P. H. Sand, 'The Evolution of International Environmental Law' in Bodansky, Brunnée & Hey, *supra* note 3, 29, 35 (calling Conferences of the Parties at most 'quasi-autonomous').

9 M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' in A. von Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions* (2010), 688 [Bogdandy *et al*, The Exercise of Public Authority by International Institutions], [Goldmann, Inside Relative Normativity].

10 See for instance CITES COP Decisions with regard to a suspension/ban of all imports from certain treaty parties due to a lack of adequate legislation or ineffective implementation of that legislation. M. Bowman, P. Davies & C. Redgwell, *Lyster's International Wildlife* Law, 2nd ed. (2010), 518-525, provide various examples.

11 These three descriptions all come down to some form of rule-making.

12 M. Koskenniemi, 'The Mystery of Legal Obligation', 3 *International Theory* (2011) 2, 319, 323.

direction; and 3) their sheer abundance. The phenomenon has attracted quite a bit of scholarly attention in the last decade or so.[13]

First, PTRs usually contain considerably more 'regulatory detail'[14] than their underlying treaty or protocol provisions. For example, Article 7 of the *Kyoto Protocol*[15] merely stipulates that industrialized parties[16] have an obligation to incorporate in its annual inventory "necessary supplemental information for the purposes of ensuring compliance."[17] The article delegated to the Conference of the Parties Meeting as the Parties to the *Kyoto Protocol* (COP/MOP) the significant task to "decide upon modalities for the accounting of assigned

13 T. Gehring, 'International Environmental Regimes: Dynamic Sectoral Legal Regimes', 1 *Yearbook of International Environmental Law* (1990) 1, 35; T. Gehring, 'Treaty-Making and Treaty-Evolution' in Bodansky, Brunnée & Hey, *supra* note 3, 467 [Gehring, Treaty-Making and Treaty-Evolution]; P. H. Sand, 'Institution-Building Compliance with International Environmental Law: Perspectives', 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996), 774 [Sand, Institution-Building]; J. Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements', 15 *Leiden Journal of International Law* (2002) 1, 1 [Brunnée, COPing with Consent]; J. Brunnée, 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements' in Wolfrum & Röben, *supra* note 6, 101 [Brunnée, Reweaving the Fabric of International Law?]; G. Ulfstein, 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements, Comment by Geir Ulfstein', in *ibid*., 145 [Ulfstein, Reweaving the Fabric of International law?]; Handl, 'International 'Lawmaking', *supra* note 6, 127; R. Churchill & G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little- Noticed Phenomenon in International Law', 94 *American Journal of International Law* (2000) 4, 623; A. Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International La*w (2009) 1, 231; G. Loibl, 'Conferences of Parties and the Modification of Obligations' in M. Craven & M. Fitzmaurice (eds), *Interrogating the Treaty* (2005), 103. This still leaves unmentioned the literature on various specific environmental regimes where PTIs and PTRs, while not discussed as the primary issue, emerge as important tools for shaping, developing and transforming international environmental rules in these respective fields.

14 Gehring, 'Treaty-Making and Treaty-Evolution', *supra* note 13, 481. Gehring speaks of the "tendency of government representatives" to collectively choose not a treaty but "later stages in the governance process" for much of the precise rules of international environmental governance.

15 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2302 UNTS 162, Article 7(1) [Kyoto Protocol].

16 More precisely, those State Parties to the *Kyoto Protocol* that are assigned an emissions reduction target in Annex I to the *Kyoto Protocol, List of Annex I Parties to the Convention* available at http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php (last visited 19 May 2016).

17 Article 7(1) *Kyoto Protocol*.

amounts."[18] The COP/MOP did so by way of the lengthy and detailed *Decision* 13/CMP.1: The *Accounting Modalities*[19] which provided definitions, calculation methods, additions and subtractions, carry-over to later commitment periods, and many other accounting issues. Its accounting methods made a considerable difference in how various mitigation efforts could be used to subtract from country targets. The *Accounting Modalities* and related decisions that formed part of the package adopted in a series of meetings in Bonn, The Hague and Marrakech, determined the fate of the *Kyoto Protocol*. These were not mere details, but central aspects of international climate regulation, such that they enabled the ratification of the *Kyoto Protocol*.[20]

Second, PTRs have the potential to be used for taking international environmental regulation into new directions. Early environmental treaties that lacked mechanisms for adopting post-treaty instruments were doomed to become obsolete. With the MEAs adopted during the last four decades, whenever the existing rules become unacceptable for the treaty parties, or when new political or scientific breakthroughs take place, PTRs can be used to adapt to these changing circumstances. For instance, Resolutions of the COP of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[21] introduced quota systems for ivory so that ruffled African countries would continue to cooperate within the regime. Under the *Ramsar Convention on Wetlands of International Importance*[22], PTRs were used to perform a rapid shift from conservation of wetlands as such, to the 'wise use' of wetlands in

18 Article 7(4) *Kyoto Protocol*.

19 *Framework Convention on Climate Change: Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol*, 30 March 2006, FCCC/KP/CMP/2005/8/Add.2 [the Accounting Modalities].

20 H. E. Ott, 'The Bonn Agreement to the *Kyoto Protocol* – Paving the Way for Ratification' 1 *International Environmental Agreements: Politics, Law and Economics* (2001), 469; M. Bothe, 'The United Nations Framework Convention on Climate Change – an Unprecedented Multilevel Regulatory Challenge', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003), 239, 246.

21 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 7 September 1973, 993 UNTS 243 [CITES]; P. H. Sand, 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment', 8 *European Journal of International Law* (1997) 1, 29, 41-42 ("So in a matter of two decades, the CITES regime retrofitted itself with new institutions, incentives and disincentives ('carrots' and 'sticks'), none of which were articulated in the original treaty text.").

22 *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 2 February 1971, 996 UNTS 245 [*Ramsar Convention*], available at http://portal.unesco.org/en/ev.php-URL_ID=15398&URL_DO=DO_TOPIC&URL_SECTION=201.html (as amended in 1982 and 1987) (last visited 19 May 2016).

light of their benefits to human beings.[23] As formal treaty amendments or new protocols are often out of political reach, and because their entry into force is uncertain and may take years, the only realistically available tool for efficiently shaping, developing and transforming international environmental rules over time, is through repetitively filling and refilling MEA provisions with content.

Third, as a result, in the regimes formed around MEAs, PTRs are an *abundant* form of rule-making. This is not only true for the *Kyoto Protocol*. For example, the criteria for listing species that transform Article II of CITES[24] into more specific rules, were first adopted at the First Conference of the Parties in 1976,[25] replaced at the Ninth Conference of the Parties, and further revised on various details at most Conferences afterwards.[26] Similarly, Conferences and Meetings of the Parties of the *Ramsar Convention* and the *Montreal Protocol* held every few years adopt dozens of decisions of a general character on such issues as 'critical use' of methyl bromide, 'wise use' of wetlands, and what constitutes the 'ecological character' of wetlands.[27]

In light of these three observations, it is no exaggeration that environmental post-treaty rules potentially constitute a significant type of exercise of international public authority (IPA) in the development of international environmental treaty-based governance. This pivotal role for PTRs is in principle a good thing, as it leaves the treaty parties with the possibility of solving political disagreement and responding to new scientific and environmental developments by adopting and re-adopting more specific rules over time. It is important to realize, however, that as a consequence of this central regulatory role of PTRs, ultimately the environmental or 'problem-solving' effectiveness[28] at large

23 M. Bowman, P. Davies & C, Redgwell, *Lyster's International Wildlife Law* (2010), 414-415.

24 Article 2 CITES merely requires that Appendix I "shall include all species threatened with extinction which are or may be affected by trade."; see also Fuchs, *supra* note 7.

25 *The Bern Criteria*, 1976, Res. Conf. 1.1; for text and discussion see W. Wijnstekers, *The Evolution of CITES*, 9th ed. (2011), 101-103.

26 *Ninth Conference of the Part - is Criteria for amendment of Appendices I and II*, 1994, Res. Conf. 9.24 (Rev. CoP16) [CITES COP].

27 For instance, at one particular COP to the *Ramsar Convention* about 45 substantive Resolutions and Recommendations were adopted, see *Report of the 8th Meeting of the Conference of the Contracting Parties*, Valencia (Spain) 18-26 November 2002, available at http://ramsar.rgis.ch/cda/en/ramsar-documents-cops-cop8-report-of-8th/main/ramsar/1-31-58-128%5E17797_4000_0__ (last visited 19 May 2016).

28 See D. Bodansky, *The Art and Craft of International Environmental Law* (2010), 253 ("*problem-solving effectiveness* focuses on the degree to which a treaty achieves its objectives or, more generally, solves the environmental problem it addresses").

of MEAs greatly depends on the *content* and *authority* of PTRs. Whereas authoritative international regulation is no guarantee for effective environmental protection, it is certainly one necessary condition. If the authoritative character of international regulation declines, effective environmental protection depends on voluntary implementation.[29] This makes the authority of PTRs crucial.[30] Indeed, the fact that PTRs are very significant for completing the bridge between indeterminate treaties and effective environmental protection does not mean that in practice they have always fulfilled this expectation. On the contrary, sometimes it seems that PTRs contribute little to increasing the authority of international environmental law over the domestic environmental policies of the treaty parties but may actually undermine it or simply maintain the *status quo*. Likewise, even before studying compliance and effectiveness *ex post*, already at first glance a number of important PTRs alleviate the obligations of the treaty parties in changing domestic policies rather than tightening them.

This article takes a dual focus in assessing the practice of shaping, developing and transforming international environmental rules through PTRs as exercises of international public authority. The bulk of the article concentrates on understanding the paradoxical regulatory role of the *instrumental outcomes* (the PTRs): Are they an *exercise* in international public authority or an *evasion* of public authority? Notwithstanding the potential and actual significance of PTRs set out in the previous paragraphs, the article singles out two parameters according to which the actual authority exercised through PTRs over States and their impact on international environmental law in a broader sense may not be as clear as it seems from their widespread presence. These parameters are the *substance* (or wording) and the legal status of PTRs. This poses particular challenges to the thinking about international public authority and its legitimacy (Part B.). First, the substance (or wording) of PTRs is not always of a nature that it contributes to an exercise of international public authority over States or a tightening of their obligations (Part C). Second, while there is good reason to argue that PTRs are binding upon the treaty parties within the regime's bodies as if they were law, the multi-interpretable *legal status* of PTRs renders

[29] This article is faithful to the IPA project's analytical move of separating legitimacy from authority. This is an important distinguishing characteristic in comparison to competing conceptualizations of authority, such as Raz's, Lake's or Hurd's see B. Peters & J. Karlsson Schaffer, 'Introduction: The Turn to Authority Beyond States', 4 *Transnational Legal Theory* (2013) 3, 315, 321.

[30] My forthcoming dissertation at the University of Amsterdam, working title: 'Environmental Post-Treaty Rules: Authority and Legitimacy', contains a more extensive analysis of the authority and legitimacy of environmental PTRs.

their authority outside the environmental regime of origin uncertain (Part D). This 'fluctuating' authority on two levels – substance and status – shows that Conferences of the Parties have a long way to go in fulfilling the potential of developing the open-textured provisions of international environmental treaties through PTRs. Moreover, particularly the ambiguity of legal status reduces legal certainty for individual and corporate actors.

The other side of the dual focus is the role of the *process* of consensual decision-making in the adoption of environmental PTRs. Part E. briefly discusses the possibility that deficits in legitimacy and effectiveness of the consensual process, might be a significant cause of the findings in Part C. and D. Part F. concludes with the consequences which the findings of this case study might have for the study of international public authority at large.

B. Exercising or Evading International Public Authority – Sketching an Approach

I. The Challenge of Identifying Diversified Exercises of International Public Authority

One vexing problem that was identified in the early stages of the project on International Public Authority (IPA) is particularly present in attempting to gauge the exact impact and regulatory role of environmental post-treaty instruments. Von Bogdandy, Dann and Goldmann describe the problem as follows: The first thing to establish when trying to devise a legal framework applicable to exercises of international public authority, is to identify "those acts which are critical because they constitute a unilateral exercise of authority."[31] This is the case, they argue, "*if* it determines individuals, associations, enterprises, States, or other public institutions."[32] In the case of PTRs, this question is not so easily answered, at least no single answer can be provided for PTRs as a group.

Goldmann emphasizes the importance of distinguishing different types of instruments, implying that exercises of IPA might come in different types of authority.[33] The present contribution goes one step further and suggests that

[31] A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions*, *supra* note 9, 3, 10.

[32] *Ibid*., 4-5.

[33] Goldmann, 'Inside Relative Normativity', *supra* note 9, 661, 679-691.

we should also be conscious of differing *degrees* of authority. Particularly, one should be aware of international acts that upon closer scrutiny do not exercise IPA at all, or very little. In some cases, they might even give back authority to States – in the sense of freedom of action – and loosen the constraints previously imposed by a treaty. Are they *exercises* of authority, or do they merely look at first glance like they are, while in fact some of them attempt, or end up, being *evasions* of authority? And in those instances where they do exercise authority, is that authority meaningful if it alleviates the obligations of treaty parties? Is the choice of for example an instrument with unclear legal application a strategy, particularly of powerful States, for evading previous, undesirable exercises of international public authority?[34]

While the IPA-project is rightfully concerned with the legitimacy of exercises of international authority, a prior step should be to investigate more scrupulously the exact scope of international public authority in particular fields. The evasion of authority or alleviation of obligations in fact requires legitimating as much as their opposite (i.e. exercises of authority, tightening of obligations). It may equally have an impact on actors and societies,[35] by leaving authority with those who possessed it previously: The treaty parties' governments. Through such shifts in the authority holder, a *status quo* may be maintained which is harmful to large parts of the world population, either now or in the long term.[36] Not taking a decision may have just as much impact as taking a decision. Both may have distributive effects. The observations in this article thus connect to a trend recently noted evocatively by Caroline Foster that, paradoxically, "as we move forward through a new century of increased transnationalism, ambition for employing public international legal authority as a means for the protection of human health and the environment appears to be diminishing."[37]

34 Recently, N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *American Journal of International Law* (2014) 1, 1 (noting that rather than changes to the consent-based structure of international law, a flight from international law towards less consent-based instruments can be witnessed, particularly with regard to global public goods).

35 D. W. Rae, 'The Limits of Consensual Decision', 69 *The American Political Science Review* (1975) 4, 1270, 1279.

36 Cf. the principle of inter-general equity (Article 3(1) *Kyoto Protocol*) and the precautionary principle (e.g. in Article 3(3) *Kyoto Protocol*).

37 C. E. Foster, 'Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era', 17 *Journal of International Economic Law* (2014) 2, 355, 355.

Weak exercises of authority pose a greater problem in some areas of global governance than others. On the one hand, international rules on terrorist financing, development aid, IMF conditionality or financial markets regulation will often have an authoritative wording and a legal status conducive to its effectiveness because a sufficient number of powerful States sees the need for international action.[38] On the other hand, environmental governance – despite regular calls of warning – often fails to reach the top of the list of global concerns, and is as such a likely place for finding rules that evade or alleviate pre-existing authority.

II. Two Parameters for Identifying Reductions in the Authority of International Rules: Substance and Legal Status

Frederick Schauer suggests that there are two ingredients of general rules that play a prominent role for functioning as *authoritative* rules. This matters to our discussion, because if a rule is quite authoritative, it is the rule-maker (in our case the COP, COP/MOP or MOP) who primarily exercises authority; if less so, it is the rule-applier or rule-addressee (in our case the treaty parties) who primarily (continues to) exercise authority, remaining free from the authority of the rule-maker.

As a first ingredient for an authoritative rule, it helps if an instrument contains a rule formulation which – in a reasonably clear and determinate manner – *requires a certain behavior* from its addressee or applier.[39] Otherwise,

[38] However, even for these areas of global governance the story may not always be straightforward. A recent study by Chey on international financial regulation finds that the Basel Accords might have much less influence on harmonization of national financial laws than is often assumed. H. Chey, *International Harmonization of Financial Regulation? The Politics of Global Diffusion of the Basel Capital Accord* (2013), 218 (noting that "the past trend of international harmonization of financial regulation may be illusory, to at least some extent, in terms of its actual effectiveness").

[39] F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making* (1991), 62. Of course, what ultimately matters is whether there exists a common understanding among the appliers or addressees, even if this is not clear from the canonical inscription of the rule, i.e. written rule formulation. *Ibid*., 68; see also J. Brunnée & S. J. Toope, 'Interactional International Law: An Introduction', 3 *International Theory* (2011) 2, 307; J. Brunnée & S. J. Toope, *Legitimacy and Legality in International Law* (2010), (emphasizing the importance of shared understandings for international rules gaining legitimacy and authority); also T. M. Franck, *The Power of Legitimacy Among Nations* (1990), who however counts determinacy as a factor in the legitimacy, rather than in the authority of a rule.

due to its non-normative substance the instrument is unlikely to exercise much authority over its addressees. This concerns both the mandatory quality[40] of the wording (from recommendatory to mandatory) and the specificity of the wording (from vague to specific).

Second, for a set of international rules to possess authoritative force in the international legal order, or in a particular domestic or supranational legal order it helps tremendously if it can claim to be somehow applicable and valid in that order in accordance with predetermined criteria.[41] One would usually call this the legal status of the instrument. Absent occasional implementation within the regime's plenary or non-compliance bodies, the room for the addressed governments to decide whether or not to (self-)apply those rules increases. It becomes for instance up to each international or domestic court to decide what weight it will give to the rule, in light of many subjective considerations. Thus, if the applicability of PTRs is contingent upon the opinion of the rule applier, such as national courts, or national governments, then it is questionable if PTRs really amount to strong exercises of authority, or are merely *instructions* that rule-appliers may or may not choose to apply at their best judgment.

The legal status of a rule might vary with the legal order in which application of the rule is sought. It is therefore a pluralist notion.[42] For instance, a PTR has usually a higher legal status within the legal order in which it was adopted (the environmental regime in question) than in other legal orders. The legal status of a PTR may accordingly be greater before an intra-regime non-compliance mechanism than before a domestic court. As this testifies, legal status should also be understood as a relative notion. An instrument may have no status at all, may merely have to be 'taken into account', may be of equal relevance to other sources of law, or may be peremptory of everything else.[43]

Note that wording and legal status are not exclusive parameters influencing the exercise of authority through international rules such as PTRs. A significant deal of international public authority is exercised without a firmly and specifically worded substance and without legal status. For instance, *mere* guidelines or instructions without authoritatively worded substance or legal status can also

40 D. Bodansky, *The Art and Craft of International Environmental Law* (2010), 103-106.

41 Schauer, *supra* note 39, 118.

42 B. Kingsbury, 'The Concept of 'Law' in Global Administrative Law', 20 *European Journal of International Law* (2009) 1, 23, 29-30; L. Casini & B. Kingsbury, 'Global Administrative Law Dimensions of International Organizations Law', 6 *International Organizations Law Review* (2009) 2, 319, 352-354.

43 The primary example of the last category in international law is *jus cogens*, whereas in national law it would be constitutional law.

affect others in myriad ways. This depends on factors extraneous to the rule's content, or its status, causing that effect.[44] An example is public pressure, or peer pressure, through for instance the PISA system of university rankings.[45] It is not denied that other factors in the make-up of authority may persevere regardless of low substantive authority and low legal status, and thus still may determine domestic government policies in various ways. Nor is the point of this article to delineate exactly which factors form part of the concept of authority and which should be counted as (pure) persuasion or power.[46] The exact impact of such factors in relation to PTRs is however not further discussed here, if only because it is hard to measure.

The focus on the two parameters of substance and legal status is rather informed by the observation that their absence can greatly *reduce* the exercise of authority through PTRs, while their presence *strengthens* that authority. Weaknesses in these two parameters most clearly impact on the degree of authority in the context of international and domestic court proceedings, reducing the possibility of channeling the exercise of authority through dispute settlement procedures. This is not unimportant, because if PTRs fail to claim authority before international and national courts, their authority will have to rely on some form of pressure from the other treaty parties represented in the treaty bodies. When it comes to most areas of international environmental cooperation, peer pressure is a rather vulnerable and volatile source of authority. And in governments' own perceptions of being under an obligation, as Geir Ulfstein remarks, even in this era of soft law they "consider it to be a fundamental difference between binding and non-binding international law."[47]

Also, domestic court proceedings are the most accessible venue for companies, individuals and NGOs to test and argue the authority of PTRs over governments. By keeping legal status ambiguous or substance vague and non-committal, governments thus keep environmental matters among themselves and prevent intervention by others through the courts.[48]

44 See various contributions in Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions, Advancing International Institutional Law*, *supra* note 9.

45 See for instance A. von Bogdandy & M. Goldmann, 'The Exercise of International Public Authority through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument', 5 *International Organizations Law Review* (2008) 2, 241, 262-263.

46 I. Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law', 4 *Transnational Legal Theory* (2013) 3, 354, 355 .

47 Ulfstein, 'Reweaving the Fabric of International Law?', *supra* note 13, 145, 151.

48 This includes the non-compliance bodies, which are composed of government experts.

The following sections (C. and D.) apply these two parameters to environmental post-treaty rules. The common image of PTRs in a number of existing scholarly accounts is that they are binding in some way[49] and that they further the implementation of international environmental law – i.e. increase its impact on States and indirectly on individuals.[50] The account proposed here attaches some question marks to that common image, without tearing it down in its entirety.

C. A Closer Look at the Substance of Environmental PTRs

In one sense PTRs are indeed flexibly adoptable instruments that States to progress from the vague and general objectives they can arrive at initially in treaty form, towards more specific, precise, elaborate and – over time – innovative prescriptions on how to define and meet those objectives. For instance, the criteria adopted by the CITES COP are widely believed to have made the process of listing species on three appendices[51] more scientifically sound and based on information rather than on parochial interests.[52] At the very least the dynamics of listing and down-listing species have undergone significant changes through the adoption of PTRs. Today, on paper only biological information is relevant for the listing or down-listing of a species.[53] The criteria are formulated such as to leave little doubt that they are mandatory.

Likewise, under the *Montreal Protocol*, the Meeting of the Parties adopted decisions that accelerate the phase out of controlled ozone depleting substances,[54]

49 Brunnée, 'Reweaving the Fabric of International Law?', *supra* note 3, 101; Gehring, 'Treaty-Making and Treaty Evolution', *supra* note 13, 491-495.

50 Wiersema, *supra* note 13, 231, 233, 245 (stating that COP activities 'deepen' and 'thicken' treaty obligations); G. Ulfstein, 'The Conference of the Parties to Environmental Treaties', in J. Werksman (ed.), *Greening International Institutions* (1996).

51 Trade in Appendix I species is prohibited with very limited exceptions; trade in Appendix II species must meet strict conditions; Appendix III species are voluntarily listed by particular treaty parties and concern only the specimens on the territory of that treaty party. See Articles II-V CITES and W. Wijnstekers, *The Evolution of CITES, International Council for Game and Wildlife Conservation*, 9th ed. (2011).

52 T. Gehring & E. Ruffing, 'When Arguments Prevail Over Power: The CITES Procedure for the Listing of Endangered Species', 8 *Global Environmental Politics* (2008) 2, 123; more skeptical is S. A. Goho, 'The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decisionmaking', 114 *Harvard Law Review* (2001) 6, 1769.

53 Gehring & Ruffing, *ibid*., 145.

54 See the procedure of Article 2(9) *Montreal Protocol*. The unequivocally binding nature and unprecedented possibility of majority voting for the phase-out decisions put those

while other decisions scale down gradually the 'critical use' that was temporarily allowed for methyl bromide.[55] Article 2H.5 on Methyl Bromide leaves open the possibility that the parties will allow some continued critical use of methyl bromide.[56] At the Ninth Meeting of the Parties (MOP), the treaty parties decided in rather specific and mandatory terms that use of methyl bromide should qualify as 'critical' only if "the lack of availability of methyl bromide for that use would result in a significant market disruption" and "[t]here are no technically and economically feasible alternatives or substitutes."[57] Further, production or consumption of methyl bromide would be permitted only if, crucially, it was "not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide."[58] The MOP subsequently applied these criteria to yearly nominations by parties, to determine yearly exemptions.[59]

However, these successes are only part of the story. In opposition to the image of PTRs as the key to progress in international environmental law due to their flexible method of adoption, the *content* of PTRs has not necessarily always deepened inroads into domestic environmental policies. Many MEA provisions can be considered to be more or less open regarding the international obligations of States they might actually give rise to. Their extent is left to PTRs to be adopted by the respective COP or MOP. Just like any instrument, PTRs are neutral

sui generis PTRs outside the scope of this article. See for the discussion of their *sui generis* character D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *American Journal of International Law* (1999) 3, 596, 604, 608-609; Churchill & Ulfstein, *supra* note 13, 639-641.

55 *Montreal Protocol MOP Decision - Ninth Meeting of the Parties*, 15-17 September 1997. – several docs from this meeting.

56 "This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.".

57 Article 1(a)(i)(ii) *Montreal Decision* (MOP) IX/6.

58 Article 1(1.b.ii) *Montreal Decision* (MOP) XV/54 added later that exemptions "are intended to be limited, temporary derogations from the phase-out of methyl bromide.". XV/54 *Categories of assessment to be used by the Technology and Economic Assessment Panel when assessing critical uses of methyl bromide*, Fifteenth Meeting of the Parties and *Montreal* MOP *Decision* Ex.1/3 *Critical-use exemptions for methyl bromide for 2005*, First Extraordinary Meeting of the Parties.

59 Beginning with *Montreal Decision* (MOP) Ex.I/3, March 1994 and *Annexes to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol,* available at http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/26700 (last visited 19 May 2016), the most recent methyl bromide exemptions show that the assigned amounts are rapidly going down.

'containers',[60] and given the low specificity of MEA provisions, 'retrogressive' PTRs are normally no 'breach' of the underlying treaty in a legality sense.[61]

There are many ways in which the *wording* or *substance* of environmental PTRs – what Goldmann calls its 'textual parameters'[62] – may point us to an evasion of exercising international authority, or to an alleviation of international obligations. First, the wording of PTRs may be such that it is clear that they contain mere optional instructions, hortatory advice to States how to conduct environmental policy in a certain issue area most effectively, if willing to do so. In this scenario, the *status quo* is simply maintained, or just slightly affected, unless individual States decide for themselves to follow these rules. Many examples of this type of 'very limited exercise of authority-PTRs'[63] are found under the *Ramsar Convention* and CITES. Second, when MEAs delegate rules on a certain unresolved issue to the COP or MOP for future rule-making, this is sometimes simply a way of postponing decision-making indelibly. Such 'non-exercise of authority' can be witnessed in two examples from the *Cartagena Protocol on Biosafety* where the COP/MOP simply did not adopt any PTRs at all on the subjects in question. A third type of PTR, while phrased in mandatory and specific terms, retracts on steps previously taken in the underlying treaty. This type does not amount to an evasion of authority, but rather to an *alleviation of treaty obligations*. It basically gives back freedom to States compared to the underlying treaty, or alleviates their obligations compared to what seemed to be required on the basis of the – albeit open-ended – treaty text. Primary examples are the numerous decisions taken within the COP/MOP in the aftermath of the negotiation of the *Kyoto Protocol*, and some Resolutions of the *Ramsar* COP on the 'wise use' of wetlands.

A happy chorus about the role of PTRs is thus misguided. PTRs have not only been used to set authoritative or increasingly tightening international environmental rules. They have also been used to merely create the image of authority or tightening of obligations. In this respect, skepticism leveled at

60 J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19 *European Journal of International Law* (2008) 5, 1075, 1081.

61 Krisch, *supra* note 34, 28 ("where institutions exercise broader formal powers they seem for the most part to remain within the bounds of delegation, especially if one accepts that these bounds are subject to relatively flexible interpretation").

62 Goldmann, 'Inside Relative Normativity', *supra* note 9, 661, 686-689.

63 F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making* (1991), 4, 104, would call these 'instructions', or 'rules of thumb'.

various aspects of international environmental treaty law and institutions[64] also applies to a significant part of PTRs.

I. Evading Authority Through Ambiguous Wording

Many PTRs adopted in the Conference of the Parties of the *Ramsar Convention on Wetlands* are phrased as hortatory guidelines. Such hortatory guidelines hardly constrain the freedom of action of the parties. For example, *Recommendation* 4.10 (1990) contains the phrase that "the following actions *should* be taken to promote wise use of the wetland"; *Recommendation* 6.2 (1996) states that "(EIA) is a recognized field which *should* be applied … EIA *should* be undertaken"; *Resolution* VII.16 (1999) "CALLS UPON …" and "ENCOURAGES" while *Resolution* VIII.9 (2002) "URGES appropriate use …".[65] These PTRs contain guidance that evades exercising more than marginal international public authority.

The limited authority of *Ramsar* guidelines as a consequence of a lack of mandatory wording can be illustrated by an important Australian federal court case. The Federal Court of Australia had to engage with the question of whether the designation of an Australian wetland to the *Ramsar* List[66] had been properly performed.[67] If the listing had not been successful, the special obligations that *Ramsar* parties have with regard to Listed wetlands[68] would not apply. *Ramsar* COP *Resolution* VI.16 states that "the boundaries of each listed wetland shall be precisely described and also delimited on a map by States." The Court decided, however, that this PTR was not authoritative for the validity of the designation:

64 Recently, C. Foster, *supra* note 37; also R. S. Dimitrov, 'Hostage to Norms: States, Institutions and Global Forest Politics', 5 *Global Environmental Politics* (2005) 4, 1.

65 This list of *Ramsar* COP *Resolutions* and *Recommendations* relied on by the Dutch Crown Court in the case *Lac Sorobon* discussed below; Annex to *Recommendation* 4.10, *Guidelines for the Implementation of the wise use concept* (1990); *Recommendation* 6.2, *Environmental Impact Assessment* (1996); *Resolution* VII.16, paragraphs 10 and 11 on EIA; *Resolution* VIII.9, *Guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and/or processesand in strategic environmental assessment'* adopted by the *Convention on Biological Diversity* (CBD), and their relevance to the *Ramsar Convention* (2002).

66 *The List of Wetlands of International Importance*, last updated 3 May 2016, available at http://www.ramsar.org/sites/default/files/documents/library/sitelist.pdf (last visited 19 May 2016).

67 *Ramsar Convention*, Art. 2(1).

68 *Ramsar Convention*, Art. 2(6)(3) and 4(2).

> "The history of the meetings of the Contracting Parties discloses a concern to have the information required by Article 2(1), and more, provided. At no point however has it ever been suggested that if it were not done at the time of designation, that designation is taken not to have occurred or that a listing would be regarded as invalid."[69]

Although it is not excluded that COP *Resolution* VI.16 may influence domestic policies and practices regardless of its limited mandatory quality – for instance through political pressure in the Conference of the Parties or because of a preference by the Australian government to act in accordance with PTRs – the Resolution does not constrain Australian government agencies through the Australian federal courts. This is a clear instance where limited mandatory quality helps a government to evade international public authority.

II. Evading Authority by not Adopting PTRs

Some MEA provisions that explicitly enable the adoption of PTRs on a certain issue have never led to the actual adoption of PTRs. In such – admittedly rare – cases, any authority of PTRs on the issue is smothered in its early stages. The most striking examples are found in the *Cartagena Protocol on Biosafety* and relate to very significant issues.[70] Article 18.2(a) *Cartagena Protocol* provides that the required documentation accompanying 'intentional transboundary movements' of Living Modified Organisms (LMOs) "clearly identifies that they "may contain" living modified organisms and are not intended for international introduction into the environment." However, the negotiators could not agree on "the detailed requirements for this purpose, including specification of their identity and any unique identification", which was postponed to a decision by the COP/MOP no later than two years after the entry into force of the

69 *Greentree v. Minister for the Environment and Heritage*, Federal Court of Australia Full Court, 13 July 2005, 128. In the meantime, the *Ramsar* COP has accorded a greater role to the *Ramsar* Secretariat in deciding upon the listing of wetlands designated by the treaty parties. See *Resolution* XI.8 Annex 2 *Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance of the Convention on Wetlands* 1971, 2012 Revision, available at http://www.ramsar.org/sites/default/files/documents/pdf/cop11/res/cop11-res08-e-anx2.pdf (last visited 19 May 2016), para. 418-420.

70 In fact, another comparable example from the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, adopted on 29 January 2000 and entered into force on 11 September 2003, is the non-adoption of PTRs under Article 7(4) of the *Cartagena Protocol* on the scope of application of the advance informed agreement procedure.

protocol. Engaging with the assignment of Article 18.2(a), the COP/MOP to the *Cartagena Protocol* established an 'open-ended technical expert-group' (ICCP) that would assist the COP/MOP in reaching such criteria.[71] Four meetings later the COP/MOP "decided to postpone until its seventh meeting further decision-taking on detailed information to be included in documentation accompanying LMOs-FFP" (*Decision* BS-V/8). This confirmed Lefeber's early prediction that Article 18.2(a) is "an obligation of conduct and absolutely no guarantee that such a decision will be taken, even though there will be strong political pressure to do so."[72]

III. Exercising Authority While Alleviating Obligations

Just like any instrument, PTRs are neutral 'containers',[73] and given the low specificity of MEA provisions, *retrogressive* PTRs are normally no real *breach* of the underlying treaty to the point where they can be considered *ultra vires*.[74] In other words, as much as they can be used for effective and authoritative regulation, they can also be used for *weakening* or *mitigating* existing or potential obligations. Pollack and Shaffer have called such global governance instruments 'antagonists', because they reverse the direction or spirit of an earlier instrument.[75] It is striking that a fairly large number of PTRs primarily serves this purpose.

The most eye-catching example of alleviating obligations through PTRs are the *Marrakesh Accords* that were adopted to elaborate the Protocol's requirements, but also to facilitate the ratification of the *Kyoto Protocol*.[76] The *Kyoto Protocol* sets potentially serious emissions reduction targets for a number of industrialized States, and indicated in Article 17 that the so-called 'flexibility mechanisms' should not be more than 'supplemental' to domestic mitigation of

71 *Cartagena* COP/MOP *Decision* BS-I/6, Article 18: Handling, transport, packaging and identification of living modified organisms, *First meeting of the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety*, 23-27 February 2004, Malaysia.

72 R. Lefeber, 'Creative Legal Engineering', 13 *Leiden Journal of International Law* (2000) 1, 1, 8.

73 d'Aspremont, *supra* note 60.

74 Krisch, *supra* note 34, 28 ("where institutions exercise broader formal powers they seem for the most part to remain within the bounds of delegation, especially if one accepts that these bounds are subject to relatively flexible interpretation").

75 G. Shaffer & M. A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* (2010) 3, 706.

76 Ott, *supra* note 20.

CO_2 emissions. As Michael Bothe characterized this approach, "Kyoto was still characterized by a wait-and-see-approach. The real meaning of Kyoto could only become clear when a number of relevant details were established."[77] When the dust of repeated negotiations in The Hague, Bonn and Marrakesh had settled, reaching the same targets had become considerably easier for some of the parties, leading many scientists to calculate that total mitigation estimates had fallen from 5% to 2,5% overall reduction of greenhouse gas emissions.[78]

Decision 15/CP.7 now reads that "the use of the [flexibility] mechanisms shall be supplemental to domestic action and domestic action shall thus constitute a significant element"[79]: no quantitative cap was placed on the use of emissions trading, the Clean Development Mechanism or Joint Implementation. Moreover, a number of decisions of the COP/MOP considerably increased the extent to which parties could rely on land use, land use change and forestry activities in meeting their targets.[80] Thus, most importantly for present purposes, the impact of international climate law on the domestic policies of the industrialized treaty parties decreased notably due to the series of PTRs adopted in the aftermath of *Kyoto*. According to a participant in the negotiations, the PTR process presented powerful States, such as Australia, Canada, Japan, the U.S., and Russia with "a journey through the jungle" that "provided an opportunity to minimize … obligations to reduce emissions of greenhouse gases."[81]

One could of course argue that these decisions were no breach of legality, were not *ultra vires*, as they stayed within the broad, open-textured boundaries of the text of the *Kyoto Protocol*. However, the point here is that, rather than tightening those boundaries, as one might have expected, the relevant PTRs loosened them further, by providing treaty parties with a wide array of tools to implement the *Kyoto Protocol* in a manner that interrupted domestic policies as little as possible.

77 Bothe, *supra* note 20, 240-243.

78 See B. Brouns & T. Santarius, 'Die Kyoto-Reduktionsziele nach den Bonner Beschlüssen', 51 *Energiewirtschaftliche Tagesfragen* (2001) 9, 590, 591; M. G. den Elzen and A. P. de Moor, 'Analyzing the Kyoto Protocol under the Marrakesh Accords: Economic Efficiency and Environmental Effectiveness', 43 *Ecological Economics* (2002) 2, 141, 156-157; C. Böhringer, *Climate Politics From Kyoto to Bonn: From Little to Nothing?!?* (2001), Centre for European Economic Research Discussion Paper No. 01-49, 1-38, 21; I. Fry, 'Twists and Turns in the Jungle: Exploring the Evolution of Land Use, Land-Use Change and Forestry Desisions within the Kyoto Protocol', 11 *RECIEL* (2002) 2, 159.

79 UNFCCC COP Decision 15/CP 7, Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol, 21 January 2002.

80 *The Accounting Modalities*, Article 7(4) of the *Kyoto Protocol*.

81 Fry, *supra* note 78, 159.

In another example of this kind, as follow-up to the *Ramsar Convention*, the *Ramsar* COP provided definitions and guidelines for the practical application of indeterminate treaty concepts such as 'conservation', 'wise use' and 'ecological character'.[82] Through these decisions, the Parties have gradually conflated conservation with wise use,[83] notifying a shift from wetlands as ecosystems for waterfowl intrinsically requiring protection, towards "the practical benefits of wetlands conservation"[84] to human health, resources and culture. Some commentators submit that the parties in doing so have turned the barebones foundation of Article 3.1 into "an extremely comprehensive and sophisticated policy framework for the management of wetlands areas."[85] However, important parts of this framework basically merely require the parties to manage wetlands according to their best insights. The choice to appoint pride of place to for instance environmental impact assessments (EIA)[86] means that a lot is left to balancing competing considerations, rather than excluding certain specific activities.[87] By shifting the balance from conservation to wise use, PTRs alleviated the potential burden of Article 3.1 of the *Ramsar Convention* upon domestic wetlands policies.

Further, the *Montreal Protocol Critical Use Exemptions* mentioned above as an example of authoritative wording can also be looked at in this light. While authoritatively phrased, the MOP *Decisions* on this topic alleviate the obligations of some treaty parties – predominantly the U.S. – by according them temporary exemptions from the phase-out of Methyl Bromide year after year.[88] By way of conclusion, Sand put it quite right when he stated:

82 *Ramsar Convention*, Art. 3.1 and 3.2.

83 *Ramsar Resolution* (COP) VIII.14 N*ew Guidelines for management planning for Ramsar sites and other wetlands*, November 2002, *Resolution* VII.11, May 1999, Annex.

84 M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law*, 2nd ed. (2011), 415.

85 *Ibid*., 419.

86 E.g. *Ramsar Resolution* (COP) X.17, 'Environmental Impact Assessment and Strategic Environmental Assessment: updated scientific and technical guidance', 28 October-4 November 2008.

87 D. Farrier & L. Tucker, 'Wise Use of Wetlands under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law', 12 J*ournal of Environmental Law* (2000) 1, 21, 40.

88 See the analysis in B. J. Gareau, 'Dangerous Holes in Global Environmental Governance: The Roles of Neoliberal Discourse, Science, and California Agriculture in the Montreal Protocol', 40 *Antipode* (2008) 1, 102, 123 ("US protectionism of its strawberry production complex appears to be undermining the environmental objectives of the Montreal Protocol.").

> "Consensual ascertainment of treaty standards limits the sphere of potentially divergent auto-interpretation by states, and thus contributes to regime stabilization. But well-meaning peer interpretation may also soften "hard" treaty rules (thereby weakening their effectiveness, while ostensibly easing compliance) to accommodate offenders, albeit for the sake of stability Sicilian style: *la legge applicata a nemico, ma interpretata all'amico*... ["law is applied to the enemy, but interpreted to a friend"]."[89]

PTRs may do so either by enlarging the freedom of action of treaty parties, or by more or less maintaining the same freedom of action that they previously had, thus limiting or stabilizing the impact of the international exercise of authority on States and other actors.

D. A Closer Look at the Legal Status of Environmental PTRs

Besides the wording or substance of a PTR, its legal status also influences what authority it is likely to have over the treaty parties. Even if the wording or substance of PTRs contributes to their exercise of authority or tightens obligations, their limited legal status might compromise that capacity. Legal status is a pluralist and a relative notion. Each legal order defines legal status separately. The legal status of a particular PTR often differs between the normative order in which it was first adopted, the international legal order in general, and the various domestic legal orders. The following sections investigate the multiple legal status of PTRs in these three orders. Both doctrine and practice show that the choice for the PTR-form leaves open the door to evading authority in another legal order at the application stage.

I. Legal Status of PTRs in the Internal Legal Order of the Treaty Regime

Legal status[90] is not likely to be questioned much *within* the treaty regime, since treaty bodies will normally operate in accordance with the regime's rules,

89 Sand, 'Institution-Building', *supra* note 13, 780.

90 When this article speaks of 'legal status', it always does so in relation to a particular legal order: The internal legal order of the treaty regime; the international legal order; or the domestic legal orders. Although it is controversial whether one may call the semi-

be they formally binding or not.[91] Thus, within the Conference of the Parties or its sub-organs, PTRs aimed at the operation of these bodies will normally be treated as valid and applicable in a similar manner as the provisions of the underlying MEA.[92] Examples are the CITES listing criteria or the *Montreal Protocol* criteria for critical use, both of which govern further individualized decision-making within the bodies of the respective regimes, such as listing of species or substances. By contrast, they govern the environmental behavior of States outside the regime only indirectly.[93]

Legal status is more relevant for those PTRs that purport to set or transform rules for the environmental behavior of States directly, compliance with which is checked in non-compliance bodies. Examples are the *Montreal Protocol Decisions* on critical use exemptions of methyl bromide,[94] and the *Kyoto Protocol Rules* on how to account for Land Use, Land Use Change and Forestry[95] discussed above. Although status plays a role on the international and domestic levels, it should not be questioned by or before those treaty bodies.

In the internal legal order of the treaty bodies, it is not so much legal status that threatens to undermine the authority exercised through PTRs, but the on-going political conflicts over listing- and non-compliance processes. The intergovernmental nature of the COPs, COP/MOPs and MOPs may often lead to the making of exceptions, for instance through the adoption of new PTRs

autonomous order composed of environmental treaty bodies a '*legal*' order, and therefore whether can speak of 'legal status' in that order, is not the main point. If one takes issues with the use of therm 'legal' in that order of the treaty bodies, one can choose to call it a 'normative order', and to speak simply of 'status', without changing the argument.

91 Gehring, 'Treaty-Making and Treaty-Evolution', *supra* note 13, 467, 476-479; Ulfstein, 'Reweaving the Fabric of International Law?', *supra* note 13, 149 ("… decisions by the supreme organ of the organization will usually be considered binding at the internal level … This means that the COP, the subsidiary bodies and the secretariat established by the MEAs are bound by these decisions. But also States, when acting in these treaty bodies, must respect the decisions.").

92 See Goldmann, 'Inside Relative Normativity', *supra* note 9, 661, 689 (pointing at 'Direct Implementation' as a factor in determining the normativity of an instrument).

93 Cf. Goldmann's distinction between first level and second level addressees, *ibid*., 687-688.

94 E.g. *Montreal Decision* (MOP) XXIV/5, 'Critical-use exemptions for methyl bromide for 2014', 16 November 2012, Annex, recently adopted decisions allocating maximum quantities of methyl bromide for critical uses.

95 *Kyoto Decision* (COP/MOP), 30 March 2006, 16/CMP.1,'Land Use, Land-Use Change and Forestry'.

that override older, undesirable ones, or through certain favorable interpretations of existing PTRs.[96]

The question of legal status attains the greatest relevance for PTRs whose implementation is only partially assessed in the regime's bodies. Examples are the *Ramsar Resolutions* on the application of 'wise use' of wetlands,[97] and several CITES *Resolutions* on what constitutes a 'hunting trophy',[98] what is a 'specimen taken from the wild',[99] or how 'confiscated specimens' should be disposed of by national authorities.[100] Implementation of such PTRs is primarily left to national institutions, not to the regime bodies. The following two sections discuss PTRs' legal status in the international and domestic legal orders, respectively.

II. Legal Status of PTRs in International Legal Doctrine and Court Practice

Wiersema rightly points out that asking whether PTRs can be categorized somewhere within the formal sources of international law as self-standing instruments is asking the wrong question.[101] PTRs are not treaties, and do only very sparingly contribute to the formation of customary law. They also are not legally binding decisions of international organizations, for several reasons. First of all, COPs, COP/MOPs and MOPs are not international organizations. Second, with the exception of adjustment decisions adopted under Article 2.9 *Montreal Protocol*, no MEA provision indicates that decisions adopted on its basis are legally binding. Neither is the soft law concept useful,[102] as the statement that an instrument is 'soft law' tells us very little about an instrument's actual

96 Sand, 'Institution-Building', *supra* note 13, 787-788; J. Klabbers, 'Compliance Procedures', in Bodansky, Brunnée & Hey, *supra* note 3, 995.

97 *Ibid*.

98 CITES COP *Resolution Conf.* 12.3 (Rev. CoP 16).

99 CITES COP *Resolution Conf.* 12.3 (Rev. CoP 16), 'Permits and Certificates'.

100 CITES COP *Resolution Conf.* 9.10 (Rev. CoP 15), 'Disposal of confiscated and accumulated specimens', November 1994 and CITES COP *Resolution Conf.* 10.7 (Rev. CoP 15), 'Disposal of confiscated live specimens of species included in the Appendices', June 1997.

101 As they are neither treaties, nor customary law, nor binding decisions of international organisations see Brunnée, 'COPing with Consent', *supra* note 13, 21-33; Wiersema, *supra* note 13, 258, 264 (noting that "attempts to analyze COP activity according to conventional standards for finding legal obligation are fraught with difficulty", that "a one-size-fits-all determination of their legal status or relationship to underlying treaty obligations is impossible", and that therefore we need to rephrase the question).

102 Cf. *ibid*., 259-264.

legal significance.[103] Considered as self-standing instruments, PTRs are neither explicitly legally binding nor explicitly non-binding,[104] but at least the former position is difficult to maintain. This ambiguous position can be witnessed every time the question of the legal relevance of environmental PTRs arises, be it among academics, government officials, or before a national or international court.[105]

Some commentators argue, however, that the status of PTRs should be inferred from their *interpretive relationship* with the underlying treaty provision, and the legal qualification of this relationship as 'subsequent agreements'.[106] They point to Articles 31.2, 31.3. (a) and (b) of the VCLT, which respectively recognize as means of treaty interpretation: "any agreements [adopted] in connection with the conclusion of the treaty", "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[107] If the interpreters of MEAs – e.g. governments and courts – would be legally obliged on the basis of Article 31 VCLT to interpret treaty articles in accordance with the content of PTRs, the legal status and authority of the latter would indeed be firmly established.

Yet, even though PTRs *qualify* as interpretive agreements in the sense of Article 31, it is not at all clear that this would unambiguously establish their legal status, upon a closer look at how Article 31 as a whole is constructed. The mere existence of an interpretive agreement does not necessarily make it a

103 Goldmann, 'Inside Relative Normativity', *supra* note 9, 661, 667-668.

104 Cf. Wiersema, *supra* note 13, 248-250.

105 Governments, for instance, tend to vehemently deny that they are legally bound by PTRs, disputing their legal status. Note the stance of the U.S. government filed in the proceedings of *Natural Resources Defense Council v. Environmental Protection Agency*, United States Court of Appeals For the District of Columbia Circuit, Judgment after rehearing, Case No 04-1438, 464 F3d 1 (DC Cir 2006), 29 August 2006, *Supplemental Brief for the Respondent and Final Rule 69* Fed. Reg. at 76.989; The EPA repeats this stance in its yearly Final Rules on the use of methyl bromide, e.g. for the year 2013 see *Proposed Rule 77* Fed. Reg. 74435, by pointing back at the Supplemental Brief and the ruling in *NRDC v. EPA*.

106 Wiersema, *supra* note 13, 276-278; G. Ulfstein, 'Treaty Bodies' in Bodansky, Brunnée & Hey, *supra* note 3, 884; On subsequent agreements generally see International Law Commission, *Report on the work of its sixtieth session*, UN Doc. Supplement No. 10 (A/63/10), para. 365-389 (5 May-6 June and 7 July-8 August 2008); Georg Nolte (ed.), *Treaties and Subsequent Practice* (2013).

107 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

mandatory and hierarchically primary means of interpretation.[108] First, Article 31.3 VCLT merely states that subsequent agreements and practice "[…] shall be taken into account […]". They do not become the only means of interpretation to the exclusion of all others. Quite the contrary, if there were any hierarchy, the place where interpretive agreements are mentioned in Article 31.3 VCLT would indicate that they only gain weight "in the absence of a clear solution based on the means of interpretation enunciated in the previous paragraphs."[109] At the very least, it remains for the interpreter, be it a State, a treaty body or a dispute resolution body, to decide the weight that should be accorded to the different means of interpretation of Article 31. Besides subsequent agreements, they are good faith, object and purpose of the treaty, the wording of the treaty, and the intentions of the drafters – in other words, basically any consideration the applier deems relevant. If the rule-applier relies solely on the relevant PTRs, that is a choice not *mandated* by Article 31 VCLT, nor by the language of the PTRs themselves.[110]

As a result, even if PTRs qualify as 'subsequent agreements on interpretation' – which traditional approaches in the literature dispute in case of very substantial modifications[111] – the limited, or at least ambiguous legal status that this confers is not enough to be the sole factor for the actor[112] that decides whether or not to give precedence to PTRs in interpreting an MEA provision. Doctrine renders the interpretive effect of PTRs on international environmental treaty rules, to which PTRs are potentially so important, arbitrary and uncertain. Viewed in this light, PTRs are mere policy instruments among States, whose application and implementation depends on how courts and governments decide to interpret the doctrinal rules on interpretation. Of

108 Cf. Wiersema, *supra* note 13, 278 (carefully concluding that Article 31(3a) "[…] when placed alongside the question of what the relationship of COP activity is to the original parties' obligations, allows for a more careful exploration of the current legal obligations of those parties.").

109 J. Sorel & V. Boré Eveno, 'Article 31', in O. Corten & P. Klein (ed), *The Vienna Convention on the Law of Treaties, A Commentary*, Vol. I (2011), 804, 826.

110 Of course, the question can be asked whether national courts and governments are the legitimate actors to decide the relative weight of different interpretive means in concrete cases, thereby assuming part of the authority over the applicability of PTRs.

111 Some traditional accounts of Article 31 argue that informal agreements such as PTRs only qualify as 'subsequent agreements on interpretation' if they amount to slight changes to, or confirmations of pre-existing meanings. Such account would disqualify a significant number of PTRs. See e.g. Sorel & Boré Eveno, *supra* note 109.

112 The relevant actors here are in first instance courts, because their decisions to give or not give precedence to PTRs is likely to affect the authority of PTRs over governments.

course, such decisions are influenced by soft and hard enforcement measures,[113] all sorts of other prudential reasons, legitimacy considerations and experience of coercion. These factors are however much more volatile and subjective than legal status. Especially appreciation of legitimacy depends on fresh consideration by each court confronted with an issue involving PTRs. That situation will remain until consistent treatment of PTRs over time might stabilize and elevate their status in comparison to the underlying treaty and to other interpretive devices.

International court practice is too sparse and cautious to conclude that it has substantially elevated the legal status of PTRs. The judgment in the recent ICJ case *Whaling in the Antarctic* puts special emphasis on the requirement that PTRs be adopted by consensus (i.e. the great majority of PTRs) to have any – even limited – relevance in the international legal order. After noting that the PTR in question – *Resolution* 1986-2 of the International Whaling Commission merely required the parties 'to take into account' the feasibility of non-lethal methods of whale research,[114] the Court suggests that the 'duty of cooperation' – a general duty of unclear depth that exists both in the law of international organizations and in international environmental law – requires the parties to 'give due consideration to' the Resolution (i.e. *show* that they have taken it into account).[115] It is difficult to see how a repeated obligation 'to take into account' rises above a single obligation to 'take into account'. Until an international court is confronted with a PTR with a more authoritative wording, it cannot be concluded that *Whaling in the Antarctic* has elevated the status of PTRs in the international legal order.

III. Legal Status of PTRs in Domestic Legal Doctrine and Court Practice

Another possible source of solidifying the authority of PTRs is the consistency of courts in considering themselves bound to apply PTRs, regardless of their ambiguous international legal status. Repeated applications based on legitimacy or persuasion *can* transform the legal status of PTRs upwards or downwards. Doctrinal uncertainties pervading international law reverberate in the domestic legal status of PTRs. Domestic and regional courts present

113 Goldmann, 'Inside Relative Normativity', *supra* note 9, 689-691.

114 *Resolution on Special Permits for Scientific Research*, IWC *Resolution* 1986-2, 38th Annual Meeting, 1986 (Rep. Int. Whal. Commn 37), available at https://iwc.int/private/downloads/nBoylGUS_4nCBOSEBlwAhw/IWCRES38_1986.pdf (last visited 19 May 2016).

115 *Ibid*.

an insightful battleground for examining whether there is, regardless of those similar uncertainties, any consistency in the treatment of PTRs in practice. Such practice may serve as an influence on the development of a less ambiguous doctrine or even a strengthening of the legal status of PTRs in the long term.

Domestic courts are important players in deciding whether PTRs constrain actors on the local level. Mainly, they are invoked by individuals or NGOs to consider the legality of government action concerning environmental issues. Of course, not only courts influence the existence of the domestic legal status of PTRs, but it is one of the few fora where indications of that authoritativeness can be found.[116] An alternative source of information would be the extent to which national and regional legislators and administrators consider themselves bound to incorporate PTRs into national legislation or administrative acts.[117] Another *caveat* is that national constitutional rules on the applicability of international law within the municipal legal order differ, as well as domestic attitudes towards international law. However, as the following examples will illustrate, none of the observed domestic legal systems has an easy answer to the legal status of PTRs, so that dismissing the findings by pointing at such differences seems unfounded. A number of domestic and EU court cases suffice to clarify that the treatment of PTRs' domestic legal status is not consistent. The position taken in United States courts contrasts with the position generally taken in the Netherlands and in the EU courts. The limited and ambiguous legal status of PTRs in the domestic legal orders remains. Most consistency exists as far as it concerns hortatorily phrased PTRs, which courts from both sides of the divide often dismiss as relevant for the legal obligations of States: Legal status is then a redundant point.

In the Netherlands Antilles' *Lac/Sorobon* case,[118] the highest administrative court of the Kingdom of the Netherlands considered a series of PTRs adopted

116 Wiersema, *supra* note 13, 263, (arguing that a focus on dispute resolution bodies fails to capture obligations that exist without ever passing through dispute resolution bodies, such as is the case with many COP decisions).

117 See for that type of examination J. Friedrich & E. J. Lohse, 'Revisiting the Junctures of International and Domestic Administation in Times of New Forms of Governance: Modes of Implementing Standards for Sustainable Development and Their Legitimacy Challenges', 2 *European Journal of Legal Studies* (2008) 1, 49, 50 ("looking at the various modes of how the norms of these instruments determine and thus internationalise domestic administration.") (emphasis added).

118 *Lac/Sorobon* (*Bestuurscollege van het Eilandgebied Bonaire tegen de Gouverneur van de Nederlandse Antillen*), Kroonberoep Raad van State van het Koninkrijk der Nederlanden, 11 September 2007; For an extensive case summary and note in English see J. Verschuuren, 'Ramsar soft law is not soft at all – Discussion of the 2007 decision by the

by the *Ramsar* COP to be determinative for the legality of domestic government conduct with regard to prohibiting a construction project near or on a listed wetland, because of their interpretive connection with the treaty.[119] This court took the position that a decision taken by the *Ramsar* COP constitutes an interpretive agreement in the sense of Article 31.3(a) VCLT. In its view, the existence of this decision was sufficient for it to prevail over any other possible interpretation of Article 3.1 *Ramsar Convention*, particularly because that article "contains too little to allow determination of the content of the obligations flowing from it".[120] The court furthermore pointed at the 'unanimous' adoption of the relevant instruments, bypassing the fact that consensus is not the same as unanimity.[121]

Likewise, in *Nilsson*,[122] the CJEU consulted CITES *Resolution* 5.1.1 to arrive at what they deemed the authoritative definition of specimens acquired with a view to personal possession.[123] The CJEU did not justify why they relied on PTRs to reach judgment.

By contrast, the U.S. federal District Court (D.C. Circuit) in the *NRDC v. EPA*[124] case considered PTRs[125] to be mere international political commitments, irrelevant for the legality of domestic government conduct,[126] regardless of their connection with the treaty. At issue were *Decisions* IX/6, Ex.I/3 and Ex. I/4 of the *Montreal Protocol* Meeting of the Parties on critical use for consumption and production of methyl bromide by certain parties. According to the district court, it is up to the treaty contracting parties of the U.S. government to negotiate amongst each other whether the U.S. had breached what the court called its 'political commitments'; not up to a domestic court of law.[127]

In *U.S. v. One Etched Ivory Tusk of African Elephant (Loxodonta Africana)*,[128] another U.S. District Court was even blunter in ignoring explicitly

Netherlands Crown on the Lac Ramsar site on the island of Bonaire [translation of a case law annotation in Dutch]', 35 *Milieu en Recht* (2008) 4, 28.

119 *Ibid*., para. 1.

120 *Ibid*., para. 2.2.3.5.

121 *Ibid*., para. 2.2.3.5.

122 *Nilsson*, Case No. C-154/02, Judgment of 23 October 2003, ECR 2003 I-12733.

123 *Ibid*., para. 40.

124 *NRDC v. EPA*.

125 The Court of Appeals called them 'post-ratification side agreements', *ibid*., 8-10.

126 Cf. the reading of the judgment in B. Kingsbury, 'Weighing Global Regulatory Rules and Decisions in National Courts', 9 *Acta Juridica* (2009), 90, 101-103.

127 *NRDC v. EPA*, *supra* note 124, 9-10.

128 *U.S. v. One Etched Ivory Tusk of African Elephant (Loxodonta Africana)*, United States District Court, E.D. New York, No 10-CV-308, 871 F.Supp.2d 128, 17 May 2012.

a CITES *Resolution* that gave a more lenient definition of a 'hunting trophy' than guidelines on the same subject issued by the U.S. Fish and Wildlife Service:

> "Claimant does not provide authority to support the proposition that resolutions of parties to a treaty are binding on the parties even as a matter of international law (when those resolutions are not styled as amendments to the treaty and adopted through the treaty amendment procedure)."[129]

At other occasions, U.S. district courts however are more open to accepting PTRs as authoritative interpretive agreements, but this does not mean that they always consider them to be decisive. In *Castlewood Products v. Norton I* and *II*, on first instance the District Court[130] cited the Supreme Court's holding that it has "traditionally considered as aids to [a treaty's] interpretation [...] the post-ratification understanding of the contracting parties."[131] The Court of Appeals[132] argued that:

> [W]hile "the CITES resolutions are merely recommendations to the Parties and, therefore, they are not binding on the United States[, … t]his does not render the resolutions meaningless, however. There would be no point in the contracting states agreeing on resolutions only to then completely ignore them. Therefore, while not binding, it was surely reasonable for [the Fish and Wildlife Service] and [the Animal and Plant Health Inspection Service] to look to the CITES resolutions for guidance in interpreting the regulations implementing CITES."[133]

These cases viewed together showcase the contradictory views currently held in domestic court practice – both within and across jurisdictions – with regard to PTRs' domestic legal status. They further underline the nature of PTRs' as evasions of authority in demonstrating that governments acting in

129 *Ibid*., 136-137.

130 *Castlewood Products v. Norton*, United States District Court For the District of Columbia Circuit, 264 F.Supp.2d 9, D.D.C., 16 April 2003.

131 *Zicherman v. Korean Air Lines Co.*, United States Supreme Court 516 U.S. 217, 226, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996), 226.

132 *Castlewood Products Llc v. A. Norton*, United States Court of Appeals For the District of Columbia Circuit, Case No. 03-5161, 365 F3d 1076 (DC Cir 2004), 30 April 2004.

133 *Ibid*., para. 44.

accordance with a non-binding instrument against private actors are safe from being held to have acted unlawfully (*Lac Sorobon*, *Nilsson*), governments acting in contravention of PTRs need not fear to be held to have acted unlawfully either (*One Tusk*, *NRDC v. EPA*).[134]

Where the language of PTRs is hortatory, courts are particularly quick to dismiss them as sources of obligation or legal effect, thus the two ways of evasion of authority are reinforcing each other. In addition to the Australian *Greentree* case, discussed in Part C.I. above, this can also be observed in the Dutch case of *Face the Future v. Staat der Nederlanden*.[135] The court in this case decided that the language of Paragraph 33 of the *Accounting Modalities* was such that it allowed the State final authority in deciding whether or not it would annul certain emissions units derived from afforestation by a private party.[136] The Court therefore deemed it unnecessary to reach a conclusion on the legal status of the *Accounting Modalities* in the Netherlands legal order or the extent to which Face the Future could rely on it.

The court cases discussed here support the general observation that the final say over the domestic authority of PTRs lies almost entirely with national governments. Even on the few occasions that courts are invoked, they generally defer to the understanding of authority defended by the government side. If the government relied on the PTRs in its decision, the court usually agrees; if a government has defied the relevance of a PTR in its decision, the court usually follows, too. The arbitrariness of the authority of exactly those rules that specify how States should comply with their international environmental obligations not only questions the extent to which these rules are really exercises of authority. It also creates uncertainty for private actors and the public about whether or not they can hold their governments to their international promises.

134 G. Ulfstein, 'Treaty Bodies and Regimes', in D. B. Hollis (ed), *The Oxford Guide to Treaties* (2012), 438.

135 *Face the Future tegen de Staat der Nederlanden*, Rechtbank 's Gravenhage, ECLI:NL:RBSGR:2012:BX1737, para. 4.2.1.

136 Para. 33 of the *Accounting Modalities* reads: "Each party included in Annex I may cancel ERUs, CERs, AAUs and/or RMUs so they cannot be used in fulfilment of commitments under Article 3(1), in accordance with paragraph 12 (f) above, by transferring ERUs, CERs, AAUs and/or RMUs to a cancellation account in its national registry. Legal entities, where authorized by the Party, may also transfer ERUs, CERS, AAUs and RMUs into a cancellation account."

E. The Role of Consensual Decision-Making

This section explores some of the reasons for the evasion of authority and alleviating of obligations through PTRs. Explanations for the directions into which global governance develops are always multi-faceted. At least part of the explanation for the multiple ways in which PTRs evade authority, however, may be found in the consensual decision-making process through which the treaty parties adopt them. Consensual decision-making generally means the taking of decisions without a formal vote: A consensual decision is successfully adopted if no objections are made known to the chairperson.[137] First, consensual decision-making, which is the regular mode for adopting PTRs, may be a significant reason behind the hortatory or even retrogressive content identified in Part C. and the choice of instruments of ambiguous legal status identified in Part D. Second, consensual decision-making may have negative effects on sovereign equality compared to individual State consent and may upset the domestic balance between legislative and executive branches, thus diminishing PTRs' legitimacy in the view of the addressees and appliers of MEAs, which is essential for PTRs to gain authority in practice over time. In short, consensual *processes* of PTR-adoption suffer from problems of procedural legitimacy and (in)effective decision-making. Those problems are likely to have direct results for the authority of the decisions that come out of those processes. This may be exactly what certain executive branches want, because it maintains domestic policy discretion.

The relationship between authority and legitimacy can be approached in multiple ways. On the one hand, legitimacy can be considered as a further *parameter* for gauging the authority of an instrument: The more legitimate it is considered to be by its addressees, the more authority it is likely to gain over time. This is usually called 'social' or 'sociological' legitimacy.[138] On the other hand, one can argue, as do the proponents of the IPA project, that first it must be established whether a certain instrument is an exercise of IPA, and then *independently* ask the question of its legitimacy. The present article combines these propositions. While it identifies deficits in the process of PTR-adoption in terms of legitimacy and effective decision-making from a normative viewpoint,

[137] This sets consensual decision-making apart from decision-making by consent, or decision-making by unanimity.

[138] S. Bernstein, 'Legitimacy in Global Environmental Governance', 1 J*ournal of International Law & International Relations* (2005) 1, 139, 156-162; D. Bodansky, 'The Concept of Legitimacy in International Law', in Wolfrum & Röben, *supra* note 6, 308, 313-315.

it understands these findings also as a cause for why PTRs often end up as evasions of IPA more than as exercises of IPA.

The central characteristic of PTR-adoption is its consensual character. The COP/MOP of the *Kyoto Protocol* is formally under an obligation to decide by consensus.[139] Under other MEAs, the *Rules of Procedure* formally allow recourse to voting with qualified,[140] or in some cases even simple majorities.[141] However, the *Rules of Procedure of the Ramsar Convention* for instance state that "[t]he Parties shall make every effort to reach agreement on all matters of substance by consensus". [142] Similarly Rule 21.1 CITES *Rules of Procedure* provides that "[t]he Conference shall as far as possible decide on draft resolutions and other documents by consensus."[143] In other words, for most[144] treaty bodies the norm is consensus,[145] while all except the UNFCCC/*Kyoto Protocol* theoretically have the shadow of a vote hanging over that consensus. In practice, however, the formal possibility of voting is hardly ever invoked. Discussions continue both inside and outside the plenary until consensus or *acclaim* is reached, or until a few reservations or interpretive declarations are sufficient to satisfy opposing parties.

139 The *Rules of Procedure of the* COP *to the* UNFCCC, which also apply to the *Kyoto* COP/MOP (see Article 13(5) *Kyoto Protocol*), were never adopted in so far as it concerns the section the provision on voting rules, because the parties were unable to agree on including the 'specified majorities' mentioned in Article 7(3) UNFCCC for certain types of decisions.

140 Rule 40 of the *Rules of Procedure for Meetings of the Conference of the Parties to the Vienna Convention and Meetings of the Parties to the Montreal Protocol*; Rule 26 of the CITES *Rules of Procedure of the Conference of the Parties* requires a two-thirds majority; Rule 40 of the *Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity*, require a two-thirds majority (however, this last Rule is still bracketed).

141 Article 7(2) *Ramsar Convention*.

142 Rule 40(1) *Rules of Procedure for Meetings of the Conference of the Contracting Parties to the Ramsar Convention* (Rev. COP 11, 2012).

143 Rule 21(1) CITES *Rules of Procedure*.

144 With the exception of the *Rules of Procedure* under the *Montreal Protocol*, which do not state a preference for consensus.

145 Also Rule 40(1) CBD and *Cartagena Protocol Rules of Procedure*: "The Parties shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement reached, the decision [except a decision under Article 21(1) or 21(2) of the Convention] shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting [...]."

For instance, at *Ramsar* COP VIII about 45 *Resolutions* and *Recommendations* on substantive issues were adopted by consensus and none by voting.[146]

The merits as well as the problems of consensual decision-making have received their share of attention in international relations, with a notable focus on the GATT/WTO[147] and the EU.[148] With the arrival of the *active* consensual method of treaty-text adoption in the UNCLOS-negotiations with a large role for the chairperson,[149] international legal scholars paid it some attention, seeing it mostly in a positive light as they gave it a chance at more *effective* decision-making.[150] The several ways in which PTIs lack authority, however, should lead us to examine some of the more negative aspects of consensual decision-making: A tendency towards maintaining the *status quo*, and the "invisible weighting"[151] of underlying power configurations, which in turn may act as a further catalyst of the *status quo*, depending on the issue.

First, consensual decision-making is problematic from the perspective of effective decision-making, whereby 'effective' should be understood as producing

146 See Report of the 8th Meeting of the Conference of the Contracting Parties, *Ramsar Convention*, *supra* note 27.

147 R. H. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 I*nternational Organization* (2002) 2, 339; C. D. Ehlermann & L. Ehring, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?', 8 J*ournal of International Economic Law* (2005) 1, 51, M. E. Footer, 'The Role of Consensus in GATT/WTO Decision-Making', 17 *Northwestern Journal of International Law & Business* (1997) 1, 653; R. Kissack, 'Crisis Situations and Consensus Seeking: Adaptive Decision-Making in the FAO and Applying Its Lessons to the Reform of the WTO', in T. Cottier & M. Elsig (eds), *Governing the World Trade Organization: Past, Present and Beyond Doha* (2011), 241; A. Lang & J. Scott, 'The Hidden World of WTO Governance', 20 *European Journal of International Law* (2009) 3, 575.

148 D. Heisenberg, 'The Institution of 'Consensus' in the European Union: Formal versus Informal Decision-Making in the Council', 44 *European Journal of Political Research* (2005) 1, 65.

149 'Active consensus', as opposed to 'passive consensus', meant that the Chairmen assumed an active role in producing negotiat*ing* texts, which would then gradually evolve into negotiat*ed* texts. B. Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea', 75 *American Journal of International Law* (1981) 2, 324, 334-335.

150 O. Schachter, 'The Nature and Process of Legal Development in International Society', in R. St. J. MacDonald & D. M. Johnston (eds), *The Structure and Process of International Law* (1983), 745; K. Zemanek, 'Majority Rule and Consensus Technique in Law-Making Diplomacy', in *ibid*., 857; Buzan, *ibid*., 329.

151 Steinberg, *supra* note 147, 346-350.

authoritatively formulated rules with the aim of achieving behavioral change. Consensual decision-making has a tendency to lead to the *status quo* or the lowest common denominator, thus producing PTRs that ask little concrete action from their addressees. Of course, in both these scenarios consensus decision-making need not be the only reason for disappointing outcomes – there may simply be a great deal of disagreement among the treaty parties. But that does not eliminate the fact that, at least with the current consensual system, the freedom of action of States' environmental policies is not reduced.

Examples of the ineffectiveness of consensual decision-making – both as regards stalling the process and delivering lowest common denominator outcomes – abound. A prominent example of stalling are two crucial sets of PTR adoption processes under the *Cartagena Protocol on Biosafety*, on advance informed agreement and documentation accompanying transboundary shipments of LMOs intended for direct use. These decisions are simply not taken,[152] despite the underlying treaty explicitly containing the mandate to take them.[153] In most cases, however, as was seen in the discussion of evasion of authority through substance (Part C.), the parties do take decisions, but these simply require minimal action. The need to seek consensus and the ability to stall that forms part of this mode of decision-making contributes to PTRs becoming vehicles for hollow words that allow much and oblige little. Qualified majority voting as a serious fallback option if consensus fails, would be more effective.[154] At least a real shadow of a vote would hang over the States' representatives that could be used as a catalyst.[155]

Second, the consensual decision-making process suffers from input and procedural legitimacy deficits that weaken the legitimate claim to authority of PTRs. In the absence of undisputed legal validity, such as is the case with PTRs, the perception of a legitimate process of adoption may tilt the balance in

[152] See *Cartagena* COP/MOP *Decisions* BS-III/9, BS-IV/10, BS-V/9 and BS-VI/8 for the decisions to postpone rules on documentation accompanying transboundary shipments of LMOs; see *Cartagena* COP/MOP *Decisions* BS-I/12 and BS-V/16, Annex I, para. 5 for the advance informed agreement procedure available at http://bch.cbd.int/protocol/cpb_mopmeetings.shtml (last visited 19 May 2016).

[153] Articles 7(4) & 18(2) *Cartagena Protocol*.

[154] A famous plea for qualified majority voting in the context of international environmental law is G. Palmer, 'New Ways to Make International Environmental Law', 86 *American Journal of International Law* (1992) 2, 259, 281.

[155] Ehlermann & Ehring, *supra* note 147, 65 ("The practical impossibility of a vote means that the negotiations in search of a consensus do not even take place in the shadow of a threatening vote.").

favor of applying an instrument in practice, which may render the instrument more authoritative over time.[156] Yet consensus decision-making in the context of adopting PTRs is vulnerable to a legitimacy deficit from several perspectives. Consensus tends to neither respect sovereign equality of weaker States,[157] nor *global* interests, given its tit-for-tat negotiating nature and package deals.[158] Consensus decision-making is an invitation to what Steinberg calls 'invisible weighting', i.e. it "assures that legislative outcomes reflect underlying power".[159] From less powerful individual States' perspectives, what remains is to play along or ask for small favors in exchange for leaving the consensus undisturbed. If 'unimportant' States do not play along, such as Bolivia in case of the Cancun Agreements adopted at the end of the climate change summit in Cancun, Mexico, they are simply ignored.[160] This goes contrary to the often-made assumption that, in comparison to majority decision-making, consensualism would be more inclusive. In fact, under consensual decision-making, "it is hypothetically possible to have a proposal pass with less support than a simple majority."[161] Qualified majority decision-making would give more voice to most States.

156 Several contributions in Wolfrum & Röben, *supra* note 6, take issue with the notion that legitimacy can replace legal validity. E.g. G. Abi-Saab, 'The Security Council as Legislator and as Executive in Its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy', in *ibid*., 109, 115-116 ("I would discard from the discourse of legitimacy any attempt to use it as a means to dodge or get round the law; as a passe-droit, a licence trumping legality or a "justification" of its violation (cause d'exoneration, "circumstance excluding wrongfulness".)"

157 See B. Kingsbury, 'Sovereignty and Inequality', 9 *European Journal of International Law* (1998) 4, 599 (underlining the continuing importance of sovereignty for equality).

158 J. Evensen, 'Three Procedural Cornerstones of the Law of the Sea Conference: The Consensus Principle, The Package Deal and The Gentleman's Agreement', in J. Kaufmann (ed.), *Effective Negotiation* (1989), 75, 78 ("Consensus is a state of the art emerging from the negotiations.").

159 Steinberg, *supra* note 147, 342.

160 A similar episode in the recent adoption of the Arms Trade Treaty (ignoring objection by Syria, Iran and North-Korea) caused Akande to query 'What is the Meaning of "Consensus" in International Decision Making?', D. Akande, EJIL Talk (8 April 2013), available at http://www.ejiltalk.org/negotiations-on-arms-trade-treaty-fail-to-adopt-treaty-by-consensus-what-is-the-meaning-of-consensus-in-international-decision-making/ (last visited 25 May 2016) ("On this scenario, one wonders whether an objection by the United States, Russia or China would be treated the same as that from a smaller country [...] Indeed, it should be remembered that it was the larger, more influential States that had originally favoured the consensus procedure at UNCLOS as a means of counteracting the collective voting power of developing countries.").

161 Heisenberg, *supra* note 148, 70.

Moreover, consensual decision-making, by being entirely the domain of national executive branches, may upset the national balance of power. Even within (democratic) powerful States, there foreign executive branches make rules that mostly bypass its national legislative institutions.[162] This executive dominance renders weaker the legitimacy of PTRs even in domestic jurisdictions whose governments have a relatively large say in the COP process.

Going back to two of the domestic court cases discussed earlier, they show that two very different views on the legitimacy of the consensual process are possible, and can be sought by participants in the law-applying process to fit with the preferred outcome. The Kingdom of the Netherlands' administrative court in *Lac/Sorobon* interpreted the consensual adoption of the relevant *Ramsar Resolutions* and *Recommendations* – which it understood to be 'unanimity' – as a boost to the legitimacy of letting those PTRs determine the outcome of the dispute.[163] The United States federal court in *NRDC v. EPA* simply saw the procedure by which the relevant PTRs were adopted as a different method than the one prescribed for creating binding international legal agreements, suggesting that if PTRs were allowed to govern the court decision it might upset the constitutional separation of power and the nondelegation doctrine.[164]

The often-used argument that the individual consent given to a general system of governance by ratifying an environmental treaty and establishing a Conference of Parties with decision-making powers would also be sufficient for subsequent PTIs loses its strength in light of the fact that the underlying MEA provisions hardly predispose the range of substantive outcomes laid down in PTRs.[165]

Lastly, an even less legitimate picture emerges when ineffective decision-making and procedural legitimacy deficits are combined. It must not be forgotten that taking no decision or one that clearly does not authoritatively require change, is also a decision affecting States and individuals.[166] For instance, *not* adopting authoritative rules on climate change affects low-lying countries vulnerable to floods from rising sea-levels. Not adopting authoritative rules on

162 See generally, R. D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 *International Organization* (1988) 3, 427.

163 *Lac/Sorobon*, *supra* note 118, para. 2.2.3.5.

164 *NRDC v. EPA*, 14, 8-9.

165 D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', *supra* note 54, 604, 608-609; R. O. Keohane & A. Buchanan, 'The Legitimacy of Global Governance Institutions', in Wolfrum & Röben, *supra* note 6, 25, 62.

166 Rae, *supra* note 35, 1273, 1274.

wetland protection may threaten wetlands that local communities depend on for their livelihoods. Under consensus decision-making, these can be decisions forced by a single or a handful of powerful actors upon a large majority.

In summary, the PTR-adoption process is hardly a supportive factor in strengthening the authority of PTRs or the extent to which they tighten obligations. This is so in terms of effective decision-making as well as in terms of legitimate decision-making boosting authority in the long term.

F. Conclusion

This article may leave a gloomy impression with the reader, because it argues that potentially significant parts of environmental global governance are not very authoritative or are even used to evade international authority or obligations. State representatives in the Conference of the Parties were shown to avoid authoritative language, requiring little concrete action by the treaty parties; or to adopt rules that are authoritatively formulated, but which give back to the treaty parties more freedom of action than the terms of the treaty indicate. In a second type of evasion, PTRs were shown to (purposefully?) possess an ambiguous legal status outside the regime, making the decision whether or not to consider them authoritative dependent on their assessment by local authorities or, in rare cases, courts.

The article further argued that consensual decision-making may well be at the root of this ambivalent practice. Consensus decision-making as it is practiced in international plenary bodies is in reality neither supportive of genuine sovereign equality that can boost the legitimacy of PTRs, nor of effective decision-making that produces outcomes that make substantial inroads into national environmental policies. The former effect also supports the latter in that powerful States will more often prefer the *status quo* than less powerful States, because this leaves them more room for continuing to shape their own policies. Exceptionally, there are issues where powerful States find each other, such as the depletion of the ozone layer in the 1980s. These exceptions prove the point that powerful holdup States are often the problem in other cases.

These findings suggest that international environmental law and cooperation has a long way to go in directly affecting national policies from above, and that merely reverting to more flexible, informal instruments than treaties is no guarantee of more international public authority. It also points to the need for giving non-treaty instruments such as post-treaty rules – as they

become used as functional equivalents to treaties[167] – a less ambiguous place in international legal doctrine,[168] if they are to gain a predictable and stable legal status.

In addition, there is a broader point to be gathered, an attempt at a contribution to research such as the IPA project into global governance. When international legal scholars set out to introduce changes to the legal framework that might improve the legitimacy of exercises of international public authority, they should closely investigate also the manner in which and the extent to which international instruments really do amount to exercises of authority, or to restrictions of freedom in a broader sense. Too often it is taken for granted that international instruments will have an action-requiring impact on addressees, where they might not. Too little attention is given to the diversity of impact that such instruments may have. PTIs differ greatly in the impact they have within or outside regimes, on other norms, on States, and indirectly on corporations and individuals in different places.

This variety of impacts – including the impact resulting from *not* exercising international public authority and not tightening obligations – does not facilitate the question of how to integrate legitimating into a prospective legality framework for standard instruments as envisaged by Goldmann.[169] The particular form of *exercising* authority that consists of consciously leaving certain policy domains to national discretion, or even re-enlarging that space, poses different but significant challenges, also from a legitimacy standpoint. Preventing inaction, or at least making sure that inaction is the result of a legitimate process, is one of the most important challenges for a future 'international public law' of global governance – on climate change, biodiversity, or financial and tax regulation. Yet, incorporating incentives against weakly legitimated inaction – such as more effective and equal decision-making methods – into new legal

167 Gehring, 'Treaty-Making and Treaty-Evolution', *supra* note 13, 481 ("Hence, the two levels of law-making become – to some degree – functional equivalents – that is, actors can increasingly choose the level at which they will deal with a given problem."); M. Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law', 25 *Leiden Journal of International Law* (2012) 2, 335, 336-337 ("why should soft law be excluded from the definition of international law if it looks like international law and basically functions like international law?").

168 One strategy to reduce doctrinal uncertainty could be to categorize PTIs and PTRs as one or more types of standard instruments, as suggested in Goldmann, 'Inside Relative Normativity', *supra* note 9, 666-669.

169 *Ibid*., 679 ("A standard instrument is a combination of a rule of identifcation for authoritative instruments of a specific type and a specific legal regime that is applicable to all insruments coming under the rule of identification.").

frameworks may well prove to be even more daunting than incorporating rules for legitimizing action.

Goettingen Journal of International Law 7 (2016) 1, 49-94

A Public Law Approach to Internet Standard Setting*

Biel Company**

Table of Contents

* This article owes as much to Matthias Goldmann's ideas as to his patience, persistence and constructiveness. Without either of these, it would have never seen the light of day. I would also like to thank Pere Fabra for his support and helpful discussion. All errors are mine.

** Biel Company is a PhD candidate at the Internet Interdisciplinary Institute (IN3) of the Open University of Catalonia (UOC).

doi: 10.3249/1868-1581-7-1-company

Abstract

This article lays the foundations of a comprehensive analysis of the legitimacy of global Internet governance institutions from the perspective of public law. It does so by extending the application of the international public authority approach (IPA) not only beyond public institutions, but beyond ICANN and the unique identifiers regime, which have been the focus of public and scholarly attention so far, to cover another domain where informal and private institutions play a leading role: Internet standardisation. In order to do so, section B. provides an overview of global Internet governance as an example of the privatization and informalization of authority that characterizes global governance. Section C. presents IPA's conceptual framework and situates it within the broader context of public law approaches to global governance, focusing on the way it justifies the application of pubic law standards to the exercise of authority by informal and private institutions and instruments. Section D. inquires whether the development of the main technical standards of the Internet, the TCP/IP protocol suite, by two private and informal institutions, the IETF and the W3C, qualifies as an exercise of international public or functionally equivalent authority. These standards can be regarded as authoritative because they constitute the code of the Internet and because economic network effects render them economically obligatory. Whereas technical standardization meets IPA's original functional equivalence criterion for identifying those instances where private authority should be assessed and subjected to public law standards, the extent to which it qualifies as public authority according to Goldmann's more demanding conception of it remains an aspect to be clarified in further research.

A. Introduction

This article seeks to further the mutual fertilization of two literatures: the literature on global Internet governance, and public law approaches to global governance. It is based on the conviction that public law approaches can make a valuable contribution to the problem of legitimizing global Internet governance, and that public law perspectives on global governance can learn from the study of global Internet governance.

Within the transdisciplinary literature on global governance,[1] scholars interested in the legitimacy of global Internet governance have often resorted

[1] K. Van Kersbergen & F. Van Waarden, "Governance' as a Bridge Between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of

to public law standards. Public law principles – such as independent review, transparency, due process or the rule of law itself – have been widely invoked in this domain, both for descriptive-reconstructive and for evaluative purposes. Lawyers have found themselves applying these principles not only to institutions of public international law, but also to informal and private organizations, because it is this kind of institutions that the global Internet governance literature depicts as the *governors* of the Internet.[2] However, the justification of this particular way to proceed – the application of public law concepts to private and informal institutions – has generally been taken for granted. This article addresses this assumption by situating such approaches within the broader context of theories about the role of public law in legitimizing global governance that provide precisely this kind of justification.

If public law perspectives have the potential to enrich the critical understanding of global Internet governance, Internet governance is a *fertile testing ground* [3] for public law theories of global governance, too. The governance of the Internet has been qualified as "the new frontier of global institutions"[4] because it has indeed been at the forefront of institutional innovation not only within the State but also beyond. The Internet sector has spearheaded the transformation of the State-centric regulatory model that had historically prevailed in the regulation of information and communication networks into the current co-regulatory model, where private and informal institutions play a leading role.[5] Global Internet regulation exemplifies the postnational constellation *as governance*,[6] i.e. as precisely the kind of institutional

Governability, Accountability and Legitimacy', 43 *European Journal of Political Research* (2004) 2, 143-171.

2 L. A. Bygrave & T. Michaelsen, 'Governors of Internet', in L. A. Bygrave & J. Bing (eds), *Internet Governance. Infrastructure and Institutions* (2009), 92.

3 T. Schulz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists', 10 *Yale Journal of Law and Technology* (2007) 151, 151.

4 J. Mathiason, *Internet Governance: The New Frontier of Global Institutions* (2009).

5 B. Frydman, L. Hennebel, & G. Lewkowicz, 'Co-Regulation and the Rule of Law', in E. Brousseau, M. Marzouki & C. Méadel (eds), *Governance, Regulations and Powers on the Internet* (2012), 133-150; M. Holitscher, 'Co-Regulation for Internet Governance?', in D. Stauffacher & W. Kleinwächter (eds), *The World Summit on the Information Society: Moving from the Past into the Future* (2005), 256; O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governace in Contemporary Legal Thought', 89 *Minnesota Law Review* (2004) 2, 342; C. T. Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (2011).

6 T. Buthe & W. Mattli, *The New Global Rulers: The Privatization of the Regulation in the World Economy* (2011), 126.

landscape that challenges traditional understandings of international law, its role in international affairs, and its relation to legitimacy beyond the State. It is not least in response to the rise of the type of institutions that characterize the global governance of the Internet that new theories focusing on public law and authority in global governance more generally have developed over the last decade.[7] This extensive, complex, and heterogeneous domain offers, to put it in these theories' language, multiple examples of public and private, formal and informal *institutions* using a variety of regulatory *instruments* for what may – or may not – qualify as *exercises of public authority* or instances of *administration* beyond the State, which may – or may not – reproduce or be subjected to principles of constitutional, administrative or international institutional law.[8]

This article furthers the application of public law approaches to global governance by applying one of such theories, the *international public authority approach* (IPA), to one of the core aspects of global Internet governance, Internet standard setting, where informal and private organizations play a leading role. It does not provide a fully-fledged public law analysis of the informal and private aspects of global Internet governance generally or of technical standardization in particular. Rather, the purpose of the article is to assess IPA's potential for the analysis and critique of aspects of global Internet governance other than the Internet Corporation for Assigned Names and Numbers (ICANN), which has been the focus of scholarship so far. The article inquires in particular whether the development and maintenance of the main Internet technical standards, those of the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, by the Internet Engineering Task Force (IETF) and the World Wide Web Consortium (W3C), two informal and private organizations, qualifies as an exercise of public authority beyond the State, and highlights a number of difficulties that this entails.

7 Although "[…] theorizing public authority in global governance is still in its infancy." N. Krisch, 'Global Governance as Public Authority: An Introduction', 10 *International Journal of Constitutional Law* (2012) 976, 986.

8 *Infra*, sec. C.

B. Global Internet Governance and the Rise of Private and Informal Regulation

I. Global Governance, Privatization, and Informalization

The turn to governance within and beyond the State,[9] and specifically the configuration of *global* governance as it is today, has been characterized as a process of relocation of political authority.[10] In general, authority has been relocated away from the State. The relocation has been both vertical amongst public entities – from States upwards to international institutions, and downwards, to intra- or sub-state institutions – and horizontal – at each level from public, inter- or intra-state institutions to private, hybrid or informal institutions. The result has been a diffusion of authority into multi-layered or multi-level institutional complexes characterized by the presence of informal and private or hybrid elements. This does not entail, however, that the State has become obsolete, an empty cage without significance. On the contrary, States remain the main site of political authority, and beyond them it is formal international institutions – namely international organizations – that have most clearly acquired it.[11] My interest here is, nonetheless, the way public law can be used to address the legitimacy problems that result not from this vertical diffusion of political authority within the realm of public institutions – the main object of analysis of public law approaches – but from the horizontal diffusion to private and informal institutions at each layer, i.e. the problem of justifying the exercise of political authority by private and informal institutions in global governance.[12]

9 For a synthesis of the governance turn at the State, European and international levels, see C. Joerges, 'Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework', TranState Working Papers 2005/17, 16 (sec. III). Focusing on the European Union, see B. Kohler-Koch & B. Rittberger, 'The 'Governance Turn' in EU Studies', 44 *Journal of Common Market Studie*s (2006) 27.

10 See J. N. Rosenau, 'The Relocation of Authority in a Shrinking World' 24 *Comparative Politics* (1992) 3, 253; S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996).

11 This applies to global Internet governance, too Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (2007); J. Goldsmith & T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (2006).

12 Describing such shifts in the context of global Internet governance specifically, W. Kleinwächter (ed.), *Multi-Stakeholder Internet Governance: The Role of Governments*, 13, and J. S. Nye Jr., 'Information Technology and Democratic Government', in

The rise of global governance has consisted, to a significant extent, in the *privatization* of authority, or in the authorization of private institutions. This is not a particularity of the post-national constellation.[13] Governance as a distinct model of social ordering or regulation is characterized by non-state, informal or private institutions assuming roles and responsibilities in the regulation of domains of activity that had formerly been situated under the purview of public institutions. Such roles and responsibilities are assumed by top-down delegation from public authorities or by bottom-up, spontaneous self-authorization of social actors, and range from norm development to enforcement. Private autonomy exercised collectively has given rise to a variety of self-regulatory institutions, including organizations or private bureaucracies, which have come to play a significant role in the regulation of many sectors of economic and social life. This not only represents a significant development in the configuration of the relationship between the public and private spheres, between the State and society, but undermines the distinction between the domestic and international realms as well, because the authority of private self-regulatory institutions often transcends borders and gives rise to transnational private regimes.[14] These private self-regulatory regimes, however, tend to be situated within or intertwined with public institutional frameworks.[15] Rather than purely private self-regulation, what characterizes global governance are hybrid, public-private regulatory systems or regimes.[16] Thus, the proliferation and growing weight of private institutions has not entailed a replacement of inter-state institutions, but has generally come to complement them.[17]

E. C. Kamarck and J. S. Nye Jr. (eds) *Democracy.com? Governance in a Networked World*, (1999), 1.

13 C. E. J. Schwöbel, 'Whither the Private in Global Governance?' 10 *International Journal of Constitutional Law* (2012) 4, 1106, 1121.

14 Krisch, *supra* note 7, 976.

15 Applying the idea to Internet governance see J. P. M. Bonnici, *Self-Regulation in Cyberspace* (2007); E. M. Weitzenboeck, 'Hybrid Net: The Regulatory Framework of ICANN and the DNS', 22 *International Journal of Law and Information Technology* (2014) 1, 73.

16 "While purely private regimes are extremely rare, hybrid public-private arrangements are much more common […]", so "[…] the connections between public and private regimes […]" are "[…] extremely widespread in global governance […]" M. DeBellis, 'Public Law and Private Regulators in the Global Legal Space', 9 *International Journal of Constitutional Law* (2011) 2, 425, 426. The same happens in the domestic context, where "[…] [it] is rare […] that a self-regulatory body has no relationship […] [with] the state." M. E. Price & S. G. Verhulst, *Self-Regulation and the Internet* (2005), 12.

17 In Internet governance specifically, complementarity is the norm, although ICANN's authority over Internet unique identifiers is a case of deep privatization, see R. Bendrath

Informalization, understood here as the proliferation of institutional forms other than those of international law, has been as important a dimension of this diffusion of authority as privatization.[18] Most relevant for the purposes of this article is, in the first place, the informalization of regulatory instruments. Beyond the State, both international and transnational institutions resort to non- or quasi-legal instruments to perform their regulatory functions,[19] as reflected in the debate on soft law in international legal scholarship.[20] There has also been, in the second place, an informalization of the organizations themselves, i.e. a proliferation of regulatory entities that lack subjectivity in international law.[21] Third, there has also been an informalization of authority in the related sense that the institutions effectively wielding it not always do so in virtue of a legal basis.[22]

The global governance of the Internet epitomizes both the privatization and the informalization of authority beyond the State. The core of the global Internet governance system is a network of informal and private regulatory institutions that develop and manage the infrastructure of the Internet,[23]

et al. 'Governing the Internet: The Quest for Legitimacy and Effective Rules', in A. Hurrelmann *et al.* (eds), *Transforming the Golden Age Nation-State* (2007), 130, 147.

18 For an overview, see B. Peters & J. K. Schaffer, 'Introduction: The Turn to Authority Beyond States' 4 *Transnational Legal Theory* (2013) 3, 315; J. Pauwelyn, R. Wessel & J. Wouters, *Informal International Lawmaking* (2012) [Pauwelyn, Wessel & Wouters, Lawmaking].

19 "[…] [Even] if one sees traditional international law as 'law', the problem with global governance is that much of its normative production comes in other forms. Informal regulation – through soft law, government networks, private regulation, intra-institutional norms – makes up a large part of transboundary cooperation in many issue areas, and in others it coexists with more established forms of law-making, such as treaties and formal adjudication." see Krisch, *supra* note 7, 976, 982.

20 For an overview, see M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' 9 *German Law Journal* (2008) 1865, sec. B.

21 A. Berman & R. Wessel, 'The International Legal Status of Informal International Lawmaking Bodies: Consequences for Accountability', in Pauwelyn, Wessel & Wouters, *Lawmaking*, *supra* note 18, 35.

22 Krisch, *supra* note 7, 976, 979.

23 Analyzing it as network governance, M. Lips & B. Koops, 'Who Regulates and Manages the Internet Infrastructure? Democratic and Legal Risks in Shadow Global Governance' 10 *Information Polity* (2005) 1/2, 117, 126; J. Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum* (2008); M. L. Mueller, *Networks and States: The Global Politics of Internet Governance* (2010); DeNardis, for example, emphasizes that "[…] Internet protocol design and coordination of critical Internet resources, have historically not been the exclusive purview of governments but of new *transnational institutional*

the authority of which has not been delegated formally by the international community through international law – what Mueller calls, emphasizing their emergence outside the international legal system, *organically developed internet institutions*.[24] In the performance of their regulatory functions, these institutions resort to a variety of non-legal instruments, including technical standards, which are the focus of this article. Combined with each other and with the public elements that make up the rest of the hybrid Internet governance system, these institutions determine the use and evolution of the Internet at the global level. Before embarking on their analysis in a public law perspective, an overview of global Internet governance seems apposite.

II. Global Internet Governance: International, Informal, and Private Institutions

"The Internet is the global data communication capability realized by the interconnection of public and private telecommunication networks using Internet Protocol (IP), Transmission Control Protocol (TCP), and the other protocols required to implement IP internetworking on a global scale, such as DNS [Domain Name System] and packet routing protocols."[25] At the World Summit on the Information Society (WSIS), Internet governance was defined as "[…] the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution

forms and of private ordering" (emphasis added). In L. DeNardis, 'The Emerging Field of Internet Governance', *Yale Information Society Project Working Paper Series* 2010, 1, 11-13. [DeNardis, Internet Governance]; see also M. J. van Eeten & M. Mueller, 'Where is the Governance in Internet Governance?' *New Media and Society Online Publication* (2012) 1; the reference to the Internet governance *ecosystem* is also commonplace. See, for example, Y. Benkler, 'The Battle Over the Institutional Ecosystem in the Digital Environment' 44 *Communications of the Association for Computing Machinery* (2001) 2, 84.

24 Mueller, *supra* note 23, 217.

25 There are many definitions of the Internet. I choose this one because it emphasizes the constitutive importance of technical standards in global internetworking generally and specifically of the TCP/IP protocol suite for today's Internet see Mathiason, *supra* note 4, 11; see also J. Mathiason *et al.*, 'Internet Governance: The State of Play', *Internet Governance Project Paper* (2004), available at http://www.internetgovernance.org/wordpress/wp-content/uploads/mainreport-final.pdf (last visited 9 May 2016), 6–7.

and use of the Internet."[26] This definition reflects the hybrid and complex character of the global Internet governance system. It combines the idea of governance as a process of social ordering through the concert of public and private, State and non-state actors, with the concept of international regime – understood as conceived in institutionalist international relations theory – as both the framework and the outcome of such process.[27] The governance of the Internet is thus conceptualized as the concerted development and application by State and non-state actors of the legal and, crucially for our purposes, non-legal normative materials that, beyond the State, conform the set of regimes that have come to configure an intricate "Regime Complex for Managing Global Cyber Activities".[28] While there is no international organization or framework convention providing an overarching international legal framework for the Internet, the WSIS did establish some institutional mechanisms – including the global Internet Governance Forum and a set of soft law principles, amongst which that of multi-stakeholder participation itself – for the three categories of actors to coordinate, in the fulfillment of their respective roles, with a view to achieve a set of global public policy goals to be attained within a period of ten years. These encompassing mechanisms loosely bind global Internet governance together and make it possible to reconstruct it as a distributed system of co-regulation.[29]

But what are the respective roles of public and private actors, and more specifically, what are the responsibilities of the public and private organizations

[26] Para. 34 of the World Summit on the Information Society, *Tunis Agenda for the Information Society*, WSIS-05/TUNIS/DOC/6(Rev. 1)-E.

[27] It was developed by a working group that included academics specialized, amongst other disciplines, in international relations and Internet regulation. See W. J. Drake (ed.), Reforming Internet Governance: Perspectives from the Working Group on Internet Governance (WGIG) (2005) available at http://www.wgig.org/docs/book/WGIG_book.pdf (last visited 9 May 2016); *Report of the Working Group on Internet Governance* (2005), available at http://www.wgig.org/docs/WGIGREPORT.pdf (last visited 9 May 2016).

[28] J. Nye, 'The Regime Complex for Managing Global Cyber Activities', *Paper Series by the Global Commission on Internet Governance* (2014).

[29] This structure is partly explained by the technical structure of the Internet as it is today: "[…] the Internet's architecture distributes decision making power over the internetworking […] [processes] […].", available at http://www.internetgovernance.org/wordpress/wp-content/uploads/mainreport-final.pdf (last visited 9 May 2016), 8. Emphasizing its distributed structure, W. J. Drake, 'The Distributed Architecture of Network Global Governance', in W. J. Drake & E. J. Wilson (eds), *Governing Global Electronic Networks* (2008), 1 [Drake, Network Global Governance]. Reconstructing global Internet governance in terms of co-regulation; Frydman, Hennebel & Lewkowicz, *supra* note 5, 133.

that regulate the Internet at the global level? An influential account of global Internet governance distinguished three main regulatory functions: *public policy*, *technical coordination* and *technical standardization*.[30] Whereas Internet public policy – including policy formulation, enforcement, and monitoring, as well as dispute resolution – regulates "[…] the conduct of people and organizations […]", the other two regulatory functions deal with "[…] the structure and operation of the technology."[31] Until the WSIS, Internet governance had mainly been conceived narrowly, as the governance of *critical Internet resources or Internet infrastructure*. The main critical or infrastructural issues have traditionally been IP addresses and domain names, root servers, and the data transmission protocols that constitute the Internet (the TCP/IP protocol suite).[32] These issues were generally conceived as *carriage* issues of a markedly technical character.[33] The WSIS, however, consolidated a broader understanding of Internet governance that covered the regulation of the *content* conveyed over electronic networks too – with issues such as freedom of expression, privacy, intellectual property rights or multilingualism, amongst many others – which were perceived as

30 J. Mathiason *et al.*, *supra* note 25; Mathiason, *supra* note 4. I follow authors like Malcolm in calling the second function *technical coordiantion* instead of resource allocation and assignment – which is how Mathiasson *et al.* originally called it – to cover as well with it the operational responsibilities associated with domain name and IP address allocation and assignment, such as the operation of the root servers, see Malcolm, *supra* note 23, 30. DeNardis and Raymond later developed a more nuanced taxonomy of regulatory functions. See L. DeNardis & M. Raymond, 'Thinking Clearly About Multistakeholder Internet Governance', *Paper Presented at Eighth Annual GigaNet Symposium* (2013) available at http://www.phibetaiota.net/wp-content/uploads/2013/11/Multistakeholder-Internet-Governance.pdf (last visited 9 May 2016). Although it can be argued that this threefold functional taxonomy is undermined by the very point of this paper – namely that, just like technical coordination, at least some of the standardization activity that *a priori* should be rather technical qualifies as public policy making and is therefore susceptible of being analyzed in terms of public law – I keep it as a reference because, by separating them from ICANN's technical coordination and resource allocation functions, it puts the institutions involved in Internet standard setting on a par with those performing the other two kinds of governance functions, thus highlighting their relevance and potential as public or functionally equivalent authority.

31 Mathiason *et al.*, *supra* note 25, 10.

32 Bygrave & Michaelsen, *supra* note 2, 3. For a wider account of Internet infrastructure see, however, the report on *Internet Governance and Critical Internet Resources* by the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, (2009).

33 On the distinction between content and carriage issues, see Drake, 'Network Global Governance', *supra* note 29, 10–11.

primarily political.[34] This rough distinction between political and technical regulatory issues and functions is reflected in the kind of institutions that regulate each of them.[35] Whereas content issues and public policy are the realm of States and international organizations, the *a priori* technical-infrastructural issues of standardization and technical coordination are regulated mainly by informal and private organizations.[36] The Geneva Declaration of Principles of the WSIS explicitly establishes that it is "[…] the sovereign right of States […]" to make Internet policy.[37] Beyond the State, at the global level, its place is intergovernmental organizations, many of which – such as the ITU, the WIPO or UNESCO – belong to the United Nations family.[38] These intergovernmental organizations are not centered on Internet-specific regulatory issues – although their mandates comprise issues that have some impact or are impacted by the Internet.[39] In contrast, the other two regulatory functions, resource allocation and assignment and technical standardization, are mainly carried out by an

34 In fact, this broadening of the concept of "Internet governance […] put practically all of the traditional problems of communication and information policy within its frame." Eeten & Mueller, *supra* note 23, 5.

35 "Each function is characterized by different processes and expertise, different methods of 'enforcement,' and is often carried out by different organizations." see Mathiason *et al.*, *supra* note 25, 9.

36 Malcolm provides an alternative way to distinguish public policy governance from the other two functions: "One way in which to usefully distinguish it from technical coordination and standards development is that the problems engaged by public policy governance are more likely to be problems of *regulation*, rather than coordination." Malcolm, *supra* note 23, 30; In general, problems of regulation, i.e. deriving from the production of negative externalities, require hierarchical governance structures in order to neutralize such externalities and, therefore, pose problems of democratic legitimacy. On the distinction between coordinative and regulative problems see B. Holznagel & R. Werle, 'Sectors and Strategies of Global Communications Regulation', 17 *Technology and Policy* (2004) 2, 19. Malcolm is rightly cautious: standardization and resource allocation and assignment are *more likely* to be problems of coordination.

37 Para. 35 (a) of the World Summit on the Information Society, *Tunis Agenda for the Information Society*, WSIS-05/TUNIS/DOC/6(Rev. 1)-E.

38 Y. Schemeil, 'Global Governance: Evolution and Innovation in International Relations', in E. Brousseau, M. Maryouki & C. Méadel (eds), *Governance, Regulation and Powers on the Internet* (2012).

39 That is,"[…] [problems] that arise as a direct consequence of the involved parties' mutual use of the Internet protocols to communicate globally." see Mathiason *et al.*, *supra* note 25, 8; see also L. B. Solum, 'Models of Internet Governance', in Bygrave & Bing, *supra* note 2, 45, sec. B. II.

extensive network of *ad-hoc* institutions, within which private and informal organizations play a leading role.[40]

C. A Public Law Approach to Informal and Private Authority

I. The Public Turn

In response to the governance turn in world politics and law, and to the associated informalization and privatization of authority that global Internet governance epitomizes, a *public turn*, a turn to public authority and law,[41] has arguably taken place in legal scholarship and neighboring disciplines during the last decade.[42] This turn to the public has been prompted, first, by the insight that much of global governance has a highly political character.[43] It has come to constitute a *domain of rule*[44] over States and, increasingly, private entities and individuals.[45] Second, such capacity to rule is often institutionalized in such a way that it is susceptible of being understood in terms of public authority and law.[46] Although the literature becomes ever richer and more complex, there

40 Mathiason, *supra* note 4, 18.

41 Qualifying it as a "public turn" and as a new "paradigm" see Krisch, *supra* note 7, 976, 976–977. Although in a different sense, and referring specifically to IPA, Kadelbach suggests as well that the public law approach of the Heidelberg school entails a "change in paradigm: from private law to public law as a system of reference" for international legal doctrine. S. Kadelbach, 'From Public International Law to International Public Law: A Comment on the 'Public Authority' of International Institutions and the 'Publicness' of their Law' in A. von Bogdandy *et al.* (eds), The Exercise of Public Authority by International Institutions: Advancing International Institutional Law (2010), 33, 42 [Bogdandy et al., The Exercise of Public Authority by International Institutions].

42 Synthetically characterizing it as such are Kohler-Koch & Rittberger, *supra* note 9, 28–31 and K. Dingwerth & P. Pattberg, 'Global Governance as a Perspective on World Politics' 12 *Global Governance* (2006) 2, 185.

43 Krisch, *supra* note 7, page 977.

44 H. Enroth, 'The Concept of Authority Transnationalised' 4 T*ransantional Legal Theory* (2013) 3, 336, 337–338; Peters & Schaffer, *supra* note 18, 315.

45 A. von Bogdandy, A. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in A. von Bogdandy *et al.*, *The Exercise of Public Authority by International Institutions*, *supra* note 41, 3, 4.

46 E.g. "The idea of public authority is powerful as a lens through which to observe and understand emerging structures of global governance." see Krisch, *supra* note 7, 976, 985–

are three leading frameworks for the conceptualization of global governance specifically from the perspective of public law: *postnational constitutionalism, global administrative law* (GAL) and the *international public authority* (IPA) approach.[47] In what follows I focus on IPA because, although it is a distinct theory,[48] it combines administrative and constitutional perspectives, and it incorporates elements of the other two theories.[49] The common purpose of these theories is "[…] understanding, framing and taming […]" global governance

986. In fact, Peters and Schaffer reconstruct the centrality that the concept of authority has acquired in international studies as a *turn to authority*. As they point out, "[…] this turn to authority represents both claims that there has been an empirical shift, with ever more institutions and actors, public and private, expanding their claims to authority over states and other subjects, and a theoretical shift, where adding 'international authority' to the conceptual toolbox available to researchers allows them to see and describe the empirical shift, or dispute such claims." see Peters & Schaffer, *supra* note 18, 315, 318.

47 These are all quite wide and diverse theoretical strands, each rooted on its own precedents. In the case of IPA and GAL, their fundamental tenets can be found in concept papers laying out their theoretical frameworks or research concepts. For the PLA, see Bogdandy *et al.*, *The exercise of Public Authority by International Institutions*, *supra* note 42; With respect to GAL, see B. Kingsbury *et al.*, 'Global Governance as Administration – National and Transnational Approaches to Global Administratie Law', 68 *Law and Contemporary Problems*, (2005) 3, 1; and B. Kingsbury, N. Krisch & R. B. Stewart, 'The Emergence of Global Administrative Law' 68 *Law and Contemporary Problems* (2005) 3–4, 15. Postnational Constitutionalism, on the other hand, has more robust historical roots, and although it can be said to have revived after the end of the Cold War too, it has become such a complex theoretical stream that it is difficult to trace back to any single contribution. For an overview, see C. E. J. Schwöbel, 'Situating the Debate on Global Constitutionalim' 8 *International Journal of Constitutional Law* (2011) 3, 611; A. Wiener, *Global Constitutionalism* (2012). Of the many recent remarkable contributions, see, for example, J. Dunoff & J. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (2009); J. Klabbers, A. Peters, & G. Ulfstein, *The Constitutionalization of International Law* (2009); N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010) [Krisch, Beyond Constitutionalism]; M. Loughlin & P. Dobner (eds) *The Twilight of Constitutionalism* (2010) and G. Teubner, *Constitutional Fragments: Societal Constitutionalims and Globalization* (2012).

48 IPA is "[…] not a simple fusion of existing methods, but an alternative system that is firmly rooted in European public domestic law." see S. Leibfreid, 'To Tame and to Frame' in Bogdandy *et al.*, *The exercise of Public Authority by International Institutions*, *supra* note 41, 51, 52. For an explanation of what it means to theorize global governance from the perspective of public law, see M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' in A. von Bogdandy *et al.*, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, *supra* note 41, 661 [Goldmann, Inside Relative Normativity, in Bogdandy et al.].

49 Bogdandy, Dann & Goldmann, *supra* note 45, 21–26 (sec. C.III).

through public law.[50] They use public law concepts for descriptive-reconstructive purposes, but also as categories for the critical analysis of the institutions of global governance, and as potential models for the development, respectively, of constitutional, administrative or public law frameworks that ensure their public accountability and, thereby, their legitimacy.[51]

The focus of these approaches is on formal public institutions. But the strong presence of informal and private instutions wielding authority beyond the State has brought these theories to inquire whether and, if so, in what way public law can be used to legitimize such kinds of authority as well. With a view to applying it to the specific context of global Internet governance in the next section, this section examines how one of such theories, IPA, treats the exercise of authority by private and informal institutions. After an overview of IPA as a public law approach (C. II.), the section introduces IPA's understanding of international public authority, before turning to the way IPA expands the scope of its public law analysis to cover not only international public, but also informal (C. III.) and private (C. IV) exercises of authority.

II. IPA as a Public Law Approach to Global Governance

As a public law approach to global governance, IPA addresses the problem of the legitimacy of global governance institutions specifically from the perspective of public law. It proceeds by identifying those institutions of global governance the activity of which can be understood as an exercise of international public authority, and then critically analyzing their legal framework in order to ensure it provides democratic legitimacy.

Like the other public law approaches, IPA's understanding of and response to the problem of legitimizing global governance is based on a specific normative conception of the relationship between public authority and public law. IPA's fundamental normative tenet is that, in order for public authority to be legitimate, it must be subjected to a proper public law framework.[52] In other words, although it cannot be regarded as a sufficient condition, a legal framework regulating the exercise of public authority according to the standards of public law is a necessary condition for it to be legitimate.[53] This is a central

50 Ibid., 26.

51 M. Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)' (2013), available at http://ssrn.com/abstract=2260293 (last visited 9 May 2016), 2.

52 Bogdandy, Dann & Goldmann, *supra* note 45, 5.

53 Ibid., 16.

aspect of the rule of law, so it can be said that IPA's purpose is to develop the rule of law in the postnational domain.[54]

In order to legitimize the exercise of public authority beyond the State, IPA proposes to develop international law into a properly public law, as public law is understood in the liberal democratic tradition.[55] In this tradition, public law is conceived as having two functions: the *constitutive function*, according to which only public law can enable the exercise of public authority, and the *limiting function*, which consists in legally establishing substantive and procedural constraints to the exercise of public authority.[56] In its enabling aspect, public law determines the production of public authority as the expression of the collective self-determination of a public. This enabling function not only allows for authority to be effective but is already inherently limiting because it rules out the possibility for any exercise of political authority that is not based on public law to qualify as public. In addition to this positive subjection of public authority to the legal form, the limiting function of public law consists in the establishment of substantive and procedural conditions for authority to be legitimate. The principles or standards that define the liberal democratic idea of public law – such as transparency, participation, legality, etc. – are oriented at establishing the conditions under which the exercise of authority can be conceived as an act of collective self-determination advancing the public interest, simultaneously enabling individual and collective freedom and preserving it against that very authority.[57]

This aspiration situates *international public authority* and *international institutional law* as IPA's most central concerns, the core of its object of analysis. As it has been pointed out, the main sites of authority outside the State in global governance are international organizations and similar autonomous institutions

54 On the rule of law as a gradual institutional ideal, see A. Marmor, 'The Ideal of the Rule of Law' in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. (2010), 666; G. Palombella, 'The Rule of Law as an Instirutional Ideal' in G. Palombella & L. Morlino (eds), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (2010), 3; On the extension of rule of law to global governance, including to non-legal regulatory systems, see M. Kötter & G. F. Schuppert, 'Applying the Rule of Law to Contexts Beyond the State' in J. R. Silkenat, J. E. Hickey & P. D. Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (2014), 71.

55 Bogdandy, Dann & Goldmann, *supra* note 45, 9, 13.

56 Ibid., 9–10.

57 Goldmann roots this functional characterization of public law in Habermas' discourse theory of democracy. See Goldmann, 'A Matter of Perspective', *supra* note 51, 8–9.

of international law.[58] The law regulating such authority is international institutional law, the law of international organizations.[59] Therefore, a critical public law approach to global governance seeking to descriptively reconstruct the legal-institutional framework that frames the exercise of authority beyond the State and to develop it into public law proper will primarily be reconstructing and developing international institutional law – and, thereby, the "[…] publicness of public international law […]" generally.[60] The problem is that, in the current state of development of international institutional law, it is still "[…] very difficult to construe a meaningful argument regarding the legality of an exercise of international public authority."[61] Even in those ambits where such argument can be construed, the legality of public authority does not necessarily entail a strong claim to legitimacy – let alone one that satisfies liberal democratic standards of legitimacy as they are captured in domestic public law.[62] IPA's purpose in developing international institutional law according to the standards of liberal democracy is to enable such assessments of legality to be made with respect to every exercise of public authority beyond the State, and that the authority exercised on the basis and within the limits of international institutional law can be presumed to be legitimate.[63]

58 Highlighting the sources of authority and autonomy of international organizations and some less formal institutions by conceptualizing them as autonomous bureaucracies, I. Venzke, 'Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction' 14 *Theoretical Inquiries in Law* (2013) 2, 381; J. von Bernstorff, 'Procedures in Decision-Making and the Role of Law in International Organizations' in Bogdandy *et al.*, *supra* note 41, 777; Conceptualizing international courts as autonomous actors wielding public authority, see A. von Bogdandy & I. Venzke, 'In Whose Name? An Inversitgation of International Courts' Public Authority and Its Democratic Justification' 23 *European Journal of International Law* (2012) 1, 7.

59 I.e., heuristically, the conception of international law that is synthesized in the list of sources of Art. 38 (1) of the *Statute of the International Court of Justice*, 24 October 1945, 1 UNTS XVI.

60 Bogdandy, Dann & Goldmann, *supra* note 45, 3, 6.

61 Ibid., 3, 19. The problem results, on the one hand, from the absence of a general law of international institutions (see Bernstorff, *supra* note 58, 779) and on the other, from the fact that, in those regimes where public authority is actually exercised, international institutional law is, where available, underdeveloped. Qualifying the available legal standards as "rudimentary", for example, Kadelbach, *supra* note 41, 43.

62 Bogdandy, Dann & Goldmann, *supra* note 45, 20–21.

63 Goldmann, 'A Matter of Perspective', *supra* note 51, 9–10; J. Habermas, *Facticidd y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*, 5th ed. (2008), sec. 1.III.1.

But a critical analysis seeking to legitimize global governance through public law can no longer focus exclusively on formal, international-legal authority. Turning a blind eye on the informal and private forms of authority that characterize governance beyond the State would leave uncovered a significant portion of the regulatory activity that poses the kind of legitimacy problems addressed by public law.[64] This is why the IPA approach broadens the object of public law analysis in a double sense. First, it focuses on the *exercise* of international public authority by *international institutions*, which brings informal exercises of authority within its scope of analysis. Second, it covers the exercise of authority by private institutions, identifying them as an object for *public* law analysis when the authority they exercise qualifies as either public or *functionally equivalent to international public authority*.

III. Bringing the Exercise of Authority by Informal Institutions Under the Scope of International Public Law Analysis

IPA defines the *exercise of public authority by international institutions* as the realization of an international institution's "[…] law-based capacity to legally or factually limit or otherwise affect other persons' or entities' use of their freedom"[65] Authority is conceived, thus, as institutionalized capacity – a competence, right or entitlement – to unilaterally – that is, without the passive subject of authority's direct consent – determine others in a way that qualifies as an affectation of freedom.[66] Such affectation may be positive or negative, concern individual or collective liberty, and the subject of authority may be a private or a public entity.[67]

Crucially for this article's purposes, this concept of international public authority acknowledges that it may be exercised by *formal or informal* international institutions, and that the subjects' freedom may be affected *legally*

64 Bogdandy, Dann & Goldmann, *supra* note 45, 3,11.

65 Goldmann, 'A Matter of Perspective', *supra* note 51, 11, referring to an almost identical formulation in Bogdandy & Venzke, *supra* note 58, 7, 18.

66 I unfold the former definition, which synthesizes and slightly modifies the original one, on the basis of IPA's concept paper, where it was defined as follows: "How exactly do we define the exercise of international public authority? For this project, we define *authority* as the legal capacity to *determine* others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation. An exercise is the realization of that capacity, in particular by the production of standard instruments such as decisions and regulations, but also by the dissemination of information, like rankings. The determination may or may not be legally binding." see Bogdandy, Dann & Goldmann, *supra* note 45, 11.

67 Ibid., 5.

or factually. In other words, international public authority may be informal from the point of view of international law, be it with respect to the institution exercising it or the instruments through which it is exercised.[68]

Regarding institutional informality, a traditional analysis of international institutional law would cover only *international organizations* as the only organizations established in an instrument of international law and possessing international legal personality.[69] IPA, in contrast, applies public law standards to institutions "[…] in the sense of organizational sociology […],"[70] provided they exercise international public authority. The analysis in terms of public law of informal institutions such as the G20 is possible because "[…] the operation and action of many informal institutions are governed by rules in a similar way to that of formal international organizations."[71] This makes IPA adequate for an analysis of the informal organizations dominating global Internet governance.

The second dimension of the informalization of authority is the diversification of regulatory instruments,[72] understood as "the concrete acts by which institutions intend to reach their policy objectives,"[73] in which the exercise of international public authority is actualized. IPA's conception of authority acknowledges that, just like States, international institutions can affect freedom by means of binding law; that is, by modifying the legal situation of the subject, but also through non-binding *soft law* and even *non-deontic* instruments, which determine the subject's factual situation.[74] Soft law instruments may therefore fall within the scope of IPA's analysis even if they do not qualify as law in any proper sense.[75] It is one of IPA's strengths that it clearly distinguishes the question of the

68 As put in IPA's concept paper: "Research on global governance has […] convincingly demonstrated that constraining effects do not only emanate from binding instruments or legal subjects" Bogdandy, Dann & Goldmann, *supra* note 45, 1381.

69 As well as "[...] institutions with a different legal status, such as treaty regimes and informal regimes (e.g. the OSCE)." see von Bogdandy, Dann & Goldmann, *supra* note 45, 26; on the concept of international organization, see ILC 'Report of the International Law Commission, Fifty-fifth Session' (5 May–6 July and 7 July–8 August 2003) GAOR 58th Session Supp 10, A/3810.

70 Bogdandy, Dann & Goldmann, *supra* note 45, 15 and 16.

71 Ibid.

72 Goldmann, 'A Matter of Perspective', *supra* note 51, 12.

73 See footnote 83 on page 89 in Bogdandy, Dann & Goldmann, *supra* note 45.

74 Ibid., 11.

75 The juridicity of concrete soft law instruments is disputed under the light of the more abstract controversy around the juridicity of soft law. For a synthesis of the debate, see Goldmann, 'Inside Relative Normativity' in Bogdandy *et al.*, *supra* note 48, 671 677 (sec. B.I.); on the relationship between informality and softness in law, see, for example,

legal character of such instruments from that of their authoritativeness. At least in the case of those instruments whose authoritativeness does not stem from their legal character – as it often, but not necessarily, happens with technical standards – both analyses can be conducted separately. Insofar as they effectively condition or constrain the freedom of their addressees, IPA understands soft legal instruments as international public authority. As will be shown, this is the case of Internet standards, the authoritativeness of which does not derive from their being binding legal instruments, be it by reference or incorporation, and regardless of whether they are seen as a form of non-official law, so the question of their legal character can be left open.[76]

In order to facilitate the identification of exercises of authority, i.e to establish whether an instrument affects the freedom of its addressee, Goldmann identifies several "[…] ideal types […] for the determination of authority."[77] He points out, in line with Habermasian discourse theory, that authority requires a mechanism of *extrinsic motivation*, i.e. motivation through events external to the subject of authority. More specifically, authority according to Goldmann requires at least a mechanism that triggers *extrinsic regulation* or *introjection*, which boil down to the possibility of physical enforcement, the capacity to impose positive or negative sanctions, and discursive constraints.[78] This development is important because, on the one hand, it emphasized the behavioral aspect of the exercise of authority, its capacity to determine conduct, which is not so apparent in the abovementioned concept of authority. The concept paper defined authority as the capacity to unilaterally affect the legally or morally conceived freedom of a subject, but did not specify that it needed to *motivate* the subject to adopt any particular course of action. This conceptualization of authority on the basis of reasons for action reflects the importance of motivation-based authority in legal, market, and social norm regulation. As will be seen later,[79] however, technical

Lobel, *supra* note 5, 308–316; J. Pauwelyn, R. Wessel & J. Wouters, 'The Exercise of Public Authority Throught Informal International Law Making: An Accountability Issue?', *Jean Monnet Working Paper*, 2011/6, available at http://doc.utwente.nl/81510/ (last visited 7 May 2016) [Pauwelyn, Wessel & Wouters, Exercise of Public Authority].

76 Saying, for example, that IETF and W3C's standards are not incorporated by reference into international trade law, see S. von Schorlemer, 'Telecommunications, International Regulation' in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), 818, 823, para. 33; for an overview of the ways in which privately produced technical standards are brought into legal systems and of the solutions to the legitimacy problems this comports within and beyond the State see DeBellis, *supra* note 16, 425.

77 Goldmann, 'A Matter of Perspective', *supra* note 51, 11.

78 Ibid., 13.

79 Infra sec. D. II. 2.

standards do not fit easily into any of these traditional categories. They can be conceptualized, instead, as an instrument of *regulation through technology* or, specifically in the Internet and cyberspace, through *code*, which is a distinct model of regulation that is characterized precisely by its capacity to determine technology users' behavior regardless of their motivation. Internet governance can thus enrich IPA by adding them to the motivation-based catalogue of *types for the determination of authority*.

IV. Bringing the Exercise of Authority by Private Institutions Under the Scope of International Public Law Analysis

The second sense in which IPA broadens the focus of public law analysis is by extending it to exercises of authority by private institutions. As explained above, a significant aspect of the turn to governance has been the *privatization* of authority, including both the formal delegation to, and the spontaneous assumption by, private law institutions of regulatory functions formerly reserved to the State, often through private law instruments.

According to IPA's concept paper, for authority to qualify as *public* and *international* it must be "[…] exercised on the basis of a competence instituted by a common international act of public authorities, mostly States, to further a goal which they define, and are authorized to define, as a public interest."[80] Thus, the distinction between public and private authority remains a legal one, although it is not based, again, on the legal basis of the institution, but of the authoritative act or instrument. Those institutions exercising authority in virtue of a competence that has been validly delegated and declared to be of public interest can be said to exercise international public authority proper, even if they are instituted as private law entities or exercise it through private law instruments.[81]

The concept paper proposed a criterion, however, for extending public law analysis even further, to cover the exercise of authority by hybrid and private law institutions and instruments even in the absence of such delegation of competence. As we will see, this is the case of the IETF or the W3C.[82]

[80] Bogdandy, Dann & Goldmann, *supra* note 45, 13.

[81] On the importance of contracts in Internet governance, see L. A. Bygrave, 'Contract Versus Statute in Internet Governance', in I. Brown (ed.), *Research Handbook on Governance of the Internet* (2012).

[82] See *infra*, sec. D. II., and R. A. Wessel, 'Regulating Technological Innovation Through Informal International Law: The Exercise of International Public Authority by Transnational Actors' in M. A. Heldeweg & E. Kica (eds), *Regulating Technological Innovation: A Multidisciplinary Approach* (2011), 77.

These institutions ought to be assessed by and subjected to the same public law standards that apply to public authority if their exercise of authority is *functionally equivalent* to the authority of institutions validly established under international public law for the pursuance of public interests.[83] They would not be exercising international public authority, because this would require that the act or instrument in question had a public law basis, but an authority that should be treated as such because it performs an equivalent function in the public interest. The concept paper mentions a set of examples of regulatory functions typically considered of public interest: measures affecting public goods, global infrastructure management, and the balancing of colliding fundamental interests of different social groups.[84] According to IPA's original account, thus, the public character of an authoritative act can be established either directly, by reference to a basis in public law – beyond the State, international public law – or indirectly, by analogy with the activity of other institutions performing the same regulatory function on a public legal basis declaring its public interest. As an example of such functional equivalence between private and public authority, the concept paper refers to ICANN.[85]

IPA's original conception of public authority suggests that a public law basis is, if not the only conceivable, at least a valid way to establish whether authority is exercised in the name and interest of a public. Indeed, at least as conceived in the liberal democratic tradition, domestic public law enables the formation, determination, and expression of the collective will of a legally constituted political community. It is a means for collective self-determination, for the definition of the public interest. The problem is that international law cannot be described as being the public law of global governance in the same sense as public law is understood within the State. A basis in international law does not suffice to claim representation of a public interest in a postnational order characterized by legal and political pluralism.[86] Neither can, as Goldmann points out, the public interest be defined materially – no set of matters are always of public interest. It is the product of public discourse.[87] Accordingly, the fact that a private law institution exercises authority in fulfillment of a regulatory function that is typically considered of public interest does not suffice on its

83 Bogdandy, Dann & Goldmann, *supra* note 45, 14.
84 Ibid., 14.
85 Ibid., 14. See section D. I.
86 On such pluralism, see, for example Krisch, Beyond Constitutionalism, *supra* note 47; N. Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms', 3 *Transnational Legal Theory* (2012) 1, 61.
87 Goldmann, 'A Matter of Perspective', *supra* note 51, 18.

own to justify the applicability of public law standards. It must qualify as public authority proper. This does not, however, negate a heuristic value of the original functional equivalence criterion, which remains effective in guiding our attention to putative exercises of properly public authority.

Goldmann has recently suggested an alternative reconstruction of the distinction between public and private authority that offers some deeper theoretical ground for IPA's original criterion and contemplates the possibility of private formal and informal organizations exercising public authority proper even in the absence of delegation. Adapting the discourse theory of democracy for the legitimation of public authority in global governance, he suggests that "[…] an authoritative act is to be classified as one of public authority, if […] [in the perspective of the affected person or entity, the actor may reasonably claim] to act on behalf of a community of which the affected person or entity is a member, or a member of such member."[88] Private authority is characterized, in turn, as based on a realization of private autonomy, an act of individual self-determination oriented at advancing individual self-interests – even if it is exercised collectively. The public or private character of an exercise of authority depends, thus, on the relationship between the authority wielder and the community, on the one hand, and between such community and the passive subjects of authority, on the other.

Regarding the first relationship, for authority to qualify as public, the authority wielder must have a *reasonable* claim to represent the community, i.e. to act in its name, and it must be possible to reconstruct the exercise of authority as an act of collective self-determination defining the public, common interest of that community. What renders such a claim to act on behalf of the relevant community reasonable is the existence of a plausible legal basis for doing so.[89] The difference with respect to IPA's original position on the exercise of authority by formally private institutions is that such legal basis need not be one of public law: "[...] [associations] governed by domestic private law such as standardization organizations or professional associations might very well exercise public authority over their members (and even beyond, if acting upon an entitlement by an international institution)."[90]

Regarding the second relationship, for an exercise of authority to qualify as public, its passive subject must be a member of the community in whose name

88 Ibid., 19.
89 Ibid., 23.
90 Ibid., 22.

it is exercised.[91] Community membership is defined by reference to a shared *identity*, understood as "[...] shared elements in the self-understanding of the members of a community on the supranational level."[92] This requirement stems from discourse theory, which conceives this common layer of self-understanding as a necessary condition for communicative action or *arguing*, which is the basis of normative reasoning, and thus of the kind of discourse through which the public interests of a community can be defined.[93] In a nutshell, only a community with a shared identity may qualify as a public. What matters here is that, according to Goldmann's account, the industry or professional groups that engage in transnational self-regulation of their respective sectors through formal, private non-profit corporations – such as ICANN or the Internet Society – or through informal institutions – such as the IETF or the W3C – may indeed be capable of engaging in the kind of public discourse that is necessary for the formation of public interests, and qualify as publics.[94]

According to Goldmann's account, therefore, an exercise of authority may be public for some of its passive subjects and private for others – a matter of perspective. An exercise of authority in the name of a given community is public from the perspective of its members but private from the perspective of the non-members of such community – an externality that, if assessed by legal standards, should be assessed by the standards of private, tort law.[95] If that externality unilaterally affects freedom to an extent that cannot be justified by reference to such standards, i.e. by reference to private autonomy, the regulatory activity in question must be either regulated or directly assumed by a more inclusive public authority.[96] Intermediate solutions consist in hybridizing the institution, for example by allowing for States or public institutions to become members – as exemplified, again, by ICANN's Governmental Advisory Board – or situating it within hybrid regulatory frameworks.[97]

91 Goldmann, 'A Matter of Perspective', *supra* note 51,19.
92 Ibid., 24.
93 Ibid., 20.
94 Ibid., 26–27.
95 Ibid., 21.
96 Ibid., 2.
97 B. Carotti & L. Casini, 'A Hybrid Public Private Regime: The Internet Corporation for Assigned Names and Numbers (ICANN) and the Governance of the Internet' in S. Cassese *et al.* (eds), *Global Administrative Law: Cases, Materials, Issues*, 2nd ed. (2008), 29, 32; Weitzenboeck, *supra* note 15, 73.

D. The Exercise of Authority by Informal and Private Institutions in Global Internet Governance

If Internet governance is conceived broadly, as including any Internet-related public policy issue, then the natural starting point for a public law analysis would be the intergovernmental organizations and institutions that are somehow involved in Internet policy making. It is in these institutions that exercises of international public authority as conceived by the Heidelberg school are most likely to be found. My interest here, however, is on the private and informal institutions that dominate the (in principle) mainly technical aspects of Internet governance, because they provide an opportunity to test IPA's approach to informal and private regulatory authority beyond the State.

As we have seen, there are two distinct Internet governance functions that, at the global level, are performed mainly by informal and private organizations: technical coordination and technical standardization. The first is carried out by ICANN, whereas two non-state organizations stand out as the most important developers of Internet standards globally: the IETF and the W3C.[98] In what follows, I first provide a brief account of ICANN (D. I.) and then turn to consider whether the development of IETF and W3C's main standards can be reconstructed as an exercise of authority (D. II.) of the kind that is relevant from the perspective of public law (D. III.).

I. Technical Coordination: ICANN and Functional Equivalence

The most relevant Internet-specific institution involved in technical coordination is ICANN. It is constituted as an institution of private law – a non-profit corporation under California Law. As such, it has a public interest purpose.[99] ICANN has exclusive global authority over the allocation and assignment of Internet unique identifiers – Internet domain names and IP numeric addresses – which situates it at the apex of one of the core regimes in global Internet governance and makes it the center of control over the global Internet. This authority over top-level domain names and IP addresses derives, in fact, from its control of the root zone file – the Internet Assigned Numbers Authority (IANA) functions – which was delegated to ICANN through a contract with the United States Department of Commerce's National Telecommunications

[98] Lips & Koops, *supra* note 23, 117.

[99] *California Corporate Code*, para. 5111. Available at http://www.leginfo.ca.gov/.html/corp_table_of_contents.html (last visited 8 May 2016).

and Information Administration (NTIA).[100] The organization's claim that it represents the global public is based on the multi-stakeholder model, an institutional structure that represents the diverse constituencies that are affected by its regulatory activity.

The idea that ICANN's activity entails the exercise of public authority underlies much of the abundant literature that has been produced on the organization from its very inception.[101] Many of the critical assessments and proposals to reform ICANN have implicitly or explicitly followed a public law approach.[102] The notion that ICANN poses the kind of legitimacy problems that public law addresses was therefore established well before public law theories of global governance came to provide a theoretical justification for analyzing the legitimacy of institutions of its kind in terms of public law. In this respect, the organization has been analyzed under the lens of the two main theoretical alternatives to IPA: constitutional pluralism and global administrative law (GAL). Regarding the former, some reconstructions of global Internet governance in general, and of ICANN specifically, are based on the thesis that private transnational regimes and organizations are susceptible of developing, and ought to develop, as constitutional legal-political systems.[103] GAL literature, by contrast, sees ICANN's regulatory activity as *administration* and analyzes ICANN's accountability and legal framework in terms of administrative

100 DeNardis, 'Internet Governance', *supra* note 23, 15; Froomkin, *supra* note 100, 839.

101 E.g. H. Klein, 'ICANN and Internet governance: Leveraging technical coordination to realize global public policy.' 18 *The Information Society* (2002) 3, 193; J. Palfrey, 'The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed', 17 *Harvard Journal of Law & Technologoy* (2003) 409; J. Weinberg, ICANN and the Problem of Legitimacy', 50 *Duke Law Journal* (2000) 1, 187.

102 Even if much of this literature is pragmatically oriented and its use of such concepts is rather heuristic. E.g. "In a certain sense ICANN encompasses the classic state functions of the legislative (i.e. the determination of top level domains), executive (allocation of sub-domains), and judiciary branches. However, any separation of powers is missing as is an unambiguous democratic legitimacy." Holznagel & Werle, *supra* note 36, 25.

103 A. C. Jamart, 'Internet Freedom and the Constitutionalization of Internet Governance', in R. Radu, J.-M. Chenou, & R. H. Weber (eds), *The Evolution of Global Internet Governance. Principles and Policies in the Making* (2013), 57; R. H. Weber & R. S. Gunnarson, 'A Constitutional Solution for Internet Governance' 14 *Columbia Science and Technology Law Review* (2012) 3.

law.[104] IPA too has recognized ICANN's importance.[105] It identifies ICANN as the paradigmatic case of private institution whose authority is functionally equivalent to international public authority, and illustrates the articulation of this particular criterion for extending public law analysis beyond public law institutions precisely with ICANN's example.[106] The idea that public law is useful for assessing and improving the legitimacy of ICANN's unique identifiers regime is thus accepted by all three theories.

II. Technical Standardization: The Exercise of Authority by the IETF and the W3C

While critical public law discourse has so far focused on ICANN, authors such as Wessel have already suggested that a more comprehensive approach to global Internet governance should extend beyond the unique identifiers regime and embrace the private and informal institutions that prevail in technical standardization. Although Wessel does advance the idea that the IETF exercises international public authority, an account of such authoritativeness and a justification of its public character remain to be provided.[107] The purpose of this section and the following one is to test the grounds for the thesis that the development of some Internet technical standards qualifies as an exercise of the kind of authority that should be analyzed through the lens and framed by public law. Rather than an exhaustive study of all the institutions involved in Internet technical standardization, this section focuses on the IETF and the W3C as the organizations that develop the most important Internet standards. In order to do so, I first provide a brief account of such standards and institutions. I

104 M. Andjelkovic, *Internet Governance: In the Footsteps of Global Administrative Law* (2006); Carotti & Casini *supra* note 97; B. Carotti, 'Alternative Dispute Resolution: The ICANN's Uniform Dispute Resolution Policy (UDRP)', in Cassese *et al.*, *supra* note 97, 154; B. Carotti, 'New Protection Mechanisms: The ICANN's Reconsideration Committee and the Verio case', in Cassese *et al.*, *supra* note 97, 160.

105 M. Hartwig, 'ICANN – Governance by Technical Necessity' in Bogdandy *et al.*, *supra* note 41, 575, 605.

106 Bogdandy, Dann & Goldmann, *supra* note 45, 14.

107 R. Wessel, 'Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors' in M. A. Heldeweg & E. Kica (eds), Regulating Technological Innovation: A Multidisciplinary Approach (2011), 77, 88; although Wessel does apply IPA's conception of international public authority to several global Internet governance institutions, including the IETF, the main purpose of his analysis is to identify *informal international law* regulating technological innovation in Internet governance.

then introduce the *code thesis* and the economic concept of network effects or externalities, which combined explain how the production of such standards may qualify as an exercise of authority in IPA's sense. Finally, in the last section, I turn to the question whether such authority is public or functionally equivalent to that of technical standards developed by international public organizations, thus requiring a public law analysis.

1. The Development of Technical Standards for the Internet

The Internet is a global network of electronic data networks, a worldwide digital communications system over which an ample variety of ICT-based services and products are offered. These services and products require the diverse technologies in which they are based to be interoperable, and technical standards or communications protocols are what enable such technical interoperability. ICT technical standards or protocols can be defined as published instructions or specifications, i.e. sets of technical rules and conventions, that enable computing devices to exchange information over a given physical infrastructure or hardware.[108]

Although their general function is to provide interoperability among diverse technologies, the operation of the Internet involves a combination of myriad protocols with more specific functions – such as breaking data into packets or switching and routing them over the Internet – which are invisible to the general Internet user. Internet standards broadly conceived comprise any technical standards produced for the Internet,[109] but the most important

[108] Mathiason *et al*., *supra* note 25, 6; Solum, *supra* note 39, 67. As L. DeNardis explains, ICT technical standards or protocols "are not software code nor material products but are language – textual and numerical language. They are the blueprints that enable technical interoperability among heterogeneous technology products." In general, they "[…] provide order to the binary streams (0s and 1s) that represent information and that digital computing devices use to specify common data formats, interfaces, networking conventions, and procedures for enabling interoperability among devices that adhere to these protocols, regardless of geographical location or manufacturer." In DeNardis, ‚Internet Governance', *supra* note 23, 6. *Network* protocols are in fact a subset of ICT technical standards, those that operate at the network layer of an electronic communications system such as the Internet – the technical standards for internetworking proper – but the term is often used in reference to ICT standards generally.

[109] Internet standards narrowly conceived are associated with the IETF, which defines them as follows: "a specification of a protocol, system behaviour or procedure that has a unique identifier, and where the IETF has agreed that 'if you want to do this thing, this is the description of how to do it'. I take the distinction between broad and narrow conceptions of Internet standards from Malcolm, but widen it to cover also non-committee standards

Internet standards are a set of standards known as the *Transmission Control Protocol/Internet Protocol (TCP/IP) suite*. These are the protocols that constitute the logical backbone of the Internet.[110] Some of them are necessary for virtually any end-to-end communication over the Internet,[111] and others for the most common modalities of Internet use.

TCP/IP is also a model that classifies protocols according to their function.[112] The TCP/IP model is divided into four functional layers. Each layer provides service to the layer on top of it, and is a client for the layers under it. The most fundamental functional layer of the TCP/IP model is the *link layer*, and it includes all those protocols enabling communication between computing devices and transmission media, such as Ethernet, Digital Subscriber Line (DSL) or Wi-Fi. On top of it, we find the *internet layer*, where the Internet Protocol (IP) suite – including both the IPv4 and IPv6 versions – itself operates, and which allows for *internetworking* proper, i.e. for the addressing and routing of data packets among different networks. On top of the Internet layer, the transport layer of functional abstraction includes protocols such as the Transmission Control Protocol (TCP) and User Datagram Protocol (UDP), which break and reassemble data into packets and control errors in their delivery. The highest layer of functional abstraction, finally, is the *application layer*, which includes all those protocols regulating the interaction between the Internet and programs using the Internet (software or applications), including Hypertext Transfer Protocol (HTTP), Domain Name System (DNS), Simple Mail Transport Protocol (SMTP), and File Transport Protocol (FTP). From the original two protocols, the TCP/IP suite has gradually expanded to include those that enable what have become mainstream modalities of Internet communication, such as those enabling the exchange of sound, image, and video – like MP3, JEPG, or MPEG – Voice over IP (VoIP) protocols, or Internet access standards.[113]

– standards developed outside standard setting organizations, or market standards; Malcolm, *supra* note 25, 51.

110 Mathiason, *supra* note 4, 11; Mathiason *et al.*, *supra* note 25, 6–7.

111 R. Braden (ed.), 'Requirements for Internet Hosts -- Communication Layers' (1989), available at http://tools.ietf.org/html/rfc1122 (last visited 8 May 2016).

112 L. Lessig, *Code and Other Laws of Cyberspace. Version 2.0*, (2006), 143–145 [Lessig, Code: Version 2.0].

113 DeNardis, 'Internet Governance', *supra* note 23, 7–8. Although in practice they are necessary not only for the Internet but for any communications system, the standards that operate at the lower layer of the OSI model – the physical layer of the OSI model – fall out of the scope of the TCP/IP model and cannot, therefore, qualify as Internet standards. The Internet is just one of the communications systems running on telecommunications networks, and it is compatible with any physical infrastructure or hardware. See, for a

The standards of the TCP/IP suite are committee standards, i.e. standards developed and maintained in standard setting organizations.[114] Until the Internet became the global communications facility it is today, the technical standards that enabled telecommunications across borders were developed essentially at the ITU, an international organization with an explicit international legal mandate for it. Its standards may have legal character, as is the case of the standards incorporated in the International Telecommunications Regulations, an international treaty, or quasi-legal character, as is the case of ITU Telecommunications Sector's (ITU-T) Recommendations.[115] The ITU and the international telecommunications regime constituted the international public law layer of a mainly public and heavily regulated system of information and communication networks.[116] Since the 1980s, however, the privatization of national public service monopolies and the liberalization of information and communication goods and services markets have gradually situated the ITU and the international telecommunications regime within a growing, hybrid regime complex and, especially since the emergence of the Internet, exposed it to regulatory competition from other organizations.[117] Whereas public international organizations such as the WTO or the WIPO have come to play a significant role in a variety of global Internet-related policy domains, the convergence of information and communication services over the Internet

synthetic account of the functionally layered structure of the Internet, including both the seven-layer model of the OSI model and the four-level TCP/IP model, Mathiason *et al.*, *supra* note 25, 6. On the regulatory implications of the layered structure of the Internet, see L. B. Solum & M. Chung, 'The Layers Principle: Internet Architecture and the Law (No. 55)' (2003), available at http://ssrn.com/paper=416263 (last visited 8 May 2016); K. Werbach, 'A Layered Model for Internet Policy', 1 *Journal on Telecommunications & High Technology Law* (2002), 37.

114 As opposed to *market* standards, which are developed by private companies and become *de facto* standards if widely adopted in the market. On the distinction between *committee* and *market* as modalities of standards development, see R. Werle & E. Iversen, 'Promoting Legitimacy in Technical Standardization', 2 *Innovation* (2006) 19, 22 [Werle & Iversen, Promoting Legitimacy]. In fact, "[the] market is the ultimate selection environment for technologies and this is the default situation for the diffusion of standards incorporated in the technology", ibid., 21.

115 Malcolm, *supra* note 23, 51; J. Hinricher, 'The Law-Making of the International Telecommunication Union (ITU) – Providing a New Source of International Law?' 64 *Zeitschrift für ausländisches öffentliches Rechts* (2004) 489, 490, 495.

116 Drake, 'Network Global Governance', *supra* note 29, 32; Werle & Iversen, Promoting Legitimacy, *supra* note 113, 22–24.

117 Reconstructing the relationships between ITU-T and the IETF in terms of regulatory competition, for example, Mathiason *et al.*, *supra* note 25, 17.

has also exposed ITU-T's standard-setting activities to competition from dozens of (often ephemeral, *ad-hoc*) industry consortia and a few major informal and private organizations.[118] In fact, the ITU remains the main public international organization involved in this regulatory function,[119] but the development and maintenance of the TCP/IP suite of standards is concentrated in two main venues: the IETF and the W3C.[120]

The IETF has historically had and continues to have, *de facto* authority to develop and maintain the bulk and core of Internet standards, including most of the TCP/IP protocol suite.[121] It has "general responsibility for making the Internet work and for the resolution of all short- and mid-range protocol and architectural issues required to make the Internet function effectively."[122] The W3C, in turn, develops the standards of the World Wide Web. Thus, whereas the IETF produces standards for every functional level or layer of the Internet model, the standards developed by the W3C operate at the application layer, because that is where the Web is functionally situated. This renders W3C standards less fundamental than those produced by IETF, but it is nonetheless widely regarded as one of the governors of the Internet because the World Wide Web is one of the most important applications running on the Internet. Both

118 Industry, academy, and technical experts form groups to solve shared technical or regulatory problems through technical standards – often involving representatives from public actors too – be it with a view to implementing State legislation through standards or in response to a purely private, autonomous regulatory initiative, "to assuage specific interests of private groups". See J. P. M. Bonnici, *Self-Regualtion in the Cyberspace* (2008) *supra* note 15, 119, 121.

119 It has developed standards of importance for the Internet, such as certain IP-based voice service and security standards. DeNardis, 'Internet Governance', *supra* note 23, 9.

120 See, for a detailed account of both organizations: H. Alvestrand & H. V. L. Lie, 'Development of core Internet standards: The work of IETF and W3C', in Bygrave & Bing, *supra* note 2, 126. Worth mentioning as well is the International Standards Organization (ISO), which developed its own Open System Interconnection model (OSI Model, defined in ISO/IEC standard 7498-1:1994) as an alternative to TCP/IP. Other informal standard setting organizations usually included in accounts of technical standardization as a global Internet governance function are the Institute of Electrical and Electronics Engineers (IEEE), which is the developer of the Ethernet Local Area Network (LAN) and Wi-Fi (or 802.11 wireless LAN) standards, and the European Telecommunications Standards Institute (ETSI). For an overview including other private industry consortia too, see e.g. Malcolm, *supra* note 23, Chapter 2.2. Comparing several of these institutions, see Werle & Iversen, *supra* note 114.

121 DeNardis, 'Internet Governance', *supra* note 23, 8.

122 V. Cerf, 'The Internet Activities Board. Request for Comments', Network Working Group (1990) available at https://tools.ietf.org/html/rfc1160 (last visited 9 May 2016).

organizations cooperate closely in the development of their respective standards, but the IETF has deferred Web standards development to the W3C.[123]

What matters for our purposes is that, unlike ICANN – which exercised legally delegated authority – neither the authority of the IETF nor that of the W3C have a legal basis.[124] Although the standards they produce are not only transnational but, especially in the case of those of the IETF, precisely what confer the Internet its worldwide unity, both institutions are informal from the perspective of international law. In fact, neither of them is incorporated as a legally autonomous entity.[125] They both rely, however, on distinct private law institutions in order to carry out certain activities.[126]

The IETF is an "unincorporated, freestanding organization" without legal personality of its own.[127] It defines itself as the organizational incarnation of a functionally defined community: "an open global community of network designers, operators, vendors, and researchers producing technical specifications for the evolution of the Internet architecture and the smooth operation of the Internet."[128] It has no formal membership, and there are no formal requirements to participate in IETF's working groups, where most of the work is done – for free in the case of its all-important mailing lists, for a fee in the case of IETF's physical meetings. IETF's legal informality should not be mistaken, however, for informality in a wider, socio-institutional sense. In fact, as the venue and process through which the Internet community develops and maintains Internet technical standards, the IETF is a remarkably formal institution "in the sense of organizational sociology."[129] The organic structure and norm development process of the organization are laid out in a complex institutional normative order, systematically documented and published – rather than in bylaws or

123 D. W. Connolly & L. Masinter, 'The 'text/html' Media Type. *Request for Comments*', (2000) available at https://tools.ietf.org/html/rfc2854 (last visited 21 April 2016); Malcolm, *supra* note 23.

124 For a synthesis of the legal bounds between the US and ICANN, see Etten & Mueller, *supra* note 23, 61–63.

125 Bygrave & Michaelsen, *supra* note 2, 98, 101; Malcolm, *supra* note 23, 52, 56.

126 Bonnici, *supra* note 15, Chapter 7; Price & Verhulst, *supra* note 16.

127 P. Hoffman & S. Bradner, 'Defining the IETF. *Request For Comments*' (2002), 2, available at https://tools.ietf.org/html/rfc3233 (last visited 9 May 2016). It "exists as a collection of happenings, […] and has no board of directors, no members, and no dues." Ibid.

128 H. T. Alvestrand, 'A Mission Statement for the IETF. *Request for Comments*' (2004), available at https://tools.ietf.org/html/rfc3935 (last visited 09 May 2016), sec. 3.1.

129 Bogdandy, Dann & Goldmann, *supra* note 45, 15.

articles of incorporation – in a series of documents called Requests for Comments (RFC).[130]

IETF's links with private legal entities further qualify such informality. The most important of such links is with the Internet Society (ISOC). Internet standards development is an organized activity of ISOC.[131] Unlike the IETF, ISOC is a non-profit corporation, legally constituted under the District of Columbia Non-Profit Corporation Act, and registered in Washington, D.C.[132] As such, ISOC's public interest purposes include, among others, to support Internet standardization by providing funds, logistical support, legal assistance, and civil responsibility insurance for standards development.[133] Its establishment in 1992, several years after IETF's creation in 1986, aimed precisely at the institutionalization of responsibility for standards development:[134] it "serves as the organizational backstop for the IETF whenever a formally recognizable organization is required."[135] Besides the IETF, ISOC provides an institutional umbrella for other informal organizations involved in the production of Internet standards, the most important one being the Internet Architecture Board (IAB), which oversees IETF's work and is constituted both as a committee of the IETF and as an advisory body of ISOC.[136] In fact, although it is a distinct organization,

130 IETF's purposes, structure and standard development process are laid out mainly in J. Galvin, 'A Mission Statement for the IETF', RFC 3935, June 2004; S. Bradner, 'The Internet Standards Process-Revision 3', BCP 9, RFC 2026, October 1996; J. Galvin, 'IAB and IESG Selection, Confirmation, and Recall Process: Operation of the Nominating and Recall Committees', BCP 10, RFC 2727, February 2000; R. Hovey & S. Bradner, 'The Organizations Involved in the IETF Standards Process', *Network Working Group* (1996) available at https://tools.ietf.org/html/rfc2028 (last visited 9 May 2016); Hoffman & Bradner, *supra* note 127; IETF, 'The IETF in the Large: Administration and Execution', *Network Working Group* (2004). *Request For Comments*, available at https://tools.ietf.org/html/rfc3716 (last visited 9 May 2016).

131 Alvestrand & Lie, *supra* note 120, 130.

132 See ISOC's Articles of Incorporation, Arts 3 and 8.

133 Hoffman & Bradner, *supra* note 127.

134 Bygrave & Michaelsen, *supra* note 2, 95. Intellectual property rights infringement is one of the kinds of legal responsibility the IETF may incur. By owning a standard, the IETF assumes responsibility for it. This is why in 2005 an IETF Trust was created, in order to hold and manage IETF's intellectual property (RFC 5378, para. 1.h).

135 Alverstrand & Lie, *supra* note 120, 130.

136 Bygrave & Michaelsen, *supra* note 2; The Internet Engineering Steering Group (IESG) – the Internet Research Task Force (IRTF) and the Request for Comments Editor complete this family of institutions. Although they are sometimes analyzed separately, the first is in fact an organ of the IETF, composed of the area directors and the chair of the IETF, the second is not directly involved in the development of particular Internet standards,

the IETF is so closely interwoven with ISOC and, through it, with the rest of the organizations involved in the technical development and management of the Internet that some consider them as one, or capture the entire set of actors as a network.[137] Nonetheless, its authority can be analyzed separately because the *Internet Standards Track* – the process by which Internet standards come into being – takes place entirely within the IETF.[138] ISOC and IAB do have, however, significant influence over that process. ISOC was established with a claim of authority for "ratifying the procedures and rules of the Internet standards process."[139] In practice it has simply recognized the procedures developed by the IETF, though. Whereas ISOC is not directly involved in the development of particular standards,[140] the IAB approves new Working Groups, which shoulder the bulk of the work in the development of an Internet standard. It also appoints individuals occupying various key positions within the IETF, and it is the final appeals authority for decisions of lower IETF organs – i.e. Working Group Chairs, Area Directors, and the Internet Engineering Steering Group – in disputes over technical issues.[141] The final authority over procedural disputes lies in ISOC's Board of Trustees.[142] In sum, although the IETF is not legally incorporated as such, it relies on several private-law institutions to carry out those aspects of its activity that require a legal personality, and is closely tied with other informal institutions. It should not be conflated, however, with

and the third is responsible for editing, publishing and registering RFCs. Bygrave & Michaelsen, *supra* note 2, 95; Malcolm, *supra* note 23, 32. It is also worth mentioning the Internet Assigned Names Authority (IANA), currently contracted to ICANN, which acts as a registry for protocol parameters. As Malcolm points out: "In general, the interrelationships between these organizations [are] not lines of authority but merely of informal oversight or 'guidance,' mostly as posited in RFCs rather than in agreements or international instruments." Malcolm, *supra* note 23, 38. On the relationship between the IETF and these other organizations, see Hovey & Bradner, *supra* note 130.

137 Wessel, for example, presents it together with ISOC in Pauwelyn, Wessel & Wouters, 'Exercise of Public Authority', *supra* note 75; for a network analysis, see Eeten & Mueller, *supra* note 23, 217. The IETF is often regarded, however, as distinct and autonomous enough so as to be analyzed separately. Alverstrand & Lie, *supra* note 120, 135; Malcolm, *supra* note 23, 52–55.

138 The Internet Standards Track is defined in RFC 2026; see also Hovey & Bradner, *supra* note 130.

139 Hoffman & Bradner, *supra* note 127, 2.

140 Alverstrand & Lie, *supra* note 120, 135.

141 See B. Carpenter (ed.), Charter of the Internet Architecture Board. RFC 2850, BCP 39, May 2000. Section 2.

142 Alverstrand & Lie, *supra* note 120, 131.

either of such organizations. At most, one can regard it as a partially juridified organization, informal but with private law tentacles.

The same can be said of the W3C, with a few differences. The W3C was established in 1994 and is also unincorporated. Like the IETF, it has no bylaws, but a *W3C Process Document*, which members sign upon entrance and remain bound by. Unlike the IETF, which does not have permanent members but only participants, the W3C does have formal membership. It comprises different organizations – including public and private ones, such as academic or research institutions, Web industry corporations, etc. – as well as individuals, which pay different fees in function of the Gross Domestic Product of their country. Just like the IETF, the W3C relies on legally formal institutions to support its activity: the Massachusetts Institute of Technology, Laboratory for Computer Science (MIT/LCS), Keio University of Japan; the European Research Consortium in Informatics and Mathematics (ERCIM); and Beihang University. The process by which the W3C develops its Recommendations is also very similar to that of the IETF: open and based on *rough consensus* – declared by W3C director Tim Berners Lee. Participation is open to the public, although participants are required to be not only interested but also *informed*.[143]

Like the organizations themselves, IETF and W3C standards are also legally informal. They are *voluntary* – as opposed to legally or politically *mandatory* – standards.[144] There is no international legal obligation to adopt them, and their normative content is not legally binding – they are not incorporated into the international legal system. Neither are they intended to be obligatory in any other sense. This is explicitly recognized, for example, in RFC 3935, Section 2: Internet standards do "not imply any attempt by the IETF to mandate its use, or any attempt to police its usage – only that 'if you say that you are doing this according to this standard, do it this way.'" To put it differently, unlike the authority to *develop and maintain* the TCP/IP suite, which is concentrated, as a matter of fact, in the IETF and W3C, standards adoption is coordinated in a distributed way, left to the market itself.[145] Whether a given protocol is adopted

143 Malcolm, *supra* note 23, 56.

144 On the distinction between voluntary and mandatory standards, see Werle & Iversen, *supra* note 114, 21–23.

145 As we have seen the market is the "ultimate selection environment" for technology standards generally. Werle & Iversen, *supra* note 114, 21. Protocol adoption or implementation is different from protocol development and management, and their institutionalization differs significantly too: "Areas of centralized coordination exist in the development and administration of technical protocols, but decisions about protocol adoption are decentralized and involve the coordinated action of Internet operators and service providers,

depends on whether network operators, vendors of software and hardware, and Internet users choose to implement and use it. In consequence, not all standards developed at the IETF achieve the same degree of market penetration. As Liu explains:[146]

> "The central and salient fact about the Internet coordination process is that no central body has the de jure authority to mandate adoption of the standards published in the RFCs. The Internet is a network with distributed intelligence. Because no single computer controls the Internet, the adoption of a given standard cannot be made at a single locus but, instead, must be adopted in a distributed fashion by all of the computers on the Internet. The miraculous part is that this occurs without any formal mandate or legal obligation. With a surprising degree of non-centralized coordination, the standards are voluntarily adopted by thousands of system operators all throughout the Internet."

To sum up, the IETF and the W3C are informal from the perspective of international law, both in the sense that they are not incorporated as international legal entities, and in the sense that their standards are not legally binding. They rely, however, on formal, including private law institutions to perform their functions – which as we have seen does not entail that the authority they exercise is private. If the production of Internet technical standards is to qualify as an exercise of authority of the kind that are the object of public law, it must be in virtue of some non-legal ground.

governments, and individuals overseeing countless network components and segments that comprise the global Internet." DeNardis, 'Internet Governance', *supra* note 23, 5. The different ways in which the development, administration and adoption of protocols can be organized can be reconstructed by reference to the distinction between *open* and closed or *proprietary* standards. The core protocols of the Internet are "open and non-proprietary standards that can be freely adopted by anyone." Mathiason *et al.*, *supra* note 25, 7. However, many of the standards that operate on the Internet are closed or proprietary, i.e. developed by private companies or consortia with a commercial interest, protected by intellectual property rights, and thus not available for other technology developers to create interoperable systems. For a synthetic account of the much discussed distinction between open and closed/proprietary standards, see DeNardis, 'Open Standard', *supra* note 30, 171.

146 J. P. Liu, 'Legitimacy and Authority in Internet Coordination: A Domain Name Case Study', 74 *Indiana Law Journal* (1999) 2, 587, 596.

2. Internet Technical Standardization as an Exercise of Authority

Just as in ICANN's case, the idea that Internet standards development involves the exercise of authority underlies much of the literature on Internet standards. It is widely recognized that Internet technical standards have "behavioural" or "regulatory effects,"[147] i.e. that they constrain conduct and may be used to induce general behavioural patterns. In fact, the actors and institutions involved in Internet standards development are well aware of these effects. IETF's mission statement, for example, explicitly acknowledges the organizations' regulatory purpose.[148] But how is it that Internet standards modify the factual situation of actors so as to affect a legally or morally defined conception of freedom? In order to understand their authoritativeness, it is useful to distinguish the mechanisms by which Internet technical standards regulate two different sets of conduct: the operation and use of such technology, on the one hand, and the decision to adopt or implement a standard and to use the technology based on it, on the other. There are two main explanations for such regulatory effects in the literature on Internet governance, which combined may justify regarding at least some of the standards in the TCP/IP suite as authoritative in IPA's robust sense: Internet technical standards, and the organizations that produce them, may be regarded as authoritative because they constitute the *code* of the Internet a) and because network externalities may render them economically compulsory b).

a) A first factor explaining why technical standards may qualify as instruments for the exercise of authority is their capacity to directly determine the way in which the technology based on them operates and, thereby, to indirectly constrain the way in which such technology can be used. In the case of the Internet, and of cyberspace in general, these complex regulatory effects have been theorized as the *code thesis*. The code of the Internet is the set of technical standards that constitutes it logically and defines its technical architecture. In its current form, the code of the Internet is the TCP/IP protocol suite.[149] The code thesis is that "[...] the software and hardware (i.e. the "code" of the Internet) that

147 E.g. Bonnici, *supra* note 15, 117–118.

148 "The mission of the IETF is to produce high quality, relevant technical and engineering documents *that influence the way people design, use, and manage the Internet* in such a way as to make the Internet work better."(Emphasis added) Alvestrand, *supra* note 128, 1.

149 Solum, *supra* note 39, 67–68. On Internet architecture, see RFC 1958, "Architectural Principles of the Internet" (June 1996) (describing Internet's technical architecture as layered and based on the end to end principle).

make cyberspace what it is also regulate cyberspace as it is".[150] The technical architecture of the Internet regulates the Internet by determining the functions it performs and the way it performs them, by enabling certain behaviours and disabling others.

The code of the Internet regulates not only the activity of network operators or Internet service providers, but also, indirectly, the behaviour of Internet users understood broadly – from individuals playing online games to private corporations using instant messaging for internal communications or States offering public health services through e-health applications over mobile devices.[151] In other words, code regulates what has traditionally been conceptualized as *carriage* activities, but it may have regulatory effects over the *content* carried over the networks as well, and freedom can be affected in both of these domains.[152] It can be used both as an instrument for the regulation *of* technology and as an instrument for regulation *through* technology. And because it defines what is feasible on the Internet and modulates the way it can be done, the design of code may involve what can be qualified as regulatory choices. Engineering choices may have a normative-political dimension.[153] This is why the capacity to develop the TCP/IP protocol suite is an important *point of control* over the Internet.[154]

Perhaps the clearest examples of technical standards affecting freedom are those protocols developed explicitly to protect fundamental rights, such as privacy or freedom of expression. In the case of the W3C, there are two standards that are commonly referred to as examples of self-regulation of freedom of expression and privacy: the Platform for Internet Content Selection (PICS), which sought to allow parents and educators to prevent children from accessing certain content by rating websites with a meta-tag system, and the Platform for Privacy Preferences (P3P), which enabled users to control what personal information

150 Lessig, *Code: Version 2.0*, *supra* note 112, 5. In Lessig's words, "[life] in cyberspace is regulated primarily through the code of cyberspace […] Code is a regulator in cyberspace because it identifies the terms upon which cyberspace is offered. And those who set those terms increasingly recognize code as a means to achieving the behaviors that benefit them best." Lessig, *Code: Version 2.0*, *supra* note 113, 83–84.

151 On the increasing use of technical standards to regulate user behaviour in network environments, see D. Benoliel, 'Technological standards, inc.: Rethinking cyberspace regulatory epistemology' 92 *California Law Review* (2004) 4, 1069–116.

152 Bonnici, *supra* note 15, 117; Holznagel & Werle, *supra* note 36.

153 "In cyberspace in particular, but across the Internet in general, code embeds values" Lessig, *Code: Version 2.0*, *supra* note 112, 114.

154 DeNardis, 'Open Standard', *supra* note 30, 190–191.

is available to websites, and thus the degree to which their online behaviour is exposed.[155] IETF's Internet Protocol Version 6 (IPv6) standard is perhaps the most important example of how protocols below the application layer affect fundamental rights and freedoms. IPv6 was developed to regulate Internet access. It sought, more specifically, to solve the problem of IPv – 4the previous version – and address space exhaustion, but its design involved the possibility to maintain or modify aspects of the technical architecture of the Internet that had been coded on the previous versions of the protocol. As DeNardis explains, "Internet engineers chose to architect some privacy protections into the design of IPv6 addresses."[156]

Within legal scholarship, the conceptualization of code as a regulator of behaviour in cyberspace and on the Internet opened up a debate about its legal status. Reidenberg famously referred to the rules imposed through the technical architecture of the Internet as *lex informatica*.[157] Building on Reidenberg, Lessig metaphorically asserted that, in cyberspace generally and in the Internet in particular, "code is law."[158] One of IPA's insights, however, is that the legal status of a regulatory instrument can be analyzed separately from its authoritativeness, and that only the latter needs to be established for public law standards to be applicable to the instrument in question. Lessig's metaphorical equation between code and law remains valuable precisely for this latter purpose. It highlights that, in cyberspace and on the Internet, technical standards can be as effective a regulatory instrument as legal instruments are, if not more so. Indeed, one of the main commonalities between code and law is precisely their efficacy as means

155 Bonnici, *supra* note 15, 124–127; Malcolm, *supra* note 23, 83–84.

156 DeNardis, 'Open Standard', *supra* note 30, 191.

157 J. R. Reidenberg, 'Lex informatica: The formulation of information policy rules through technology', 76 *Texas Law Review* (1998) 3, 553.

158 Lessig, *Code: Version 2.0*, *supra* note 112, Chapter 1. In fact, Lessig refers the idea to William Mitchell. W. Mitchell, *City of bits: Space, Place, and the Infobahn* (1995), 111. In response to criticism based on literal readings of this equation of code and law, Lessig later underlined its metaphorical character. See, from a rich literature, E. J. Dommering, 'Regulating Technology: Code is not Law' in E. J. Dommering & L. F. Asscher (eds), *Coding Regulation: Essays on the Normative Role of Information Technology*, (2006), 1; P. Kleve & R. De Mulder, 'Code is Murphy's Law', 19 *International Review of Law, Computers & Technology* (2006) 3, 317; Lessig, *Code: Version 2.0*, *supra* note 112; T. Wu, 'When Code Isn't Law', 89 *Virginia Law Review* (2003), 679. For an example of a legal pluralist perspective on the legal character of code, see V. Karavas & G. Teubner, 'http://www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on Private Parties within Autonomous Internet Law' *bepress Legal Series Working Paper* 23 (2003), available at http://law.bepress.com/expresso/eps/23 (last visited 9 May 2016).

to constrain behaviour. In fact, as a modality of *techno-regulation*,[159] regulation through code can be more compelling, more irresistible than legal regulation because of "its capacity to eliminate the possibility of violation and to by-pass practical reason in its entirety."[160] The fact that, from the perspective of the user or the operator of a technology, it is not a motivation-based regulatory technique, its self-enforcing character,[161] sets regulation through code apart from the traditional modalities of regulation. This makes an interesting addition to Goldmann's so far motivation-based typology of authority.

b) Technical standards are, thus, a particularly compelling regulatory technique, because they exclude the possibility of disobedience, leaving no choice to those subject to them. But protocols can deploy their regulatory effects only over the conduct of those who *choose* to implement the standard or to use the technology on which it is based. Insofar as such choice is not compulsory, the capacity to create technical standards cannot be regarded as an exercise of authority in IPA's sense.[162] As we have seen, however, IETF and W3C's standards are not legally mandatory. What is it, then, that brings the actors controlling the myriad networks and computing devices that make up the Internet to rely on IETF's Internet standards and W3C's Recommendations? Two sets of reasons explain their observance: social forces and market forces.[163]

From a social perspective, a number of factors confer the organizations with *de facto* legitimacy within the Internet community. The IETF is, in the first place, the customary standard setting organization for the Internet,[164] and

159 "[…] [We] can express the distinctive nature of techno-regulation in the following way. Where the ideal-type of techno-regulation is instantiated by regulators, having identified a desired pattern of behaviour (whether morally compliant or not), secure that pattern of behaviour by designing out any option of non-conforming behaviour. Such measures might involve designing regulatees themselves, their environments, or the products that they use in their environments, or a combination of these elements. Where techno-regulation is perfectly instantiated there is no need for either correction or enforcement." Brownswood, 2005, *Code, Control and Choice: Why East is East and West is West*", as cited in: B. Morgan & K. Yeung, *An Introduction to Law and Regulation* (2007), 104.

160 In other words: "While communication-based techniques appeal to rational human reasoning in seeking to bring about behavioural change, code-based (or architecture-based) techniques operate in direct contrast, seeking instead to eliminate undesirable behaviour by designing out the possibility for its occurrence." Ibid., 102.

161 Karavas & Teubner, *supra* note 158.

162 "*Once accepted and adopted*, technical standards have an absolute and automatic binding effect on the parties using the standards." (Emphasis added) Bonnici, *supra* note 15, 118.

163 Alverstrand & Lie, *supra* note 122, 135; Froomkin, *supra* note 100, 837.

164 Liu, *supra* note 146, 596.

so is the W3C with respect to the Web. In addition, its standards are widely presumed to be not only functional but of technical quality. This confidence is based on the way the *Internet standards track* blends technical expertise with inclusiveness – it is an open process, based on a technically informed consensus, and it incorporates practical testing – and on the experience of standards implementers with generally well-working IETF standards.[165] Since the process by which it develops its Recommendations is very similar,[166] the same can be said of the W3C. Last but not least, participation in these institutions is well-regarded in the Internet community: "the people who do the engineering take pride in making and implementing those standards."[167]

But what renders at least some IETF and W3C standards authoritative in IPA's sense are economic factors.[168] Even if they are not legally binding, voluntary standards may come to qualify as instruments for the unilateral affectation of freedom because of certain market forces: the *network effects or externalities* that characterize network industries like the Internet.[169] In such industries, the wider a standard is adopted, the more valuable become the technologies implementing it. But the more pervasive its adoption, the higher become the costs of not implementing the standard in question, which may rise to an extent that effectively excludes the possibility of not implementing the standard or using the technology based on it. Due to these network externalities, opting out of some of the standards in the TCP/IP suite comes at an impossible cost.[170] Not every IETF and W3C standard is authoritative, however. Only if they reach a certain critical mass of implementers and users may certain standards become economically compulsory. This underscores the importance of the abovementioned social factors, since they motivate standard adoption before such tipping point is reached.[171]

165 Ibid.; As Malcolm puts it: "Internet standards are complied with not because Internet users are compelled by hierarchically-imposed authority to do so, but because they are of high quality, are timely, widely supported, and represent a high level of technical consensus amongst a broad group of experts and users." in Malcolm, *supra* note 23, 51.

166 Malcolm, *supra* note 23, 56.

167 Alverstrand & Lie, *supra* note 120, 135.

168 As Froomkin puts it: "[there] is no question that some Internet Standards, primarily those with network effects, are coercive." in Froomkin, *supra* note 100, 837.

169 M. A. Lemley & D. McGowan, 'Legal implications of network economic effects', 86 *California Law Review* (1998) 3, 479, 483–484.

170 Liu, *supra* note 146, 596–598; O. Shy, *The Economics of Network Industries* (2001).

171 In fact, the point can be made, as Liu does, that the combination of IETF's *de facto* legitimacy and network effects render binding not specific standards but IETF standards generally, and thus the organization itself: "The existing custom of technical coordination

Even protocols that are formally voluntary may become effectively mandatory when network effects neutralize any exit option, i.e. when resorting to alternative protocols would imply a significant loss of value in the function that the standard fulfils. This is the case of the standards necessarily involved in any Internet-based communication, on the one hand, and of those necessary for the most common modalities of Internet use, on the other. The clearest example of the first kind is the IP protocol itself, which falls under the purview of the IETF. IP is "a necessary precondition for being on the Internet", or "the least common denominator for connectivity over the Internet and the protocol used in every instance of Internet connectivity" for which "there are no protocol alternatives at the network layer."[172] There are, however, a number of candidates for authoritativeness in this sense on each of the functional layers of the TCP/IP model, because in order to communicate, Internet hosts "typically must implement at least one protocol from each layer" of the model.[173] Examples of the second kind are HTTP, which is necessary for web-based communications, or SMTP, on which email is based.[174] If one wants to be on the Internet, or if one wants to use the World Wide Web or email, one needs to implement or use these standards; any alternative entails the loss of the value that derives from these technologies' billions of users.

To sum it up in IPA's terms, Internet technical standards can be seen as an instrument for the exercise of authority. The authoritativeness of Internet technical standards derives from the combination of the capacity of standards to determine technology operation and use and the economic network effects that may make their adoption compulsory. In virtue of their *de facto* legitimacy – and of technological path dependence – a significant number of actors implement IETF and W3C standards. If their adoption is wide enough, network externalities obtain and implementation becomes economically binding. Once they are adopted, they automatically determine the way in which the Internet

gives rise to a powerful network externality. Those who fail to adopt a standard widely adopted by others will effectively be severed from the Internet." Liu, *supra* note 146, 596–597.

172 DeNardis, 'Internet Governance', *supra* note 23, 9; "The Internet protocol is only one of thousands of information technology standards, but it is the central protocol required in nearly every instance of Internet use. Computing devices that use IP are on the 'Net'" ibid., 5.

173 "To communicate using the Internet system, a host must implement the layered set of protocols comprising the Internet protocol suite. A host typically must implement at least one protocol from each layer." in Braden, *supra* note 111.

174 Solum & Chung, *supra* note 113, 17.

functions and can be used. This is why creating a standard is at the same time an exercise of authority over standards implementers and over the users of the technology implementing them, even if they are each constrained by different mechanisms. In so doing, they affect the public interest and impact the growing number of rights the effectiveness of which relies on the Internet.

3. The Development of Internet Technical Standards as an Exercise of Public or Functionally Equivalent Authority

Having established the authoritativeness of – at least some – Internet standards, we can now turn to qualify such authority as public or private according to IPA. Technical standards may be instrumental in the exercise of either public or private authority. The IETF and W3C, as well as their standards are usually conceptualized as self-regulatory organizations and instruments, exercising private self-regulatory authority.[175] IPA's original functional equivalence criterion justifies the subjection of private authority to public law principles insofar as it is functionally equivalent to public authority. Establishing the functional equivalence between the authority of the IETF and W3C and that of international public organizations is relatively straightforward. There is a classical international organization, the ITU, which performs exactly the same regulatory activity on a public legal basis. Just like ICANN's allocation and assignment of Internet unique identifiers is functionally equivalent to ITU's allocation of radio spectrum or satellite orbits – both of which are scarce resources whose use requires global coordination – so IETF's and W3C's technical standardization functions are equivalent to the technical standardization activities of ITU's telecommunication or radiocommunication sectors. Moreover, the standards developed at the IETF or the W3C are the logical backbone that constitutes a vital global telecommunications infrastructure. The capacity to develop this logical backbone qualifies as an instance of *global public good direct affectation* and of *global infrastructure management* as much as ICANN's capacity to modify the root zone file or to register protocol parameters.[176] In other words, if ICANN's activity is functionally equivalent to an exercise of public authority, so is that of the IETF and the W3C.

Goldmann's criterion for qualifying authority as public or private requires some further analysis that can only be sketched here. First, regarding the relationship between the authority wielder and the community that it claims

[175] See generally, Bonnici, *supra* note 15, Chapter 6.
[176] Bogdandy, Dann & Goldmann, *supra* note 45, 14.

to represent, it is not clear whether the IETF and the W3C have good enough a claim to represent the Internet community – a very vague notion that can roughly be read as the Internet sector as a whole or, more restrictively, as the community of technical experts that has historically been involved in the governance of Internet infrastructure – or the global public – be it understood as a whole or as the sum of the multiple communities that have an interest on the Internet, including but possibly extending beyond state-publics, to cover other related supra- or sub-state publics, and perhaps functional publics distinct from the Internet community or sector. The lack of a legal basis in international law for either the IETF or W3C certainly renders any claim to represent the interest of the international community of States unreasonable. As for the possibility of claiming to represent the Internet community as a sectoral polity, the W3C seems to be in a position to make it at least with respect to its members, because it has formal membership and the signature of the W3C Process Document may be interpreted as a delegation of authority – they do not bind themselves, legally or otherwise, to implement W3C standards, but its signature does entail an acknowledgement of the competence to produce technical standards for the Web. Yet the fact that it has formal membership and, very importantly, that members are obliged to pay a fee, may limit the capacity of at least those interested parties that cannot afford such payment to participate fully. The openness to public participation compensates this exclusionary effect to a certain extent, allowing for anyone with a stake, i.e. anyone potentially or actually affected by W3C recommendations, to partake at least to some extent in their development. The opposite can be said of the IETF. Given IETF's informal membership, there is nothing like the signature of the W3C Process Document that can be interpreted as a formal delegation of authority by any community, however defined, to the IETF. Yet its radical openness to participate in its deliberations renders it as inclusive as it gets: anyone willing to do so may contribute, and at least in the case of its working groups, without economic barriers other than those of Internet access. The openness of IETF and W3C standard setting processes seeks to facilitate a correspondence between those affected by their activity – including not only the usual technically expert industry and academic actors but also the global community of Internet users, directly and through their public representatives, associations, and advocacy groups – and those involved in the taking of the regulatory decisions. The question is, however, whether such openness compensates factors such as cultural and linguistic diversity, digital illiteracy or economic inequality, which obstruct meaningful participation in the deliberative processes of the Internet community, and limit their claim to representativeness.

Neither is it clear, in the second place, whether either of those putative publics – the international community, the Internet community or other territorially or functionally defined publics – do actually qualify as such according to discourse theory of democracy. Regarding the Internet community, and assuming the IETF and the W3C have a reasonable claim to represent it, establishing whether this is so would require finding out the extent to which it shares a common identity enabling its members to engage in arguing and thus for the formation of a public interest. Froomkin famously analysed the IETF through the prism of Habermasian discourse theory, and found that the IETF does not merely allow for *arguing* but comes as close as it gets to qualifying as a realization of what he calls the *best practical discourse* – a discourse capable of legitimizing its outcomes because it is open to participation in rational terms by all those affected by the decision in question.[177] Given the similarity of their standard setting processes, the point can *a priori* be extended to the W3C. If this is the case – and provided, again, that their claim to represent such communities was reasonable – then IETF's and W3C's authority could be qualified as public at least from the perspective of those members and participants – those who actually engage in the discourse – that are affected by Internet standards, and therefore as a proper object of public law analysis in this sense. In fact, their virtually unconditional openness to public participation tends to make the community of those that are entitled to participate in IETF and W3C standardization process coextensive with the community of those potentially affected by it. Given the current importance of the Internet as a global communications facility, this may even justify a claim to represent *the global public*, because everyone has a direct or indirect stake on the Internet, and everyone can participate. However, even if IETF and W3C channels facilitate arguing, the wild diversity of the global public – which stands in contrast to the relatively homogenous community of technically, economically and culturally capable usual suspects – limits the extent to which it can be said to engage in arguing to the confines of the two organizations themselves, which may not be enough to sustain the thesis that it qualifies as a proper public.

If these two organizations and the standards they produce are indeed to be considered public authority, then from this theoretical perspective, the IETF and the W3C would be more legitimate than public law systems which, at least as they exist in the real world, do not live up to the high standards of the best practical discourse, and would thus provide a model for IPA's project of developing a proper public law beyond the State.

[177] Froomkin, *supra* note 100, 796.

E. Conclusion

This paper has laid the foundation for a comprehensive public law approach to the problem of legitimizing global Internet governance. An analysis of this domain through the prism of the IPA approach seems indeed to confirm the value of public law as a normative reference for legitimizing the exercise of authority by informal and private institutions that is often assumed by the governance literature in this domain. Authority of the kind that is the object of public law analysis can be found beyond the public international component of this domain and beyond ICANN's unique identifiers regime, which have concentrated public and academic attention so far. The development by two informal and private institutions, the IETF and the W3C, of Internet's core technical standards, the TCP/IP protocol suite, can also be reconstructed as an exercise of authority because they constitute the code of the Internet and because economic network effects render them economically obligatory. Whereas technical standardization meets IPA's original functional equivalence criterion for identifying those instances where private authority should be assessed and subjected to public law standards, the extent to which it qualifies as public authority according to Goldmann's more demanding re-conception of it remains an aspect to be clarified in further research. The expansion of the focus of public law analysis in global Internet governance enriches IPA in turn by incorporating code into its catalogue of authority instruments and modalities.

Goettingen Journal of International Law 7 (2016) 1, 95-129

Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies

Pedro A. Villarreal*

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* Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. This article is directly related to a broader research project conducted as part of the author's PhD thesis, currently under development at the Instituto de Investigaciones Jurídicas (Institute of Legal Research) of the Universidad Nacional Autónoma de México (National Autonomous University of Mexico), a project that is funded by the Consejo Nacional de Ciencia y Tecnología (National Council of Science and Technology) of the same country. The main supervisor of such project is Dr. José María Serna de la Garza. I would like to thank Matthias Goldmann, Marjolein Schaap, Federica Violi, Dana Burchardt, Franz Ebert and Bolívar Portugal for numerous insightful comments about the contents of the article. All mistakes are directly attributable to me.

doi: 10.3249/1868-1581-7-1-villarreal

Abstract

The institutional decisions regarding the 2009–2010 influenza A(H1N1) pandemic displayed how the World Health Organization's (WHO) role as the international organization in charge of coordinating the pandemic response amounts to an exercise of authority. Notably, the 11 June, 2009 Pandemic Declaration was grounded in the WHO's guidelines that do not have a binding nature according to international law. However, this is not an obstacle for considering them as an act of authority, since their effects can constrain the decision-making of States. If these non-binding acts have an authoritative nature, then it is necessary to address various legitimacy issues that may be present. This is where the concept of international public authority (IPA) can prove useful, since it enables to combine the non-binding nature of Pandemic Declarations and the respective guidelines with broad legally-oriented figures such as transparency and accountability.

The controversies surrounding the 2009 Pandemic Declaration illustrate how the strictly technical-scientific elements that led to such a decision were not necessarily harmonious with other aspects more related to political decision making in general, such as transparency and accountability. This can be considered as an example of how so-called 'technocratic legitimacy' sometimes generates friction with *lato sensu* 'political legitimacy'. As the 2009–2010 pandemic period unraveled, it became clear that expertise-based legitimacy is not sufficient in itself to consider the act as generally legitimate. On the contrary, the strongest criticisms directed at the decision-making process of the WHO during this event were leveled against deficits of transparency and accountability. This article purports to discuss the issue of how both types of legitimacies, technical-scientific and political, are necessary components for deeming Pandemic Declarations as legitimate enough, since they amount to an exercise of international public authority.

A. Introduction

This article focuses on the World Health Organization's (WHO) role in the 2009–2010 influenza A(H1N1) pandemic. The 11 June 2009 Pandemic Declaration of the WHO (2009 Pandemic Declaration) resulted in a series of questions regarding the authority exercised by this organization when this event took place. This was mainly due to accusations of scientifically debatable decision-making, on the one hand, and a lack of transparency and accountability in light of possible of wrongdoings, on the other. This calls into

question the legitimacy of the Pandemic Declaration, a matter that is of utmost importance given its consequences.

The first section of this article is devoted to establish how the concept of international public authority (IPA) contributes to the understanding of why the WHO's Declaration of the existence of a pandemic constitutes an activity that entails notable constraining effects for States, even though it is based upon guidelines that are not legally binding under international law. For example, they serve as a basis for activating pandemic preparedness and response mechanisms or 'dormant' contracts with pharmaceutical companies. Pandemic Declarations are an example of the need for a conceptual framework for global governance activities which provides a looking glass for the identification of exercises of authority. In this respect, the concept of IPA can be useful to provide an appropriate response (B.).

Secondly, this article attempts to delve further into some of the features of Pandemic Declarations, and also of the WHO guidelines on pandemics that configure them, contributing to the understanding that they have an authoritative nature. In this respect one needs to distinguish the non-binding Pandemic Declarations from other binding acts, such as a declaration of Public Health Emergency of International Concern (PHEIC) (C.).

Third, once the case has been made that the IPA approach can be useful for the assessment of the authoritative nature of Pandemics Declarations, the subsequent section discusses some of the legitimacy issues related to the 2009 Pandemic Declaration. This Declaration led to questions concerning the scientific grounds for the assessment of the situation, which is a basis for what can be labeled as 'technocratic legitimacy'. It also highlights an underlying friction between the eminently technical elements of the decision and the surrounding 'political' context, a factor that led to controversy due to the (mainly) economic consequences of the Pandemic Declaration (D.).

Finally, the following section addresses the point of how, during the Pandemic Declaration of 2009, there was, and still is, a need to enhance the transparency of the process, along with the WHO's accountability (E.). These are components that lead to these acts being considered as legitimate, especially when these elements are pitted against strictly technical reasons, which themselves cannot be overlooked. The delicate balance between 'scientific' and *lato sensu* 'political' aspects needs to be tackled. Although some improvements are already under way, these discussions are ongoing within the more general debate about the legitimacy of the activities of international organizations, and in the particular context of the more recent Ebola crisis in West Africa, as well as the ongoing Zika epidemic in the Americas.

B. General Overview

I. The Concept of International Public Authority as an Analytical Lens

The notion of global governance emphasizes the fact that constraining, authoritative effects do not only emanate from binding legal documents.[1] On several occasions, these effects stem from instruments that are not legally binding, but *de facto* have significant constraining impacts on their addressees, whether they are States or individuals.

Traditional approaches to international law are considered not to be sufficient to take into consideration some of the realities highlighted by the concept of global governance.[2] IPA, by contrast, emphasizes the fact that both formal and informal acts created by public or private entities can be considered as an exercise of authority,[3] insofar as they have

> "the legal capacity to determine others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation".[4]

1 The literature on the subject is immense. For a glimpse, see the seminal work of J. Rosenau & E.-O. Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (1992). Focusing on how the term 'governance' is used to signify the authoritative effects of rules regardless of their origin, and why 'global' is preferred to 'international', see J. Peel, *Science and Risk Regulation in International Law* (2010), 5. It is worth mentioning that the multiplicity of understandings of the notion of global governance is the subject of several evolving arguments, since it is in a state of continuous flux. See A. M. Kacowicz, 'Global Governance, International Order, and World Order', in D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (2012), 688–692.

2 See J. Klabbers, *International Law* (2013), 17, 37–39 [Klabbers, International Law]. There are several noteworthy approaches that aim at providing an answer to this challenge. Among them are the global administrative law (GAL) approach and the strand of constitutionalization of international law. For the first one, see B. Kingsbury, N. Krisch & R. B. Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 3, 15, 16 *et seq*. For a glimpse at the discussions regarding the second approach, see J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009).

3 J. N. Rosenau, 'Governance, Order and Change in World Politics', in Rosenau & Czempiel (eds), *supra* note 1, 3–11.

4 A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010), 3, 11.

Therefore, it is essential that such acts find an appropriate response within the legal domain in order to improve their legitimacy.[5] The purpose is to translate some of the legitimacy challenges of authoritative acts into a cluster of principles that emanate from the broader field of Public Law. This entails that one needs to think about possible restraints to the exercise of authority.[6]

The idea of what is considered as 'public' in nature varies significantly between the domestic and the international spheres.[7] In this particular case, the 'public' nature of the act is not contested, since the creation of the guidelines that provide the grounds for the Pandemic Declarations was performed by an international organization (namely, the Director-General of the WHO). Additionally, it is grounded on the broad powers granted by its Constitution[8] and on the more specific ones deriving from the 2005 *International Health Regulations* (IHR),[9] which constitutes the core binding instrument for fighting the international spread of disease.[10] Consequently, the WHO's authority to create pandemic guidelines is considered to be a product of its legal mandate,

5 *Ibid.*, 11–12.

6 *Ibid.*, 26. Also, A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', 9 *German Law Journal* (2008) 11, 1909, 1914–1915.

7 The notions of 'public' and 'private' at the international sphere are still contested in multiple aspects, since there is no 'one definition to end them all', and some borderline cases illustrate their limitations. See T. Risse, 'Governance in Areas of Limited Statehood', in Levi-Faur (ed.), *supra* note 1, 705–707. For an overview of the current state of this debate, as well as a proposal for further defining the 'public' character of authority, see M. Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)', 5 *Global Constitutionalism* (2016) 1, 48, 76-84.

8 Both the broad nature of the functions described in Art. 2 *Constitution of the WHO*, as well as those stipulations which are perhaps most related to the current analysis, can be witnessed in the following subsections:
"Article 2.
In order to achieve its objective, the functions of the Organization shall be:
(a) to act as the directing and co-ordinating authority on international health work;
[...]
(g) to stimulate and advance work to eradicate epidemic, endemic and other diseases;
[...]
(v) generally to take all necessary action to attain the objective of the Organization."

9 This is highlighted in the *IHR*:
"Article 13 Public Health Response
1. [...] WHO shall publish, in consultation with Member States, guidelines to support States Parties in the development of public health response capacities."

10 The *IHR* were approved in 2005 and entered into force in 2007, in the form of a binding 'regulation' created under the auspices of an international organization, namely the

which was granted by a political collective,[11] namely the international community of States.

The IPA approach thus provides a conceptual background that allows for the analysis of the creation, development and implementation of Pandemic Declarations. I take the 2009–2010 influenza A(H1N1) pandemic as a case study that sheds light on some of the authoritative features of these acts. The case study also provides an example for dealing with future Declarations of this sort issued by the WHO – whether and when they occur again. It is only through the concrete assessment of a single case, rather than on an abstract basis,[12] that some of the salient issues of WHO's pandemic policy become visible.

II. Introducing the Case: The 2009–2010 Influenza A(H1N1) Pandemic

Between the months of February and April of 2009,[13] there were several outbreaks of an influenza virus with the same protein components as the most devastating pandemic known to mankind in terms of fatalities: the 1918–1920 'Spanish flu' caused by the A(H1N1) strain of the influenza virus, believed to have caused between 50 and 100 million deaths.[14] The 2009 A(H1N1)pdm09 virus had a slightly mutated genetic code, and it began spreading throughout nations. This event had been expected to be potentially catastrophic previously

World Health Assembly of the WHO. This is based on the faculties granted by Art. 21 *Constitution of the WHO*.

11 Von Bogdandy, Dann & Goldmann, *supra* note 4, 13.

12 R. Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in R. Wolfrum & V. Röben (eds), *Legitimacy in International Law* (2008), 22.

13 The basic chronological details of what happened during this period can be consulted in WHO, *Strengthening Response to Pandemics and other Public Health Emergencies: Report of the Review Committee on the Functioning of the International Health Regulations (2005) and on Pandemic Influenza (H1N1) 2009*, 2011, available at http://www.who.int/ihr/publications/RC_report/en/, 29 (last visited 14 February 2016); R. Katz, 'Use of Revised International Health Regulations During Influenza A (H1N1) Epidemic, 2009', 15 *Emerging Infectious Diseases* (2009) 8, 1165, 1166–1168; B. Bennett & T. Carney, 'Trade, travel and disease: The role of law in pandemic preparedness', 5 *Asian Journal of WTO & International Health Law and Policy* (2010) 2, 301, 306-309.

14 N. P. A. S. Johnson & J. Mueller, 'Updating the accounts: global mortality of the 1918–1920 "Spanish" influenza pandemic', 76 *Bulletin of the History of Medicine* (2002) 1, 105, 109-115. Also, D. M. Morens *et al.*, 'The 1918 influenza pandemic: Lessons for 2009 and the future', 38 *Critical Care Medicine* (2010) Supplement to 4, e10.

to its emergence[15] but was catalogued ultimately by public health experts as mild[16] given the fact that official reports tallied the fatalities at around 18,500 worldwide.[17] More recent estimates calculate a death toll that was approximately ten times higher due to the persistent under-reporting of many national health systems that complicates determining the exact incidence of influenza.[18] Although these calculations did not modify the overall degree of severity estimated for this event, [19] the pandemic strain of the influenza virus, A(H1N1)pdm09 is currently still spreading through multiple regions.

The mild-to-moderate severity of the 2009–2010 influenza A(H1N1) pandemic led some to believe that the Director-General of the WHO had wrongfully issued a Declaration without having enough factual grounds for it, based on what was considered as 'biased' counseling given by the IHR Emergency Committee. There was an ongoing – albeit constrained – discussion of whether the assessment made by these persons was either a hoax[20] or a downright

15 See P. Doshi, 'The elusive definition of pandemic influenza', 89 *Bulletin of the World Health Organization* (2011) 7, 532, 535. Also in that volume, D. J. Barnett, 'Pandemic influenza and its definitional implications', 539, and L. Bonneux & W. Van Damme, 'Health is More than Influenza', 539–540.

16 L. Sanders, 'Of Swine and Men. Scientists study H1N1's past to predict what the virus has in store', *Science News* (27 February 2010), 22.

17 WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 27.

18 See S. F. Dawood, *et al.*, 'Estimated global mortality associated with the first 12 months of 2009 pandemic influenza A H1N1 virus circulation: a modelling study', 12 *The Lancet Infectious Diseases* (2012) 9, 687; L. Simonsen *et al.*, 'Global Mortality Estimates for the 2009 Influenza Pandemic from the GLaMOR Project: A Modeling Study', 10 *Public Library of Science: Medicine* (2013) 11, 1, available at http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001558 (last visited 14 February 2016), 10–14.

19 See the explanation given by then Special Advisor to the Director-General on Pandemic Influenza, Keiji Fukuda, at a press conference on 14 January 2010, available at http://www.who.int/mediacentre/vpc_transcript_14_january_10_fukuda.pdf?ua=1 (last visited 14 February 2016).

20 This view has been supported, among others, by the former Chair of the Health Committee of the European Council, Wolfgang Wodarg, who basically accused the WHO of acting on the basis of *no* justifiable scientific evidence. The accusation faded away with time, and to this date investigations on the matter have given no additional evidence whatsoever. See 'Statement presented by Dr. Wolfgang Wodarg, medical expert specialising in epidemiology and former Chair of the Sub-committee on Health and the Parliamentary Assembly', Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe, Strassbourg (26 January 2010), available at http://www.assembly.coe.int/CommitteeDocs/2010/20100126_Statement%20Wodarg.pdf (last visited 14 February 2016).

blunder.[21] Others assume that at the start of the 2009 influenza pandemic, the existing data justified taking such a decision in order to prevent or limit the effects of further outbreaks.[22] A summary report of 18 May 2009, asserted that until that moment, 40 countries had given notice of laboratory-confirmed cases of pandemic influenza.[23]

The main source of concern about the decision-making process that led to the 2009 Pandemic Declaration is related to the possibility of conflicts of interest by some of the members of the IHR Emergency Committee that advised the Director-General in favor of doing so. These conflicts of interest were related to the alleged direct and indirect ties of those members with the pharmaceutical industry, which was seen as promoting the issue of a Pandemic Declaration due to the profits it would entail for the production and selling of antivirals and vaccines.[24] Despite the outcry, the Director-General of the WHO decided not to publicly disclose the names of the Committee's members until after the

21 See *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe (June 2010), available at http://assembly.coe.int/CommitteeDocs/2010/20100604_H1N1pandemic_e.pdf (last visited 14 February 2016); M. R. Evans, 'The swine flu scam?' (Editorial Comment), 32 *Journal of Public Health* (2010) 3, 296, 297.

22 With some nuances, such is the position taken in the editorial comment, 'H1N1dsight is a wonderful thing', 28 *Nature Biotechnology* (2010) 3, 182. Also, for a brief recount of the technical process undertaken during the discovery phase of the pandemic for identifying the strain of the virus and its epidemiologic characteristics, see A. Schuchat, B. P. Bell & S. C. Redd, 'The Science behind Preparing and Responding to Pandemic Influenza: The Lessons and Limits of Science', 52 *Clinical Infectious Diseases* (2011) Supplement to 1 January, S9–S10.

23 See *Summary report of a High-Level Consultation: new influenza A (H1N1)*, WHO Information Note 2009/2 (20 May 2009), available at http://www.who.int/csr/resources/publications/swineflu/High_Level_Consultation_18_May_2009.pdf (last visited 14 February 2016), 3.

24 The *Framework of engagement with non-State actors*, approved in Resolution WHA 69.10 at the 69th World Health Assembly (May 2016), stipulates in para. 22 that "[a] conflict of interest arises in circumstances where there is potential for a secondary interest (a vested interest in the outcome of WHO's work in a given area) to unduly influence, or where it may be reasonably perceived to unduly influence, either the independence or objectivity of professional judgement or actions regarding a primary interest (WHO's work). The existence of conflict of interest in all its forms does not as such mean that improper action has occurred, but rather the risk of such improper action occurring. [...]". Available at http://apps.who.int/gb/ebwha/pdf_files/WHA69/A69_R10-en.pdf (last visited 21 June 2016)

maximum pandemic phase was declared to be officially over in a statement published on 10 August 2010.[25]

As a result of the suspicions and inquiries that rose during the pandemic period, the WHO summoned a Review Committee composed of external experts[26] in order to start an investigation regarding the functioning of the *IHR* during the pandemic. This Committee was also meant to evaluate how the process of creating and applying the 2009 pandemic guidelines was conducted.[27] The conclusion of the Review Committee Report 'cleared'[28] the WHO members of any possible malfeasance stemming from conflicts of interest or hidden agendas.[29]

The Review Committee Report's observations, as well as the criticisms against the Pandemic Declaration and the guidelines that served as its basis, were taken into account when the WHO issued a new document in 2013 entitled "Pandemic Influenza Risk Management: WHO Interim Guidance". Currently, this new installment constitutes the decision-making basis in the event of a future Pandemic Declaration until it is replaced by a superseding document.

Given the questions of legitimacy and accountability surrounding the 2009 Pandemic Declaration, it is deemed useful to review the legal framework of Pandemic Declarations. This includes the respective guidelines as well as the mechanisms employed by the WHO that marked the beginning and the end of the official 2009–2010 pandemic period.

25 The statement declaring the 'end' of the pandemic is available at http://www.who.int/mediacentre/news/statements/2010/h1n1_vpc_20100810/en/ (last visited 14 February 2016). The full list of the names of the Emergency Committee members for the 2009–2010 period is available at http://www.who.int/ihr/emerg_comm_members_2009/en/ (last visited 14 February 2016).

26 In accordance with Arts 50–53 *IHR*.

27 See WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 14–18.

28 The word is placed between single quotation marks, due to the fact that there is no established mechanism for holding WHO officials responsible for their decision-making, although this is a generalized phenomenon within and across international organizations. See e.g., J. Klabbers, *An Introduction to International Institutional Law* (2002), 3 [Klabbers, International Institutional Law].

29 WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 111.

III. The Close Relationship Between PHEICs and Pandemic Declarations

WHO guidelines can be generally seen as legally non-binding documents[30] designed as recommendations for clinical practice and public health, directed at Member States, WHO officials, health practitioners or experts and "other stakeholders".[31] Legally, they can complement other formal binding instruments, which in the case of pandemic guidelines consist of the *IHR*, that entered into force in 2007.[32] The *IHR* establish the category of a Public Health Emergency of International Concern (PHEIC),[33] considered by some as the Regulations' "main governance activity".[34] During the currently ongoing Zika epidemic (2016), it was considered that a PHEIC must: "(1) constitute a health risk to other countries through international spread; (2) potentially require a coordinated response because it is unexpected, serious, or unusual; and (3) have implications

30 The role of the guidelines can be considered as a more detailed elaboration of the interpretation and/or application of 'hard law', as is argued, e.g., by C. Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (2000), 27–31.

31 WHO, *WHO Handbook for Guideline Development*, 2nd ed (2014), 1, available at http://apps.who.int/iris/bitstream/10665/75146/1/9789241548441_eng.pdf (last visited 14 February 2016).

32 For discussions about the binding nature of the *IHR*, see J. P. Ruger, 'Normative Foundations of Global Health Law', 96 *The Georgetown Law Journal* (2008) 2, 423, 434–435; D. P. Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Health Regulations', 4 *Chinese Journal of International Law* (2005) 2, 325, 385; R. Katz & J. Fischer, 'The Revised International Health Regulations: A Framework for Global Pandemic Response', 3 *Global Health Governance* (2010) 2, 2; B. Condon & T. Sinha, 'The effectiveness of pandemic preparations: legal lessons from the 2009 influenza epidemic', 22 *Florida Journal of International Law* (2010) 1, 1, 4–5; G. L. Burci & R. Koskenmäki, 'Human Rights Implications of Governance Responses to Public Health Emergencies: The Case of Major Infectious Disease Outbreaks' in A. Clapham *et al.* (eds), *Realizing the Right to Health* (2009), 350.

33 Art. 1 *IHR* defines a PHEIC as "an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response".

34 L. Gostin, M. C. DeBartolo & E. A. Friedman, 'The International Health Regulations 10 years on: the governing framework for global health security', 386 *The Lancet* (2015), 2222.

beyond the affected country that could require immediate action".[35] However, the elements of what is considered to be a pandemic are not at all addressed in the *IHR*,[36] but are rather the product of multiple guidelines that have existed since 1999.[37]

In order to elucidate some of the differences between a PHEIC and a Pandemic Declaration, a brief glance at the events that took place during the 2009–2010 is useful. The WHO used both legal bases at the operational level during two separate occasions in 2009: On 25 April, the Director General of the WHO issued a statement declaring that the cases of 'swine influenza' reported in Mexico and the United States of America justified labeling the situation as a PHEIC,[38] while the pandemic phase remained at level 3. Later, on 11 June of the same year, the WHO's Director-General issued yet another official statement, this time declaring that the world "[is] now at the start of the 2009 influenza pandemic", thereby deciding to raise the pandemic alert phase from 5 to 6, i.e. the maximum possible.[39] Each Declaration differed in scope and consequences. A PHEIC can be limited to a regional area, as occurred on 25 April 2009, when it was emitted on the basis of evidence that the virus was present in Mexico and the United States of America, or more recently during the Ebola crisis in West Africa. By contrast, a Pandemic Declaration, according to both the 2009 and the more recent 2013 guidelines, indicates that there is a considerable risk of the spread eventually reaching a multi-regional and perhaps even planetary dimension. At that moment, approximately 142 WHO Member States had already developed national pandemic plans[40] that were meant to be applied as a consequence of the WHO's Pandemic Declaration.

35 D. L. Heymann *et al.*, 'Zika virus and microcephaly: why is this situation a PHEIC?', 387 *The Lancet* (2016), 719–720.

36 Katz & Fischer, *supra* note 32, 11.

37 The WHO has developed several editions of the pandemic guidelines, in 1999 (*Influenza Pandemic Plan. The Role of WHO and Guidelines for National and Regional Planning*), 2005 (*WHO global influenza preparedness plan. The role of WHO and recommendations for national measures before and during pandemics*), 2009 (*Pandemic Influenza Preparedness and Response)* and 2013 *(Pandemic Influenza Risk Management*).

38 See this statement available at http://www.who.int/mediacentre/news/statements/2009/h1n1_20090425/en/ (last visited 14 February 2016).

39 Available at http://www.who.int/mediacentre/news/statements/2009/h1n1_pandemic_phase6_20090611/en/ (last visited 14 February 2016).

40 See WHO, *Comparative analysis of national pandemic influenza preparedness plans*, January 2011, available at http://www.who.int/influenza/resources/documents/comparative_analysis_php_2011_en.pdf?ua=1 (last visited 14 February 2016), 4.

The relevant 2013 WHO guidance document states that Pandemic Declarations should be distinguished from the distinct Pandemic phases established elsewhere in the guidelines.[41] The specific components that constitute a Pandemic Declaration are themselves a source of much confusion.[42] On one hand, both the WHO in a 11 June 2009 statement[43] and the Review Committee in its 2011 Report held that the maximum level of pandemic alert (phase 6) is what properly constituted a Pandemic Declaration.[44] However, the latest 2013 WHO guidelines on the matter changed the pandemic alert levels by substituting the six different phases of the 2009 document. Instead, a four-phase system was established, according to which the WHO Director-General may make a 'declaration of a pandemic', without specifying the formal details of how such a declaration will be effectuated.[45]

The Director-General of the WHO is in charge of emitting both the PHEIC[46] and Pandemic Declarations.[47] In the case of the PHEIC, this may be done only after convening an Emergency Committee composed of medical experts and receiving its recommendations.[48] By contrast, Pandemic Declarations

41 WHO, *Pandemic Influenza Risk Management: WHO Interim Guidance*, June 2013, available at http://www.who.int/influenza/preparedness/pandemic/influenza_risk_management/en/ (last visited 14 February 2014), 7. This distinction is also found in Katz & Fischer, *supra* note 32, 7-8.

42 See WHO, *Pandemic Influenza Preparedness and Response: A WHO Guidance Document*, Global Influenza Programme (2009, reprinted in 2010), available at http://www.who.int/influenza/resources/documents/pandemic_guidance_04_2009/en/ (last visited 14 February 2016), 14, Section 2.1. It appears that the only clear component of this criterion for officially declaring the presence of a pandemic (identified with phase 6), was its presence in more than one of the WHO's world regions. These elements were modified in the latest version, Pandemic Influenza Risk Management, supra note 41, 7.

43 See *Emergency preparedness, response. What is phase 6?*, available at http://www.who.int/csr/disease/swineflu/frequently_asked_questions/levels_pandemic_alert/en/ (last visited 14 February 2016).

44 WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 37. This is also the position presented in *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe, *supra* note 21, para. 7.

45 *Pandemic Influenza Risk Management: WHO Interim Guidance*, *supra* note 41, 7.

46 Art. 12 *IHR*.

47 See *Pandemic Influenza Preparedness and Response: A WHO Guidance Document*, *supra* note 42, 20; *Pandemic Influenza Risk Management: WHO Interim Guidance*, *supra* note 41, 7.

48 According to Art. 12(4) *IHR*. The failure to seek the views of the Emergency Committee is considered by some as a legal requirement that, if ignored, could lead to a case of (formal) responsibility for the WHO and enable affected State parties to the *IHR* to invoke this

are not subject to such a requirement. Nevertheless, during the 2009–2010 event, the Director-General relied on an opinion of the Emergency Committee to raise the alert phase to level 6.[49]

C. Pandemic Declarations as an Exercise of International Public Authority

I. The (Not so) Legal Nature of the WHO's Pandemic Guidelines as the Basis for Pandemic Declarations

A considerable amount of the WHO's activities are made through non-binding recommendations and guidelines.[50] In fact, binding acts issued by the WHO seem to be the exception.[51] This can be due to the additional difficulties in convincing governments to constrain themselves through binding international law, which leads to non-binding acts being a useful tool for reaching agreement on a topic.[52]

As mentioned before, WHO guidelines are legally non-binding documents[53] that consist of a series of steps and/or recommendations for decision-

matter in a dispute. See G. L. Burci & C. Feinäugle, 'The ILC's articles seen from a WHO perspective', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in memory of Sir Ian Brownlie* (2013), 187.

49 This decision has been criticized by D. P. Fidler in 'H1N1 after action review: learning from the unexpected, the success and the fear', 4 *Future Microbiology* (2009) 7, 767, 768.

50 This tendency has been pointed out, e.g., in G. L. Burci & C.-H. Vignes, *World Health Organization* (2004), 141–142 & 146–152; R. G. Feachem & J. D. Sachs (chairs), *Global Public Goods for Health. Report of Working Group 2 of the Commission on Macroeconomics and Health*, World Health Organization (2002), available at https://extranet.who.int/iris/restricted/bitstream/10665/42518/1/9241590106.pdf (last visited 14 February 2016), 55; Burci, & Feinäugle, *supra* note 48, 178, footnote 9.

51 The 2003 *Framework Convention on Tobacco Control* and the 2005 *International Health Regulations* are the two most notorious cases of binding, 'legislative' regulations adopted by the WHO. See A. L. Taylor, 'Governing the Globalization of Public Health', 32 *The Journal of Law, Medicine & Ethics* (2004) 3, 500, 505; L. O. Gostin, 'Foreword: National and Global Health Law: A Scholarly Examination of the Most Pressing Health Hazards', 96 *The Georgetown Law Journal* (2008) 2, 317, 320; T. van der Rijt & T. Pang, 'Resuscitating a comatose WHO: Can WHO reclaim its role in a crowded global health governance landscape?', 6 *Global Health Governance* (2013) 2, 6–7.

52 See L. Gostin & D. Sridhar, 'Global Health and the Law', 370 *New England Journal of Medicine* (2014) 18, 1732, 1737.

53 However, there are also views that consider certain guidelines to have an indirect binding effect, constituting 'hard' international law, since they can be used eventually as a valid

making in health policies both at the international and the national level, based on the viewpoint of what has been labeled by some as "methods of professional practice".[54] The April 2009 pandemic influenza guidelines are the ones that provided the grounds for the 2009 Pandemic Declaration.[55] These guidelines can also address public health emergencies which, due to the pressing nature of their subject matter, justify a shortened time of elaboration in comparison to other documents of a similar nature.

The guidelines' status as 'law' is contested since they were designed *prima facie* as merely recommendations. Although it can be contested that international law in general lacks a definitive criterion for determining what is law from what is not,[56] a violation of the guidelines is not considered as a breach of international law, at least not in the same manner as those acts that do fall under Article 38(1) *Statute of the International Court of Justice*. Nonetheless, they do function as the source of a line of criticisms – a 'naming and shaming'

interpretation of the main treaties they are based upon. Such might be the case, for instance, of certain guidelines that are linked to the *Framework Convention for Tobacco Control*, see S. F. Halabi, 'The World Health Organization's Framework Convention on Tobacco Control: An analysis of Guidelines adopted by the Conference of the Parties', 39 *Georgia Journal of International and Comparative Law*, (2011) 1, 121, 126–127.

54 This label is used in Gostin & Sridhar, *supra* note 52, 1732–1733.

55 Several clarifications about both the pandemic guidelines and Pandemic Declarations are pending to this date, e.g. whether they would be applicable to diseases other than influenza, such as Ebola and Zika. The wording throughout the document *Pandemic Influenza Risk Management. WHO Interim Guidance* of 2013 suggest these types of Pandemic Declarations are limited to the influenza virus.

56 The category of *soft law* will not be the core term used in this article, since it is not helpful for establishing sound criteria that can distinguish when a document is binding from when it is not, but rather expresses it as a matter of degree, i.e. one is more or less binding than the other. See Klabbers, *International Law*, *supra* note 2, 38. The broad statement about a lack of consensus regarding the categorical distinction between what is considered 'hard' and 'soft' law is also present in J. M. Serna de la Garza, *Impacto e Implicaciones Constitucionales de la Globalización en el Sistema Jurídico Mexicano* (2012), 84.

scheme[57] – or a reputational cost[58] in the eventual case of non-observance by national authorities.[59]

Hence, although the WHO guidelines do not hold the same binding legal status as the *International Health Regulations* that entered into force in 2007, both of these instruments are intertwined and share authoritative features that need to be acknowledged and developed. A closer look at the guidelines can illustrate why we should consider them as being authoritative despite them being legally non-binding.

II. The Authoritative Nature of Pandemic Declarations and Pandemic Guidelines

The fact that the *IHR* are legally binding, as opposed to the pandemic guidelines, also entails that the rules of the WHO Constitution regarding entry into force,[60] interpretation in case of disputes,[61] and obligations of surveillance capacity-building[62] are applicable only to the *IHR*.[63] Yet, the guidelines do have a practical effect. They contain indications for States, which might trigger effects at

57 See S. E. Davies & J. Youde, 'The IHR (2005), Disease Surveillance, and the Individual in Global Health Politics', 17 *The International Journal of Human Rights* (2013) 1, 133, 135–136.

58 The idea of 'reputational cost' is useful in this context, since it can be argued that States that do not comply with either the *IHR* or the guidelines will be thought of as being unreliable at future occasions. The purpose of these international documents would be to somehow create expectations about the future behavior and attitudes of States. See A. Guzman, *How International Law Works. A Rational Choice Theory* (2008), 73; Chinkin, *supra* note 30, 23–25. In the context of disease reporting, the WHO's recommendations are only one influential factor amongst many others, such as regional peer pressure in light of a commercial alliance or even what is known as the 'enlightened self-interest' of the reporting State. See S. E. Davies, 'The international politics of disease reporting: Towards post-Westphalianism?', 49 *International Politics* (2012) 5, 591, 608–609; O. Aginam, *Global Health Governance. International Law and Public Health in a Divided World* (2005), 130.

59 There were some national authorities that deviated from recommendations derived from the WHO guidelines. This is technically a result of the PHEIC and not the Pandemic Declaration, because it occurred after the declaration of 25 April of the presence of a PHEIC. There were no public statements by affected States asking for formal sanctions. See J. G. Hodge Jr., 'Global Legal Triage in Response to the 2009 H1N1 Outbreak', 11 *Minnesota Journal of Law, Science & Technology* (2010) 2, 599, 607–608.

60 Art. 22 *Constitution of the WHO* & Art. 59 *IHR*.

61 Art. 56 *IHR*.

62 Examples include Art. 5(1) & Annex 1(2) *IHR*.

63 Fidler, *supra* note 32, 385; Condon & Sinha, *supra* note 32, 4–5.

the domestic level. The 2009 Pandemic Declaration caused the implementation of national pandemic plans across the globe, as well as the simultaneous activation of 'dormant' contracts with pharmaceutical companies when phase 6 was declared.[64] The guidelines also function as internal operational rules that are to be applied by the WHO when the occasion arises, e.g. with respect to the question of who will issue Pandemic Declarations and when.[65]

Further, both the *IHR* and the guidelines can be viewed as supported by a 'name and shame' scheme for promoting States' compliance.[66] That is, if a State decides not to comply with the regulations or the guidelines, it might incur in reputational costs that may affect its relations with other States.[67] National authorities' measures that fall outside of the guidelines' recommendations might also be considered as an obstacle for the containment of an outbreak of a contagious disease. In this line of reasoning, there can be other negative non-legal consequences – be they reputational, economic, etc. – for not observing these recommendations, which emanate from non-binding guidelines.[68] This illustrates how Pandemic Declarations constitute an exercise of international public authority, independently of the *IHR*.

64 See D. Cohen & P. Carter, 'WHO and the pandemic flu 'conspiracies'', 340 *The BMJ* (12 June 2010) 7759, 1274, 1279; WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 101–102 & 116; *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe, *supra* note 21, para. 10.

65 These two different types of functions are taken directly from what is branded as 'international standards' by M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', in von Bogdandy *et al.* (eds), *supra* note 4, 661, 695–699 [Goldmann, Inside Relative Normativity].

66 See G. Rodier, 'New rules on international public health security', 85 *Bulletin of the World Health Organization* (2007) 6, available at http://www.who.int/bulletin/volumes/85/6/07-100607/en/ (last visited 14 February 2016), 428–430; further, Davies & Youde, *supra* note 57, 134–138.

67 Guzman, *supra* note 58, 73. This dynamic is also present in the PISA rankings, see the explanation in A. von Bogdandy & M. Goldmann, 'The Exercise of International Public Authority through National Policy Assessment. The OECD's PISA Policy as a Paradigm for a New International Standard Instrument', 5 *International Organizations Law Review* (2008) 2, 241, 260.

68 See Davies, *supra* note 58, 593–595 & 607; T. Murphy, *Health and Human Rights* (2013), 61–62; J. G. S. Koppell, 'Accountable global governance organizations', in M. Bovens, R. E. Gooden & T. Schillemans (eds), *The Oxford Handbook of Public Accountability* (2014), 375. For instance, although it was not officially labeled as a legal breach of the 1969 *IHR*, the failure of China to adequately report activities during the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak led to a change in the public discourse within the international community about States' obligation to make timely reports to the WHO.

The authoritative nature of guidelines can be witnessed in a third manner. Generally speaking, it is accepted that instruments that fall outside the scope of the sources doctrine, i.e., those that do not fit within Article 38(1) *Statute of the International Court of Justice*, cannot entail certain legal ramifications by themselves, e.g., asking for damages or claims before international courts.[69] Nevertheless, ignoring or wrongfully applying the contents of the various pandemic guidelines when issuing Pandemic Declarations can give rise to consequences of another kind. The pandemic guidelines were the target of a substantial part of the investigation of the Review Committee in charge of examining the rightful application of the *IHR* during the 2009-2010 pandemic by the WHO's Director-General and the Emergency Committee.

When assessing the authority of the WHO's guidelines, a complication arises: There is often no evidence in order to unequivocally determine whether a State's actions are the result of a direct compliance with the guidelines, or whether they derive from that State's own understanding of how to deal with the problem.[70] On the more general, theoretical level, it can also be argued that States' actions that happen to be in accordance with the Pandemic Declaration and its guidelines are more than a mere coincidence.[71] There is simply no clear-

69 This appears to be a broadly accepted account, as is mentioned in Goldmann, 'Inside Relative Normativity', *supra* note 65, 676.

70 At the outset of the 2009 A(H1N1) pandemic, some of the measures adopted by several States 'deviated', with varying degrees, from the WHO's guidelines and recommendations. These consisted mainly of bans on imports, arrival health screenings in airports and restrictions on flights towards the countries initially affected (U.S.A., Canada and Mexico). Only exceptionally were the more aggressive measures implemented, i.e. quarantines. For a more detailed account, see Condon & Sinha, *supra* note 32, 15–17; also see Katz & Fischer, *supra* note 32, 6–7; additionally, P. Acconci, 'The Reaction to the Ebola Epidemic within the United Nations Framework: What Next for the World Health Organization? ' in F. Lachenmann, T. Röder & R. Wolfrum, 18 *Max Planck Yearbook of United Nations Law* (2014), 413.

71 This is a conundrum present in legal theory and particularly in international law. See M. Goldmann, 'We Need to Cut Off the Head of the King: Past, Present and Future Approaches to International Soft Law', 25 *Leiden Journal of International Law* (2012) 2, 353. According to the 2013 WHO pandemic guidelines, the specific effects that are a direct result from Pandemic Declarations are also a matter of choice. States can choose to consider them as a trigger of particular consequences such as decision-making by national regulatory bodies or the activation of contractual agreements. See *Pandemic Influenza Risk Management: WHO Interim Guidance*, *supra* note 41, 7.

cut causal link between a Pandemic Declaration, the contents of the multiple guidelines, and the actual decisions taken by national governments.[72]

Regardless of the absence of an exact verification of the effects of the guidelines, they show several potential constraining effects that can be examined *ex ante*. This leads to considering them as authoritative in general, and more specifically as exercises of international public authority.

D. (Some) Legitimacy Issues of Pandemic Declarations

I. A Workable Concept of Legitimacy

One of the main consequences of viewing Pandemic Declarations as exercises of international public authority is that it opens the floor to a discussion about their legitimacy.[73] Naturally, the very concept of legitimacy is the subject of multiple views that are even opposing at times.[74] For the purposes of this article, legitimacy will be understood as the reasons justifying an exercise of authority.[75] As a caveat, a general assessment of the WHO's degree of legitimacy – based on an institutional-level credibility and integrity as a scientifically reliable entity[76] – requires an analysis that outreaches the scope of this article. This is also a result of the idea that there is no developed legal framework capable of providing a general understanding of international organizations.[77]

The authority exercised by international organizations is often criticized for its 'democratic deficit'. When facing this conundrum, international organizations resort to different ways of legitimizing their actions, which can

72 There are some illustrative indicators, such as the fact that during the 2009 pandemic, 74% of the countries had already designed a pandemic preparedness plan, and also that phase 6 of the pandemic alert structure activated the advanced-purchase agreements with some vaccine manufacturers. See WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, xix & xxi.

73 Von Bogdandy, Dann & Goldmann, *supra* note 4, 11.

74 On the political, and even ideological discrepancies that disrupt the whole idea of legitimacy, see G. C. A. Junne, 'International organizations in a period of globalization: New (problems of) legitimacy', in J. M. Coicaud & V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001), 189, 190–193.

75 See Wolfrum, supra note 12, 6; D. Bodansky, 'Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *American Journal of International Law* (1999) 3, 596–603.

76 This line of reasoning was also present during the 2003 SARS outbreak. See D. C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *The Yale Law Journal* (2006) 7, 1490, 1551.

77 Von Bogdandy, Dann & Goldmann, *supra* note 4, 20–21.

be combined between themselves.[78] One of them is the reliance upon 'expert-based' or 'technocratic' legitimacy.[79] It will be distinguished from another, even broader category of *lato sensu* 'political' legitimacy,[80] which in the present case refers to concerns about transparency and accountability. This type of political legitimacy can be visualized at a general level as a mixture between democratic and procedural aspects, linked directly to the manner in which Pandemic Declarations are made. Even though this is far from being a delineated category, it is useful for the purpose of distinguishing it from the strictly 'technical' aspects that comprise expertise-based or technocratic legitimacy.

The main argument that highlights the importance of technocratic legitimacy is that decision-makers consider the scientific nature of some problems to be beyond *lato sensu* political discussions. The issues that are labeled as 'technical' may enjoy legitimacy if they are decided in accordance with certain scientific standards and expert knowledge, even though they are not always the result of, and at times not even compatible with, democratic consensus, transparency, accountability and other elements that contribute to political legitimacy.[81] Certainly, technocratic strategies are not limited to international institutions, but have rather been a continuous matter of debate concerning national governments and the European institutions as well.[82]

78 G. De Búrca, 'Developing Democracy Beyond the State', 46 *Columbia Journal of Transnational Law* (2008) 2, 221, 240–245.

79 Although not identical in its contents, this terminology can be considered as similar to the understandings of this type of legitimacy that are employed by others, as an overall 'Results-based legitimacy'. See Esty, *supra* note 76, 1517. It is also similar to another type of 'technocratic' element, labeled as 'authority based on knowledge and expertise', in I. Venzke, 'International Bureaucracies from a Political Science Perspective - Agency, Authority and International Institutional Law', in von Bogdandy *et al.* (eds), *supra* note 4, 67, 83-85. Within the specific context of European institutions, see C. Landfried, 'Beyond Technocratic Governance: The Case of Biotechnology', 3 *European Law Journal* (1997) 3, 255, 255–262.

80 The way the generic term 'political' is used here is mostly related to the types of legitimacy associated with the 'good governance' label. The distinction has already been formulated, albeit with different terminologies and more developed components, in Esty, *supra* note 76, 1511-1512. See also the distinction used in D. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', 27 *Sydney Law Review* (2005) 1, 5, 21–28. This approach has also been criticized in Venzke, *supra* note 79, 86.

81 This does not only happen in the field of medicine. The dangers of resorting to general discourses about the distinction between science/expertise and political issues have been explored elsewhere. See Landfried, *supra* note 79, 258–259; Kennedy, *supra* note 80, 5, 15–20.

82 Peel, *supra* note 1, 6 & 14.

The expertise-based or technocratic legitimacy developed in this article encompasses two parallel aspects that can be conceptually distinguished from each other:[83]

a) the participation of independent experts, i.e. of persons endowed with special qualifications in a particular field, and the use of state-of-the-art knowledge in the decision-making process;[84] and

b) the generation of certain results that partly or completely fulfill to a certain extent technically established objectives that were formulated when the decision was initially conceived, or prior to it.[85]

Both of these elements can be considered as part of the technocratic legitimacy equation that is present in Pandemic Declarations: the exercise of authority will be considered to be technically justified if it combines these two elements in a more or less satisfactory way. Regarding the first element, authority is legitimized to a certain extent if it reflects the work of medical experts and incorporates 'state-of-the-art' knowledge produced within the epistemic community in question.[86] As for the second element, if the decision is seen as the cause of a certain desired (health-related) effect in the world, it will enjoy a higher degree of acceptance as legitimate. However, during the 2009–2010 event the inclusion of political factors within a *prima facie* technical decision such as a Pandemic Declaration was arguably the driving force of the controversy surrounding it. It later gave way to suspicions of conflicts of interest by those participating in the decision-making process within the WHO.

Even though the present analysis is mostly limited to the 2009–2010 Pandemic Declaration, it is useful to visualize some of the possible legitimacy issues that might arise in future occasions,[87] so as to look beyond the confines of a particular case. Currently, the 2014 Ebola crisis, that originated in 2013 and

83 This conceptual division is taken loosely from the classic formulaton of 'input-oriented' – as in 'procedural' – and 'output-oriented' – as in 'results' – legitimacy, put forward by F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999), 5-11. The distinction between the 'inputs' and the 'outputs' is echoed in the case of international organizations, albeit not in an identical sense, by V. Rittberger & B. Zangl, *International Organization. Polity, Politics and Policies* (2006), 60-61 & 78-87.

84 De Búrca, *supra* note 78, 242-246; Wolfrum, *supra* note 12, 19.

85 De Búrca, *supra* note 78, 245-246.

86 Here, the term 'epistemic community' denotes a widespread consensus of experts in a certain field of knowledge on how to solve a problem. This is borrowed from Rittberger & Zangl, *supra* note 83, 85-86 & 115-116.

87 Some have already noticed improvements in the decision-making process of the WHO in the case of Ebola and the declaration of a PHEIC. See T. Hanrieder & C. Kreuder-Sonnen, 'The WHO's new emergency powers – from SARS to Ebola' (22 August 2014)

was fully unraveled in 2014, highlights some of the recurrent concerns about how the WHO exercises its authority through non-binding means, even though there was no Pandemic Declaration emitted.[88] And currently, there is a Zika virus epidemic that continues to spread throughout multiple regions and has already been declared a PHEIC.[89]

The following sections provide a closer look at the type of technocratic legitimacy discussed herein. Then, its tenuous relationship with what has been labeled as political legitimacy will be shortly addressed.

II. The Importance of Being Right: The Issue of the Technocratic Legitimacy of Pandemic Declarations

The WHO's guidelines may enjoy technocratic legitimacy insofar as States can assume that the contents of their regulations are more likely to be technically accurate if they follow the guidelines instead of the conclusions that they may reach on their own.[90] When addressing the technocratic legitimacy of the 2009–2010 Pandemic Declaration**,** it is helpful to distinguish the two elements of technocratic legitimacy elaborated in the previous section. The first element is *ex ante*. It deals with the issue of whether the available scientific information at the moment of the Declaration justified the decisions adopted considering the degree of scientific uncertainty and the pressing nature of the phenomenon at hand.[91] The highly technical and fluctuating traits of an epidemiological

available at http://voelkerrechtsblog.org/the-whos-new-emergency-powers-from-sars-to-ebola/ (last visited 14 February 2016).

88 In the statement of 8 August 2014, the WHO declared the presence of a PHEIC and simultaneously issued several (non-binding) recommendations regarding Ebola. Available at http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/ (last visited 14 February 2016).

89 The declaration of a PHEIC in the case of the Zika epidemic took place in light of the scientific uncertainty behind the possible link between the virus and emerging clusters of microcephaly cases in affected countries. In this regard, it can be distinguished from previous PHEICs in the cases of A(H1N1) Influenza and Ebola, for which more epidemiological information was already available. See Heymann *et al.*, *supra* note 35, 720.

90 It has been argued elsewhere that it would have been very risky – and even costlier, if the developments had been more catastrophic – for States not to have invested heavily in vaccines and flu medications, as well as the multiple non-pharmaceutical interventions that were employed. See the editorial comment, 'H1N1dsight is a wonderful thing', *supra* note 22, 182.

91 For a brief summary of the information gathered at the time of the Declaration, see WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra*

description of influenza and its effects do not allow for a precise forecast of the severity of its incidence at the initial moment of a pandemic, since influenza is widely viewed as a virus with a highly unpredictable nature.[92] Consequently, there is an inherent difficulty in producing the desired effects, hence such a decision benefits from the second element of technocratic legitimacy described in the previous section.

The first element appears to be necessary in the case of Pandemic Declarations. Determining whether there is or is not a new subtype of influenza virus cannot be decided by broad democratic consensus, but is rather dependent on an evaluation of this matter by the medical epistemic community.[93] Thus, the first element of technocratic legitimacy is directly enhanced by the participation of the Emergency Committee, composed solely by experts in the medical field,[94] both in the case of 2009 PHEIC[95] and Pandemic[96] Declarations. In the case of the latter, there is no general, explicit procedural requirement to consult the Committee when raising the pandemic alert. Yet the WHO Director-General nonetheless decided to rely upon these experts' advice when issuing the 2009 Pandemic Declaration.[97]

note 13, xxi. Ultimately, this is the immediate consequence of a prevailing uncertainty in scientific knowledge about influenza, see *Science, H1N1 and society: Towards a more pandemic-resilient society*, Final Report from the Expert Group on 'Science, H1N1 and Society' European Commission (15 June 2011), available at http://ec.europa.eu/research/science-society/document_library/pdf_06/sis-heg-final-report_en.pdf (last visited 14 February 2016), 21-22; Peel, *supra* note 1, 101.

92 Bennett & Carney, *supra* note 13, 306-308; WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, xv; H. Fineberg, 'Pandemic Preparedness and Response. Lessons from the H1N1 Influenza of 2009', 370 *The New England Journal of Medicine* (2014) 14, 1335, 1341.

93 This is the source of many debates concerning the alleged 'technical' nature of these decision-making processes, and its friction with the constructivist view that scientific knowledge, including the assessment of risks, is socially built. For a glimpse of this debate, see A. Plough & S. Krimsky, 'The Emergence of Risk Communication Studies: Social and Political Context', 12 *Science, Technology & Human Values* (1987) 3/4, 4, 7-9; M. Thompson & S. Rayner, 'Risk and Governance Part I: The Discourses of Climate Change', 33 *Government and Opposition* (1998) 2, 140-142; Y. Yishai, 'Participatory governance in public health: Choice, but no voice', in Levi-Faur (ed.), *supra* note 1, 528.

94 In accordance with Art. 48(2) *IHR*.

95 Art. 12(4c) *IHR*.

96 WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 37.

97 Fidler, *supra* note 49, 768.

The first criterion of technocratic legitimacy would entail that influenza guidelines developed by the WHO are more or less flexible in order to adapt general rules to scientific and technological developments, thus accommodating a degree of uncertainty.[98] They may be useful as a reasonable explanation of what is more likely to be the case and what is not, without granting a level of discretion that might pave the way for abuses of power.[99]

The second criterion for assessing technocratic legitimacy – the 'output' dimension – is far more difficult to ascertain. The actual impact of issuing a Pandemic Declaration needs to be analyzed *ex post* on a country-by-country basis, given that States are in charge of implementing the medical measures directed at slowing the transmission of the disease. States also need to consider country-specific factors, such as the characteristics of a national health system, or even the natural, social and cultural environments.[100] This can fuel many complications when preparing the pandemic response throughout the various levels of government. States are ultimately the ones with the best knowledge of their national health systems and the extent of their capabilities.[101] Any international regulation therefore needs to leave some room for maneuverability at the national level in order for the mechanisms to be effective.[102]

98 Morens *et. al.*, *supra* note 14, e14–e16; G. M. Algarra Garzón, 'Definiendo un escenario de toma de decisiones: El caso de la Influenza humana A(H1N1)', in I. Brena Sesma (coord.), *Emergencias Sanitarias* (2013), 71; Fineberg, *supra* note 92, 1340–1341.

99 This can also be the case in the context of terrorist attacks and disasters at the national level. See, e.g., W. K. Mariner, G. J. Annas & W. E. Parmet, 'Pandemic Preparedness: A return to the rule of law', 1 *Drexel Law Review* (2009) 2, 341, 365.

100 L. O. Gostin & B. E. Berkman, 'Pandemic Influenza: Ethics, Law, and the Public's Health', 59 *Administrative Law Review* (2007) 1, 121, 153.

101 For a more detailed picture of the attempted effects of public health interventions in reducing the spread of the disease, see Condon & Sinha, *supra* note 32, 9. This was also an argument put forward by then Special Advisor Keiji Fukuda, during the 14 January 2010 virtual press conference, in the sense that "we don't know how many infections and deaths have been avoided or prevented by the actions taken by countries and we don't know how much these efforts have helped mediate the overall effect of the pandemic [...]", available at http://www.who.int/mediacentre/vpc_transcript_14_january_10_fukuda.pdf?ua=1 (last visited 14 February 2016).

102 Hodge, *supra* note 59, 606.

III. The Friction Between Technocratic and Political Legitimacy in the Case of Pandemic Declarations

In the case of Pandemic Declarations, the so-called technocratic legitimacy collides with other types of legitimacy. In some cases, the *lato sensu* political aspects of a decision – including the democratic element – might operate at the expense of the technical justification of certain assessments,[103] and vice versa. There is a seemingly inescapable tradeoff between the two forms of legitimacy, particularly in the case of pandemic preparedness and response mechanisms. The degree to which the pendulum has swung to either side has been, and will continue to be, a source of disagreements.[104]

The case of the 2009–2010 influenza pandemic is an example of how the technical soundness of a certain act is not impervious to, and needs to be weighed against several underlying political factors as far as possible, since all of them contribute simultaneously to the legitimacy of the act at hand.[105] From this premise, one could then address the view according to which an international organization with eminently technical purposes, like the WHO or its bodies, needs to be 'insulated' from political influence in order to gain more legitimacy.[106]

Needless to say, a Pandemic Declaration has to be firmly based first and foremost on scientific grounds.[107] Anything else would result in a seriously flawed approach that, in turn, will eventually lead to myopic decision-making. However,

103 Plough & Krimsky, *supra* note 93, 7; Peel, *supra* note 1, 10. The Ebola crisis caused disagreements between experts and some electorate-friendly measures taken by some authorities in the U.S.A. that are ill-advised from a scientific point of view. See the Editorial Comment by J. M. Drazen *et al.*, 'Ebola and Quarantine', 371 *The New England Journal of Medicine* (2014) 21, 2029, 2029–2030.

104 Finding the proper balance in this duality is considered to be a core challenge of public health law. See L. Gostin, *Public Health Law. Power, Duty, Restraint* (2008), 41.

105 For a more detailed account of how this mixture of political and scientific aspects was visible during the 2009–2010 A(H1N1) influenza pandemic, see Algarra Garzón, *supra* note 98, 61.

106 This view is held, e.g., by the Commission on a Global Health Risk Framework for the Future, see P. Sands, C. Mundaca-Shah & V. Dzau, 'The Neglected Dimension of Global Security – A Framework for Countering Infectious Disease Crises', Special Report, *The New England Journal of Medicine* (2016), 6, available at http://www.nejm.org/doi/pdf/10.1056/NEJMsr1600236.

107 A recent proposal by an independent panel, instituted in light of the WHO's handling of the Ebola crisis, stresses this element in the context of declaring a PHEIC. While the proposal is mainly aimed at delegating this authority to a 'Standing Emergency Committee', the reasoning is similar. S. Moon *et al.*, 'Will Ebola change the game? Ten essential reforms before the next pandemic. The report of the Harvard-LSHTM

Pandemic Declarations also need to take into account the multiple underlying political factors within the ever-more crowded international community of States, non-state actors, NGOs, etc. In other words, technocratic legitimacy in Pandemic Declarations is deemed a necessary, but not sufficient element for the purpose of legitimizing its exercise of international public authority.[108] The lengthy discussion that followed the declaration of the maximum pandemic alert level is an example of how decision-making based on purely technical grounds is not at all isolated from the political aspects of a particular field, no matter how sound the scientific data may be.

Among the concerns related to the political legitimacy of Pandemic Declarations is the overwhelming presence of the pharmaceutical sector on the international level and the vested economic interests it holds when dealing with public health emergencies. To put it bluntly: There is no denying that pharmaceutical companies made a big profit after the 2009 Pandemic Declaration was issued, due to the activation of several 'dormant' contracts that they had signed with national governments.[109]

Additionally, both pharmaceutical (e.g. the purchase of antivirals and vaccines) and non-pharmaceutical interventions (e.g. quarantine measures or the acquisition of sanitizing gel) directly affect the use of vital economic resources that might be urgently needed for other health-related issues.[110] If the scientific community considers the use of these resources as 'excessive', this can also undermine the aforementioned technocratic legitimacy.[111]

In sum, both expertise-based assessments and political considerations taken separately, can only account for part of the legitimacy problems of decisions that lead to Pandemic Declarations.[112] The 2009 Pandemic Declaration demonstrated that regardless of how elaborated or sophisticated the technical justification can be, decisions made by expert-bodies cannot always – if ever – be

Independent Panel on the Global Response to Ebola', 386 *The Lancet* (28 November 2015), 2212.

108 Peel, *supra* note 1, 56–57, 109; Esty, *supra* note 76, 1550–1554.

109 *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe, *supra* note 21, paras 30 & 46–48; Cohen & Carter, *supra* note 64, 1279; WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 101–102 & 116; Algarra Garzón, *supra* note 98, 65–68.

110 Bennett & Carney, *supra* note 13, 310–311.

111 For a succinct reading of some of the negative visions about the outcome of the 2009–2010 Pandemic Declaration, see Algarra Garzón, *supra* note 98, 69–71.

112 Bodansky, *supra* note 75, 623.

politically insulated.[113] More is needed in terms of legitimacy, and that is where transparency and accountability can play a fundamental role.[114]

E. Addressing the Legitimacy Aspects of Pandemic Declarations: Strengthening the Alarm Button

I. General Background: The Aftermath of the 2009–2010 Pandemic

During and after the Pandemic Declaration, many objections were leveled not only against the underlying decision-making structure, but also against the accuracy of the assessment of the evidence that led the WHO Director-General and the Emergency Committee to consider it as enough for justifying the implementation of the mechanism.

This has been a source of debate, since the WHO is perceived by some to have misled States in the 2009 Influenza Pandemic by exaggerating the magnitude of the pandemic.[115] A closely related point of inquiry is how the effectiveness of the WHO's decisions is based on the trust it inspires in Member States.[116] This would entail assessing how much trust the WHO maintains after a perceived

113 Some have already convincingly contested the general idea that certain decisions, particularly concerning risk, can be made on purely technical grounds. See Peel, *supra* note 1, 108.

114 This was already present in another set of WHO guidelines, where both transparency and accountability were considered as quintessential for building, maintaining and restoring the public's trust, i.e. as a way of improving legitimacy. See *WHO Outbreak communication guidelines* (2005), 2, available at http://www.who.int/csr/resources/publications/WHO_CDS_2005_28en.pdf (last visited 14 February 2016).

115 See, e.g., J. Grolle & V. Hackenbroch, 'Interview with epidemiologist Tom Jefferson: "A whole industry is waiting for a pandemic"', in *Spiegel Online International* (21 July 2009), available at http://www.spiegel.de/international/world/interview-with-epidemiologist-tom-jefferson-a-whole-industry-is-waiting-for-a-pandemic-a-637119.html (last visited 14 February 2016).

116 L. Gostin, Global Health Law (2014), 203; also, see WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 102.

'cry wolf'[117] situation in which a Pandemic Declaration might be considered to be an overreaction. But that is beyond the limits of this article.[118]

The following sections will deal with some of the issues related to both technocratic and *lato sensu* political legitimacy of Pandemic Declarations. This will not reduce the analysis to an anecdotal recount of a past event, since it might also provide a better understanding of how the legitimacy of these acts could be enhanced in the future (E.II.). But the question of legitimacy also needs to be translated somehow and to the extent possible into legal principles.[119] This is where the broad concepts of transparency and accountability enter the stage.

II. The Power of Words: The Price of Choosing a 'Final' Definition of Pandemics Amidst Uncertainty

The degree of technocratic legitimacy of a Pandemic Declaration also depends on the soundness of the factual basis. This, in turn, depends on whether there is an acceptable definition or shared understanding of what will be considered as a pandemic for the purposes of activating the respective mechanisms. Several of the critiques directed against the WHO's guidelines are aimed at the definition of a pandemic and its phases.[120] They could have equally been directed at the current state of epidemiology in general: There is no available, unequivocal definition that exhausts all possible instances – past, present and future – of what is to be deemed as a pandemic at a specific moment.[121]

117 'Push needed for pandemic planning', 90 *Bulletin of the World Health Organization* (November 2012) 11, 800, 801; *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe, *supra* note 21, para. 68.

118 Institutional-level assessments of WHO are certainly not uncommon in the literature. For thorough contributions, see D. P. Fidler, 'The Future of the World Health Organization: What Role for International Law?', 31 *Vanderbilt Journal of Transnational Law* (1998) 5, 1080-1126; M. J. Volansky, 'Achieving Global Health: A Review of the World Health Organization's Response', 10 *Tulsa Journal of Comparative & International Law* (2002) 1, 223, 248-259; van der Rijt & Pang, *supra* note 51.

119 Von Bogdandy, Dann & Goldmann, *supra* note 4, 10.

120 None of the previous guidelines for pandemics contained any precise definition of 'pandemic'. In the 2009 version, it was attempted, rather unsuccessfully, to discern between one pandemic phase and another. This, of course, has been the source of criticisms leveled against the absence of a workable definition. See Doshi, *supra* note 15, 532-534; also, Gostin, *supra* note 116, 202–203; similarly, S. Abeysinghe, *Pandemics, Science and Policy. H1N1 and the World Health Organization* (2015), 64-101..

121 Such a shortcoming is evidently not limited to pandemics or even the medical sciences in general, rather it is well known in the field of legal theory. For instance, see H. L. A. Hart,

It should be kept in mind that choosing between one of any of the available definitions comes at a price: If the conceptual components of a definition are too formal and rigid – for instance, by specifying a rate-of-contagion or a minimum degree of severity[122] as requirements for triggering the alert – this could narrow the kind of diseases that will fall under this category and hamper an effective and rapid response. Such rigidity was the very reason why the previous versions of the *IHR* became ineffective for facing the international spread of contagious diseases.[123] On the other hand, as occurred with the 2009 edition of the Pandemic Guidelines, a more vague and flexible definition may contribute to overcoming many of the obstacles that once plagued the former 1969 *IHR* and its subsequent revisions. But it can also entail giving decision-makers – in this case, the WHO Director-General and the Emergency Committee – too much discretion regarding the evaluation of a situation when determining whether there is an ongoing pandemic or not. With the recent Ebola crisis of 2013-2015, the point of who gets to make this decision in the case of a Public Health Emergency of International Concern (PHEIC) has once again come to the fore.[124]

For the time being, it may be acceptable to have a more or less 'incomplete' definition that is vague enough to provide for enough leeway to the WHO for determining whether the international community is facing a pandemic or not.[125] Otherwise, we might as well be demanding of the WHO to correct this

The Concept of Law, 2nd ed (1994), 6, 15–17; Klabbers, *International Institutional Law*, *supra* note 28, 7–8; T. Endicott, *Vagueness in Law* (2000), 48–49 & 181–183; E. Cáceres, 'The Golden Standard of Concepts with necessary conditions and the Concept of Law', 6 *Problema. Anuario de Filosofía y Teoría del Derecho* (2012), 39, 41–42.

122 It is worth noting that the more recent 2013 guidelines do establish severity indicators not as an element of the concept of pandemic itself, but rather as a way to calibrate national responses accordingly. See *Pandemic Influenza Risk Management: WHO Interim Guidance*, *supra* note 41, 22–24.

123 The explanation of why the former *IHR* were ineffective is relatively widespread, see e.g. Fidler, *supra* note 32, 327–329; Aginam, *supra* note 58, 77; Feachem & Sachs (chairs), *supra* note 50, 56.

124 In a proposal of July 2015, the Ebola Interim Assessment Panel recommended creating a Centre for Health Emergency Preparedness and Response within the WHO, having 'full operational authority'. Available at http://www.who.int/csr/resources/publications/ebola/ebola-panel-report/en/ (last visited 14 February 2016). Other expert groups have agreed with this. See Sands, Mundaca-Shah & Dzau, *supra* note 106, 5; S. Moon *et al.*, *supra* note 107, 2211–2212.

125 Concerning the necessary balance between the formalization of international public authority and the leeway granted in the case of different modes of decision-making at the international level, see Goldmann, 'Inside Relative Normativity', *supra* note 65, 692.

as well as many other medical definitions and their related conceptual problems. This epistemological endeavor might be unsuitable for this organization in light of its goals and institutional features.[126] But a minimum standard of what is to be considered a 'reasonable' interpretation of the existence of a pandemic is certainly necessary.[127] The problem in 2009 was the lack of clarity when the pandemic response structures were first formulated by the experts summoned by the WHO. A solution to this was attempted in the 2013 guidelines on pandemic influenza.[128] Nevertheless, the definition to date is still not clear enough, since the analytical distinction between the Pandemic Declaration and the announcement of what is now called the 'pandemic phase'[129] has not been fully clarified.

In sum, conceptual challenges like those related to the definition of a pandemic imply that decisions have to be made with a varying degree of uncertainty.[130] This epistemological problem also unveils the underlying frictions inherent in technocratic legitimacy and demonstrates the need to resort to political modes of legitimacy in the case of pandemic preparations, such as the principles of transparency and accountability.[131] This might legitimize the discretion granted to the Director-General of the WHO with respect to the application of the pandemic definition.

126 This stands in opposition to the straightforward recommendation in *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe, *supra* note 21, para. 27.

127 After all, even though it can be posited that the discretion that comes with vagueness is not in itself synonymous with arbitrariness and cannot by itself be considered to be a deficit in the rule of law, too much discretion could very well entail such a deficit. On the other hand, the determination of what is 'too much' can also be the source of major disagreements. Endicott, *supra* note 121, 202–203.

128 The 2013 pandemic guidelines provide the following definition of 'influenza pandemics': "An influenza pandemic occurs when an influenza A virus to which most humans have little or no existing immunity acquires the ability to cause sustained human-to-human transmission leading to community-wide outbreaks. Such a virus has the potential to spread rapidly worldwide, causing a pandemic", *Pandemic Influenza Risk Management: WHO Interim Guidance*, *supra* note 41, 19. The question of whether a formal Pandemic Declaration can be used in the case of a virus other than influenza is still open.

129 *Ibid.*, 7.

130 Another clear example of this particular problem within decision-making is the environmental field, where the indeterminate features of scientific debates are displayed. This is reflected in the 'precautionary principle', consecrated throughout several international environmental instruments. See, e.g., Bodansky, *supra* note 75, 622.

131 Peel, *supra* note 1, 47.

III. (More) Transparency in the Context of Pandemic Decision-Making

Despite the presence of sound technical expertise within the decision-making process of a Pandemic Declaration, a core question remains: How should decisions be made in the absence of an international democratic consensus?[132]

Indeed, one of the core topics in the Review Committee Report was the fact that there was a high degree of opacity within the process leading to the Pandemic Declaration. This opacity led to inquiries by the Council of Europe regarding the acts of the WHO and the suspicions about conflicts of interest of said Committee's members, as well as health authorities at the European and national levels.[133] At best, this could simply be the result of mishandling the relationship with the media, the main source of access to information regarding the WHO's activities.[134] This is a factor that also needs to be addressed when dealing with general issues of transparency.

Shortcomings in decision-making like the one just mentioned can be identified by focusing on two aspects. On the one hand, it involves scrutinizing the legal basis (in this case: the drafting of the guidelines), and on the other hand, the implementation in each particular case. Such a debate might lean at times more towards *stricto sensu* medical arguments than questions of international law. Yet the problem of pandemics does not always allow for an absolute analytical separation of science and politics, since many of the legal problems can only be properly understood with at least a minimum knowledge of the medical implications. Likewise, labeling political issues as technical questions in order to shut down the debate might further reduce the transparency of decision making.[135]

The fact that the full disclosure of the Emergency Committee's members happened only one year after the initial PHEIC Declaration sheds light on an important dilemma. The publication of the names and backgrounds of the members of the Emergency Committee helped clear the doubts about possible conflicts of interest in the decision that led to the 2009 Pandemic Declaration. The lack of information in this respect greatly contributed to undermining

132 Bodansky, *supra* note 75, 623.

133 *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe, *supra* note 21, 1.

134 P. Das & G. Sotomayor, 'WHO and the media: a major impediment for global health?', 383 *The Lancet* (2014) 9935, 2102–2103; also on WHO's communication issues, P. Acconci, *supra* note 70.

135 The argument has also been held in Landfried, *supra* note 79, 271–272.

its legitimacy to be seen as the result of a trustworthy, scientifically rigorous process, as demonstrated by much-publicized inquiries and complaints.[136] But at the same time, the initial reasons not to disclose the names of members of the Emergency Committee – save for its chair[137] – may have had some grounds to warrant the delay. Beyond any actual ties that have existed between some of its members and the pharmaceutical industry, the delicate nature of the decision could have enabled the exercise of external pressure against the Committee members.

The 2011 Review Committee Report had already argued for a more transparent process for selecting members of an Emergency Committee.[138] More recently, disclosing all of the members of the Emergency Committee in the case of PHEIC statements regarding poliovirus, Ebola and Zika is a sign of a lesson learned for decision-making procedures within the WHO. It is noteworthy that the disclosure was not preceded by a reform of the International Health Regulations. Instead, it resulted from internal discretion. It can be questioned whether decisions related to transparency should be discretionary, and there are already calls for "updating" the IHR on these topics.[139] Yet in the realm of guideline-related decision-making, given their non-binding nature, this discretion could linger.

136 As a testament of the flexibility and discretion with which the WHO Director-General performs some of the functions, the Declaration of a PHEIC in the case of the spread of wild poliovirus, Ebola and Zika were accompanied by the full disclosure of the members of the Emergency Committee. However, no legal reforms to the *IHR* were needed in order to modify this criterion. For members of the wild poliovirus Emergency Committee, see http://www.who.int/ihr/procedures/emerg_comm_members_2014/en/ (last visited 26 April 2016). For the Committee in the case of Ebola, see http://www.who.int/ihr/procedures/emerg_comm_members_2014/en/ (last visited 26 April 2016). And for members of the Emergency Committee related to the latest Zika PHEIC declaration, see http://www.who.int/ihr/procedures/zika-ec-members/en/ (last visited 26 April 2016).

137 Cohen & Carter, *supra* note 64, 1278.

138 WHO, *Strengthening Response to Pandemics and other Public Health Emergencies*, *supra* note 13, 117.

139 L. Gostin & E. A. Friedman, 'A retrospective and prospective analysis of the west African Ebola virus disease epidemic: robust national health systems at the foundation and an empowered WHO at the apex', 385 *The Lancet* (2015), 1906.

IV. Political and Legal Accountability in WHO Pandemic Decision-Making

For the purposes of the present contribution, the notion of accountability in the context of international or supranational organizations refers broadly to the obligation of these institutions to justify and explain their exercise of international authority.[140] Accountability[141] is to be considered as a key factor for the political legitimacy[142] of Pandemic Declarations.

Since the WHO Director-General is the only person with the power to issue both PHEIC and Pandemic Declarations, there is certainly a need for some sort of accountability with respect to this power. This concentration of authority could constitute an excess of discretionary power in a single official, but it might also be justified in light of concerns about a coherent institutional stance as well as a sufficiently rapid reaction to pandemics. The latter argument does not alleviate the need for the Director-General to justify and explain his or her acts with arguments.

Given that none of the binding legal documents that regulate the WHO's activities explicitly establish what kind of consequences there will be for a possible abuse of authority in case of Pandemic Declarations,[143] one can assume

[140] For discussions about this point, see E. De Wet, 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review', in von Bogdandy *et al.* (eds), *supra* note 4, 855, 856; Esty, *supra* note 76, 1507–1508. A more overarching concept of accountability includes the separate concern of transparency in M. N. Shaw, *International Law*, 6th ed (2008), 1317–1318. By contrast, others view accountability as one of the multiple components of the more general principle of transparency, see Gostin, *supra* note 104, 71–72.

[141] The type of accountability discussed within this section should be distinguished from the legal category of responsibility of international organizations, an issue that deals with the breach of (formal) international obligations that would enable a State to invoke the responsibility of the international organization, such as the WHO. See Burci & Feinäugle, *supra* note 48, 186.

[142] Some view the accountability of international organizations, like the WHO, essentially as a problem of legitimacy. See R. O. Keohane & R. W. Grant, 'Accountability and Abuses of Power in World Politics' 99 *American Political Science Review* (2005) 1, 29; Koppell, *supra* note 68, 370–371.

[143] The closest thing is the attribute given to the World Health Assembly in Art. 18(d) of the Constitution of the World Health Organization to "[...] review and approve reports and activities of the Board and of the Director-General [...]". Then again, the World Health Organization's Staff Regulations and Staff Rules establish in Section 10 the figures of "unsatisfactory performance or unsuitability for international service", as well as 'misconduct' that occur, *grosso modo*, when a WHO staff member does not fulfill the respective functions or commits inappropriate acts related to them. This could be

that the response to wrongful acts will have a more informal nature. Internal disciplinary measures seem to be unavailable in this case.[144] This response might therefore consist of, for example, a public request by the World Health Assembly for resignation, an eventual withdrawal of the WHO's main funding by Member States, or other forms of public criticism.[145]

Additionally, there is always the risk of having stringent accountability measures which prove to be too restrictive and untenable. WHO officials often need to act in situations of scientific knowledge gaps. Accusing the WHO's authorities of not being able to accurately predict the development of an influenza pandemic at its initial stage might as well be the equivalent, to some extent, of punishing its personnel for not having clairvoyance abilities.[146]

The publication of the 2011 Review Committee Report, and the recently published assessment by the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response[147] might not be sufficient as stand-alone mechanisms in order to provide accountability for the decisions taken by the WHO during the pandemic. Proposals for additional review mechanisms in order to evaluate not just the governing boards of the Organization, but also its relationship with non-state actors when dealing with potential conflicts of interest, are already under discussion.[148]

F. Conclusion: The Need for Enhancing the Legitimacy of Pandemic Declarations

The research on global governance has highlighted how the conceptual border between the constraining effects of binding and non-binding acts of international organizations is sometimes blurry. Such is the case in Pandemic Declarations by the WHO, which are legally non-binding but can have a constraining effect on decision-making by States.

applicable to the Director-General as well, although the phrasing of the rules can be considered quite vague.

144 According to Art. X of the World Health Organization's Staff Regulations and Staff Rules, disciplinary measures are meant to be imposed by the Director-General.

145 De Wet, *supra* note 140, 863.

146 See *supra* note 19.

147 For more information on this Committee, see http://www.who.int/ihr/review-committee-2016/en/ (last visited 21 June 2016).

148 It is also useful in this regard to take into account the draft of the *Framework of engagement with non-State actors* presented at the 138th session of the Executive Board, *supra* note 24.

In line with the discussion undertaken in this paper, the international public authority approach is a framework well suited to explain the authority of the WHO guidelines and Pandemic Declarations. It also opens a perspective for exploring the legitimacy gaps of the WHO's Pandemic Declarations. This contribution also sought to illustrate how this endeavor can only be made on a case-by-case basis, since the instances of acts by international organizations that fall under this category help us understand the different legitimacy issues related to the exercise of international public authority.

In the end, a more detailed account of Pandemic Declarations can contribute to a better understanding of the consequences that the 2009–2010 influenza A(H1N1) pandemic will have for future iterations of this WHO mechanism. Additionally, while this article focuses on the case of influenza pandemics, some broader lessons can be shared with the recent Ebola crisis in West Africa initiated in 2013 and the ongoing Zika epidemic in 2016. However, other arguments have to be more case-specific. A comparison between all three of these international epidemiological events could shed light upon how the shortcomings in public health emergency decision-making manifest in every case, which will prove useful for upcoming discussions on how to reform these mechanisms.

By using a very broad and basic distinction between expertise-based or technocratic and political legitimacy, it is possible to formulate an explanation of how international organizations with an aspiration to be viewed as technical institutions have to pay heed to several 'non-technical' aspects like transparency and accountability. Ultimately, the tale of the 2009–2010 influenza pandemic shows that it is better to tackle the political issues before they tackle you.

Goettingen Journal of International Law 7 (2016) 1, 131-155

Soft Authority against Hard Cases of Racially Discriminating Speech: Why the CERD Committee Needs a Margin of Appreciation Doctrine

Matthias Goldmann & Mona Sonnen*

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* Matthias Goldmann is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. Mona Sonnen is a graduate of the Law Faculty of Heidelberg University. Mona Sonnen carried out research for, and contributed to the writing of, parts B.I., B.II., and C.III. Address for correspondence: goldmann@mpil.de.

doi: 10.3249/1868-1581-7-1-goldmann-sonnen

Abstract

This article argues that the Committee for the Elimination of All Forms of Racial Discrimination (CERD Committee), as it exercises quasi-judicial authority, should consider applying standards of reasoning similar to those of international courts. In particular, with respect to racially discriminating speech, the legitimacy of the CERD Committee's Communications would benefit from a margin of appreciation doctrine that leaves domestic authorities greater leeway in finding their strategy to counter the threat of anti-migrant popular sentiment and gives recognition to alternative approaches beyond criminal persecution. This allows a context sensitive approach that might do justice to both the freedom of expression and the need for a more effective protection against racially discriminating speech.

A. Fighting Racial Discrimination in Times of Migration

In many regions of the world, a great number of migrants and refugees are seeking a better, more secure life in more developed countries. At the same time, many developed countries struggle with growing popular sentiment against migrants and refugees. Much of that sentiment might stem from social and economic stress in the target countries that is entirely home-grown. In particular, centrifugal social and economic developments which threaten the status and perspective of middle and lower middle segments of society provide a fertile ground for such sentiment. Right-wing populist movements eagerly take it up and transform it into sizeable results at the ballot box. Mainstream political forces are uncertain about the best strategy to counter such movements. Reactions range from imitating populist strategies, via benign ignorance, to attempts to resist them publicly and by initiating legal counteraction.

The Turkish Union in Berlin-Brandenburg, a German NGO, opted for the latter strategy when it brought the *Sarrazin* Case before the Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee). Legally, the NGO succeeded. On 26 February 2013, the CERD Committee adopted Communication No. 48 of 2010.[1] It concluded that Germany had violated its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) by not prosecuting Thilo

[1] Committee on the Elimination of All Forms of Racial Discrimination: *TBB – Turkish Union in Berlin-Brandenburg against Germany*, Communication No. 48/2010, UN Doc CERD/C/82/D/48/2010, 4 April 2013.

Sarrazin, a former Senator of Berlin and Executive Director of *Bundesbank*, for disrespectful remarks about immigrants in an interview published in 2009. Politically, however, it might have been a pyrrhic victory. The decision allows Sarrazin and other populists to style themselves as victims of a system of mainstream political correctness which supposedly suppresses diverging views by means of criminal law.

This article argues that this mixed result has to do with a structural deficit in the reasoning of the CERD Committee. The Committee seems insufficiently aware of the fact that its Communications constitute exercises of international public authority. Their effects resemble that of judgments of international courts, even though they do not have the same legal quality. Therefore, the CERD Committee should consider applying standards of reasoning similar to those of international courts. In particular, the legitimacy of its Communications would benefit from a margin of appreciation doctrine that leaves domestic authorities greater leeway in finding their strategy to counter the threat of anti-migrant popular sentiment and gives recognition to alternative approaches beyond criminal persecution. This would also contribute to furthering the Committee's goal of promoting human rights.

Part B. of the article summarizes the *Sarrazin* Case and compares it to similar CERD cases. It turns out that the reasoning of the CERD Committee displays structural deficits. It categorically excludes context-sensitive considerations relating to free speech when determining whether there has been a case of racial discrimination. Nor does the Committee give much credit to reactions of State parties other than criminal sanctions. This appears as a dangerous strategy given the intricate emotional patterns related to racially discriminating statements. It might harm the legitimacy of the CERD Committee. Part C. elaborates on the broader ramifications of this finding for the CERD Committee. It argues that CERD Communications constitute exercises of public authority, whose legitimacy and effectiveness suffers from the discovered deficit. It should therefore adopt legal strategies used by international courts which render their decisions both legitimate and effective. With respect to racially discriminating speech, the Committee would have been well advised to adopt the doctrine of the margin of appreciation developed by the European Court of Human Rights (ECtHR). This allows a context-sensitive approach that might do justice to both the freedom of expression and the need to protect against racially discriminating speech more effectively.

B. CERD Opinions on Racially Discriminating Speech

I. The CERD Committee on the *Sarrazin* Case

The *Sarrazin* Case is illustrative of two problems of Communications of the CERD Committee, namely the lack of criteria for balancing protection against racial discrimination with free speech, and for taking into account reactions of governments other than criminal proceedings that might nonetheless enhance the acceptance of migrants. The case originated in an interview given by Sarrazin, which appeared in the German culture journal *Lettre International* in 2009. The interview bore the title "Class instead of Mass: from the Capital City of Social Services to the Metropolis of the Elite" and outlined challenges and prospects for Berlin.[2] In the interview, Sarrazin set out his views on immigration in Berlin. One of the more drastic statements is the following:

> "A large number of Arabs and Turks in this city whose numbers have grown through erroneous policies have no productive function, except for the fruit and vegetable trade."[3]

Another quote reads as follows:

> "I do not have to accept anyone who lives off the State and rejects this very [S]tate, who doesn't make an effort to reasonably educate their children and constantly produces new little headscarf girls. That is true for 70% of the Turkish and for 90% of the Arab population in Berlin."[4]

Sarrazin further compared the situation of the Turkish population in Berlin with the Kosovar conquest of Kosovo, which he attributed to a higher birth rate of the immigrant population. He added that he would not mind if it were East European Jews because they had a higher intelligence quotient than Turkish people. The statements appear in the context of less controversial positions of a general political nature.

The interview did not only trigger an extensive, sometimes emotional debate about immigration in the German public, in which government officials

2 F. Berberich & T. Sarrazin, 'Class instead of Mass: From the Capital City of Social Services to the Metropolis of the Elite' 86 *Lettre International* (2009), 197.

3 CERD, Communication No. 48/2010, *supra* note 1, para. 2.1.

4 *Ibid.*

and journalists overwhelmingly rejected Sarrazin's views. It also led to a number of juridical proceedings in Germany and abroad. The Turkish Union Berlin-Brandenburg (TBB), an immigrant association, lodged a complaint with the local police submitting that some of the statements in the interview were to be qualified as defamation[5] and incitement of the people.[6] The Prosecutors initiated an investigation, but terminated it without bringing charges. They established that Sarrazin was not criminally liable since the relevant statements were protected by the constitutional right to free speech.[7] The TBB had no legal remedy against this decision under German criminal procedure. Hence, the TBB decided to lodge a complaint with the CERD Committee.

In the proceedings before the CERD Committee, Germany pointed to the significance of free speech. It considered Sarrazin's statements to be a contribution to the political debate that evoked a public discussion on how to promote integration, stressing that important German politicians, among them the German chancellor Angela Merkel, had clearly rejected Sarrazin's views. The German government emphasized that no criminal acts related to the statements had been committed against foreigners. In contrast, the TBB, supported by the German Institute for Human Rights, considered the public reactions as dangerous. It pointed out that in the population in general, Sarrazin's remarks had received a lot of positive resonance. It also claimed that German law concentrated too much on fighting right-wing organizations instead of focusing on individuals making discriminatory statements.

The CERD Committee rendered an Opinion in favor of the TBB. It decided that Germany had violated the Convention by not bringing forth criminal charges against Sarrazin. According to the Committee, Germany interpreted its own criminal law too narrowly. As the Committee had emphasized repeatedly, it was not sufficient for a State party to merely enact legislation criminalizing racial discrimination; it also needed to apply these provisions in the spirit of the Convention. Hence, it concludes that Germany violated the Convention and requests Germany to revise its policy and procedures on the subject matter.

Even if one fully agrees with the Committee's position that governments need to fight effectively against racial discrimination, the Committee's reasoning leaves some questions open. Article 4 CERD provides that the fight against racial discrimination needs to pay "due regard" to the rights guaranteed in the Universal Declaration of Human Rights (UDHR), including the freedom

5 Sec. 185, German Criminal Code.
6 Sec. 130 (1) Nr. 1, 2, German Criminal Code.
7 Article 5(1), ph.1, Var.1, German Basic Law.

of expression stipulated in Article 19 UDHR. However, the Committee restates some of Sarrazin's statements and immediately labels them as racially discriminating without much further explanation.[8] In particular, it does not consider that they might lend themselves to different readings: on the one hand, one might understand them as a polemic, yet legitimate contribution to an ongoing political debate about essential values and interests of society.[9] On the other hand, one might point to the sublime, yet effective stereotypes they convey.[10] The "due regard" clause might have given the Committee a good reason to engage in such differentiations. Instead, once the Committee has established that the statements are racially discriminating, it stresses that racist remarks such as those at hand are categorically excluded from the protection of the freedom of expression.[11] It also does not accept Germany's argument that other reactions below the threshold of criminal proceedings might be sufficient or even more effective in fighting racial discrimination.

II. Previous Case Law of the CERD Committee

The problems spotted in the *Sarrazin* Case are not unique. A look at the CERD Committee's case law reveals a consistent pattern of structural problems in the reasoning of the Committee. It has not yet developed a consistent, context-sensitive approach to the relationship between the fight against racism and the freedom of expression, nor to the intricate question whether criminal proceedings are the only acceptable reaction of a member State faced with racial discrimination. On the whole, this does not seem to do justice to the "due regard" clause of Article 4 CERD.

A first case that is comparable to the *Sarrazin* Case originated in Norway. In 2000, a group of right-wing extremists celebrated the anniversary of Rudolf Hess with a march near Oslo.[12] In that context Terje Sjolie, who headed the march, held a speech in which he glorified Rudolf Hess for his "attempt to

8 CERD, Communication No. 48/2010, *supra* note 1, para. 12.6.

9 C. Tomuschat, 'Der 'Fall Sarrazin' vor dem UN-Rassendiskriminierungsausschuss', 40 *Europäische Grundrechte- Zeitschrift* (2013), 262, 263-265.

10 M. Payandeh, 'Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin', 68 *Juristenzeitung* (2013) 980, 982.

11 *Ibid.*, 983; see also Tomuschat, *supra* note 9, 264.

12 CERD, *The Jewish community of Oslo; the Jewish community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt against Norway*, Communication No. 30/2003, UN Doc CERD/C/67/D/30/2003, 22 August 2015.

save [...] Europe from […] Jewry"[13] and demonized Jews "who suck [Norway] empty of wealth and replace it with immoral and un-Norwegian thoughts".[14] During the subsequent months, many incidents of discrimination and violence against black people occurred in that area. A fifteen-year-old half-Ghanaian boy was even stabbed to death. Norway opened criminal proceedings against Sjolie. At the last stage of appeal, the Supreme Court acquitted the accused, holding the statement to be protected by the freedom of expression. However repugnant and undesirable it may have been, it did not contain threats or incite to violence.[15] The reasoning of the CERD Committee on the merits reminds of the Sarrazin case. When assessing whether the statement is racially discriminating, the Committee restates the relevant passage and immediately qualifies it as racially discriminating. It does not define workable, context-sensitive criteria that would help domestic courts to delineate legally protected free speech from unprotected racist utterances. The CERD Committee further states that free speech has a lower weight than the prohibition of hate speech. This did not deprive the "due regard" clause of Article 4 of any significance since it referred to other fundamental rights as well, not just free speech.[16] One might only speculate whether the outburst of violence following the statement at issue provided sufficient evidence to the CERD Committee that it should have entailed criminal sanctions.

Surprising is the fact that the CERD Committee did not recognize that Norway at the time of the proceedings was in the midst of a legislative reform project. The project included a constitutional amendment that would give parliament greater scope to pass legislation against racist speech. This, as well as the fact that the Supreme Court had decided upon the case after thorough analysis, made Norway call for a margin of appreciation in balancing rights at the national level.[17] The Committee denied the request by pointing out its "responsibility to ensure the coherence of the interpretation of the provision of Article 4 of the Convention."[18]

A second notable case in which the CERD Committee dealt with racist statements and the freedom of expression originated in Denmark.[19] In January

13 *Ibid.*, para. 2.1.
14 *Ibid.*
15 *Ibid.*, para. 2.7.
16 *Ibid.*, para. 10.5.
17 *Ibid.*, para. 8.2.
18 *Ibid.*, para. 10.3.
19 CERD, *Mohammed Hassan Gelle against Denmark*, Communication No. 34/2004, UN Doc CERD/C/68/D/34/2004, 15 March 2006.

2003, right-wing extremist political leader Pia Kjærsgaard authored a letter to the editor of a national newspaper in which she complained about the Danish Minister of Justice. The Minister of Justice had invited different organizations to a hearing on a legislative proposal regarding female circumcision, among them the Danish-Somali Association. Kjærsgaard stated that asking the Danish-Somali Association for its opinion on a crime mainly committed by Somalis was as good as asking pedophiles and rapists for their views on the prohibition of rape or child molestation.[20] A Danish citizen of Somali origin felt offended and discriminated against by this statement because he considered it to equate people from Somalia with pedophiles and rapists. After exhausting domestic remedies, he filed a petition with the CERD Committee.

On the merits, the CERD Committee found that Denmark should have initiated criminal proceedings against Kjærsgaard. It stated the obvious by emphasizing that it was insufficient for compliance with the Convention for a State to merely adopt legislation making acts of racial discrimination punishable on paper without effectively implementing them.[21] But it did not explain the non-obvious, namely why the statements at hand were racially discriminating. It even accepted that, as Danish authorities had found,

> "the statements in question can also be taken to mean that Somalis are only compared with pedophiles and rapists as concerns the reasonableness of allowing them to comment on laws that affect them directly, and not as concerns their criminal conduct,"[22]

However, it did not indicate why it gave preference to the interpretation that the statement was

> "degrading or insulting to an entire group of people on account of their national or ethnic origin and not because of their views, opinions or actions regarding the offending practice of female mutilation."[23]

[20] *Ibid.*, para. 2.1.
[21] *Ibid.*, para. 7.3.
[22] *Ibid.*, para. 2.4.
[23] *Ibid.*, para. 7.4.

Even though the statement occurred in the context of a parliamentary debate,[24] the Committee repeated its familiar position that the need to protect against racial discrimination categorically prevailed over free speech rights.[25] Nonetheless, to the Committee's credit, it seems that Danish authorities had actually failed to carry out an effective investigation in the case at hand. This might justify the outcome, though not the reasoning.

A third case revealing similar problems involves a complaint of the Central Council of German Sinti and Roma against Germany.[26] In October 2005, a magazine for police officers published a letter to the editor written by a Bavarian police officer. The police officer, referring to an article about Sinti and Roma that had appeared in the magazine a few months earlier, rejected the article's moderate views based on his own experiences with Sinti and Roma. He called them "criminal gypsies [...] who feel like a 'maggot in bacon' in the welfare system of the Federal Republic of Germany."[27] He adds a sentence that strongly resembles Sarrazin's statements:

> "Whoever does not want to integrate but lives from the benefits of and outside this society cannot claim a sense of community."[28]

The Central Council of German Sinti and Roma sustained the position that the letter contained multiple discriminatory statements, racist and degrading stereotypes and phrases that could increase social exclusion.[29] Germany denied a violation of the convention and pleaded discretion in the implementation of the obligations arising from the Convention.[30] Perhaps in deference to the State's domestic procedures, the CERD Committee limited its assessment to examining whether the decisions of German authorities were manifestly arbitrary or amounted to denial of justice, which it denied.[31] In the *Sarrazin* Case, the CERD Committee mentioned this precedent, but did not apply it. There is no obvious justification for the difference between the two Committee

24 Tomuschat, *supra* note 9, 262.
25 CERD, Communication No. 34/2004, *supra* note 19, para. 7.5.
26 CERD, *Zentralrat Deutscher Sinti und Roma et al. against Germany*, Communication No. 38/2006, UN Doc CERD/C/72/D/38/2006, 3 March 2008.
27 *Ibid.*, para. 2.1.
28 *Ibid.*
29 *Ibid.*, para. 2.2.
30 CERD, Communication No. 38/2006, *supra* note 26, para. 4.5.
31 *Ibid.*, para. 7.7; See also CERD, *Er against Denmark*, Communication No 40/2007, UN Doc CERD/C/71/D/40/2007, para. 7.2, 8 August 2007.

decisions. Certainly, the reaction of the German authorities was different in the two cases. In the *Sinti and Roma* Case, German authorities took disciplinary measures against the police officer, suspending him from his position.[32] Sarrazin voluntarily quit his job as a member of the Board of Directors of the *Bundesbank* following public pressure. However, the independence of the *Bundesbank*, an important requirement of German constitutional and European law,[33] prevented Germany from taking similar disciplinary measures against Sarrazin. There is thus an important reason why German authorities reacted differently in the two cases.[34] In any event, the CERD Committee seems to lack a clear line regarding the significance it attributes to decisions below the level of criminal sanctions. This leads to unpredictable decisions.

III. Lack of Consideration for Free Speech and Context

The foregoing cases exhibit two deplorable structural shortcomings in the reasoning of the CERD Committee. First, the Committee has not yet developed a consistent approach that takes free speech seriously in the fight against racial discrimination. This problem has a doctrinal and an epistemological dimension. Doctrinally, one might agree with the committee that racially discriminating statements should be categorically exempt from free speech guarantees.[35] However, if the freedom of expression is to play any role at all, then this position should compel the CERD Committee to take it into account when determining whether there has been a case of racial discrimination, especially in cases where the line is difficult to draw because the statement in question is open to contending interpretations. As concepts are relational, the Committee's approach of defining the impermissible without having at least a vague idea of the permissible seems inconclusive. This is all the more the case because a number of States submitted interpretative declarations underlining their free speech guarantees.[36] The reductionist interpretation of the CERD

32 CERD, Communication No. 38/2006, *supra* note 26, para. 7.7.

33 Art. 88 German Basic Law, Art. 130 TFEU.

34 See CERD, *Individual opinion of Committee member Mr. Carlos Manuel Vasquez*, Communication No 48/2010, UN Doc CERD/C/82/3, 4 April 2013, para. 2 [CERD, Individual Opinion of Vasquez]. He also stresses further similarities between CERD, Communication No. 38/2006, *supra* note 26, and Communication No. 48/2010, *supra* note 1.

35 Cf. CERD, *Organized violence based on ethnic origin*, General Recommendation No. 15, 23 March 1993, para. 4.

36 See *United Nations 2. International Convention on the Elimination of All Forms of Racial Discrimination: Status as at 05.05.2016*, available at https://treaties.un.org/Pages/

Committee that denies the "due regard" clause any significance for the freedom of expression finds no basis in the text of the Convention. In particular, the text of Art. 4 CERD differs considerably from that of Art. 20(2) of the International Covenant on Civil and Political Rights (ICCPR), which exempts incitement to national, racial or religious discrimination from the freedom of expression.[37] Simple analogies therefore seem inappropriate.

The epistemological dimension of the problem has to do with the emotional side of statements related to race and ethnicity. On the one hand, the law certainly needs to bar the expression of emotions that lead to discrimination.[38] This is the whole point of the prohibition of racially discriminating speech. Albeit evidence suggests that emotions underpin our moral views,[39] not every emotion has moral value. We should only morally endorse a view for which we find rational justification.[40] Racially motivated hatred is clearly unjustifiable. On the other hand, rational discourse is not free from emotions, either. To some extent, they are a legitimate means of communication. Rational discourse requires trust, attention, confidence, and many other intersubjective sentiments which the content of a speech act alone might hardly evoke. It is thus for a law-applier to carve out the extent to which an appeal to emotions should be admissible as a legitimate element of political debate. The CERD Committee has not spent much thought on this issue as of yet.

The second shortcoming is the Committee's failure to explicitly and consistently recognize measures below the level of criminal sanctions on the part of the respondent state in reaction to racially discriminating statements. The decisions of the CERD Committee diverge on that point from one case to the other without sufficient explanation. This does not do justice to the fact that it might often heavily depend not only on the gravity of the discriminating act, but also on the particular historic, social and political context whether criminal sanctions are appropriate. While racially discriminating speech appeals to,

ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited 29 May 2016).

37 Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (2005), 'Article 20' para. 16.

38 On the emotional underpinnings of racial discrimination see C. A. Talaska, S. T. Fiske, S. Chaiken, 'Legitimating Racial Discrimination: Emotions, Not Beliefs, Best Predict Discrimination in a Meta-Analysis', 21 *Social Justice Research* (2008), 3, 263-296.

39 Cf. A. Smith, *The Theory of Moral Sentiments*, (1790); See also J. Prinz, 'The Emotional Basis of Moral Judgments', 9 *Philosophical Explorations* (2006), 1, 29-43.

40 M. Sellers, 'Law, Reason, and Emotion' (2014), available at http://ssrn.com/abstract=2448000 (last visited 29 May 2016).

and generates, dangerous emotions, there is no reason to believe that criminal sanctions are a panacea. Emotions are hard to predict.[41] Criminal investigations might give the perpetrator the possibility to present himself or herself as a victim. It therefore seems appropriate to also look at the wider context of a racially discriminating statement, without losing out of sight the need to achieve justice in the particular case. All this militates for a more context-sensitive approach that balances the various pros and cons of criminal punishment in an individual case. Instead, the CERD Committee has mostly been of the view that "one size fits all". At least, its 2013 General Recommendation on combating racist hate speech recognizes that criminal sanctions should be reserved for severe and clear cases and applied proportionately.[42]

On the whole, the CERD Committee shows a remarkable lack of awareness for the significance of free speech, the context in which a case of racially discriminating speech took place, as well as the emotional aspects of both political discourse and criminal sanctions. It remains to be seen whether this might lead to contestations of the legitimacy of Committee decisions – provided that one considers them as exercises of authority. The following makes the case for the latter and argues that a more pluralistic approach which would grant member States a larger margin of appreciation might eventually fight racially discriminating speech more effectively.

C. CERD Communications as Exercises of Public Authority: The Need for a Margin of Appreciation

The lack of context sensitivity in the CERD Committee's decisions revealed above is not to be taken lightly. As this section argues, the decisions are not just harmless expert views, but cause effects which resemble in some respects those of judicial decisions. Therefore, one should consider them as exercises of international public authority, which require, among others, adequate legal reasoning ensuring their legitimacy (I.). One technique of legal reasoning which international courts use for this purpose consists in granting member States a margin of appreciation, especially when confronted with diverging domestic traditions and understandings (II.). A comparative overview reveals that there is considerable disagreement among domestic jurisdictions on the significance

41 J. A. Blumenthal, 'Law and the Emotions: The Problems of Affective Forecasting', 80 *Indiana Law Journal* (2005), 155.

42 Cf. CERD, *Combating racist hate speech*, General Recommendation No. 35, UN Doc CERD/C/GC/35, 26 September 2013, para. 19 [CERD, Combating racist hate speech].

of free speech in relation to racial discrimination. Each position results from a specific historic and cultural situation. While a global minimum standard must always be ensured, the CERD Committee would therefore have had reason to grant Germany a wider margin of appreciation in the case at hand (III.).

I. CERD Communications as Exercises of Public Authority

We argue that one should consider the communications of the CERD Committee as exercises of international public authority, even though they have no binding effect for the member States. We understand "authority" very broadly as the law-based capacity to legally or factually limit or otherwise affect other persons' or entities' use of their liberty.[43] This definition of authority takes individual and collective self-determination, the axioms of modernity, as a starting point. Traditionally, governments facilitated, shaped and limited the exercise of self-determination primarily through binding law. This is why authority became equated with binding, enforceable law.[44] However, over time, new ways have emerged which allow governments to influence people more indirectly, but not necessarily less efficiently. They operate by means of soft instruments, such as recommendations, economic and other incentives, information and education.[45] Such instruments are nowadays omnipresent not only on the domestic, but also on the international level. The last few decades experienced a spread of all sorts of soft law and other non-binding governance instruments for the regulation of international affairs.[46] This does not imply that each and every act of an international institution qualifies as "authority". That would render the concept of authority meaningless. Instead, understanding an act, or a certain type of acts, as authority requires demonstrating that it has the

43 Cf. A. v. Bogdandy, P. Dann & M. Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008), 1375, 1381, 1382. This definition has been further developed in A. v. Bogdandy & M. Goldmann, 'Sovereign Debt Restructurings as Exercises of International Public Authority', in C. Esposito, Y. Li & J.P. Bohoslavsky (eds), *Sovereign Financing and International Law* (2013) 39, 47. The definition is consistent with definitions elaborated in A. v. Bogdandy & I. Venzke, *In wessen Namen?* (2014) 29, 30; and in M. Goldmann, *Internationale öffentliche Gewalt* (2015), 319 *et seq*.

44 Seminal: J. Austin, *The Province of Jurisprudence Determined* (1832).

45 Cf. M. Foucault, 'La 'gouvernementalité'', in D. Defert & F. Ewald (eds), *Michel Foucault: Dits et Ecrits*, vol. 2 (1994), 635-657.

46 Cf. D. Shelton, *Commitment and Compliance. The Role of Non-binding Norms in the International Legal System* (2000); R. Wolfrum (ed.), *Developments of International Law in Treaty Making* (2005); J. E. Alvarez, *International Organizations as Law-Makers* (2005).

potential[47] to produce real-life effects for the self-determination of individuals or other entities.[48]

The CERD Committee's communications reach this threshold. First, the Committee's decision potentially affects the State concerned by the communication. Even though it is legally non-binding, it constitutes a form of public "naming and shaming" that might have (positive or negative) effects for the reputation of that State or its government, whether among other States, among its own citizens or among the citizens of other States.[49] Such reputational effects might be particularly severe in case of human rights violations. Other governments as well as the general public seem to consider it as a requirement for any member in good standing of the international community of States to respect core human rights. Their violation might have numerous repercussions for the international relations of that State or even for its economic situation in case they discourage much-needed immigration.

Second, as with the decisions of international courts and tribunals, the CERD Committee's communications have effects which go beyond the particular case at issue.[50] The reasoning of the decision, both the *ratio decidendi* and any *obiter dicta*, provides an authoritative interpretation of the applicable law and further develops the meaning of the CERD. Since there is an expectation that the Committee's interpretation will be fairly consistent across cases and over time, domestic legislators or courts might adapt their understanding of the CERD accordingly when they implement the convention into domestic law, or apply the implementing legislation to new cases.[51]

47 It is important to classify acts in accordance with their potential effect in order to avoid the fallacies of sociological positivism, see M. Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law', 25 *Leiden Journal of International Law* (2012), 335.

48 This is implied in the idea of standard forms, cf. A. v. Bogdandy & M. Goldmann, 'Taming and Framing Indicators: A Legal Reconstructon of the OECD's Programme for International Student Assessment (PISA)', in K. E. Davis et al. (eds), *Governance by Indicators. Global Power through Classification and Rankings* (2012), 52.

49 On reputation in international relations see A. T. Guzman, *How International Law Works. A Rational Choice Theory* (2008).

50 A. v. Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *European Journal of International Law* (2012), 7, 18; A. v. Bogdandy & I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', 12 *German Law Journal* (2011) 979, 987.

51 Cf. M. Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (2014).

The decisions of the CERD Committee therefore qualify as authoritative acts. The authority exercised through them is also public and international, since it pursues a common interest of the international community, the fight against racial discrimination.[52] For that reason, the Committee's decisions need to be legitimized *vis-à-vis* the States and citizens in whose name they decide.[53] The procedure and the reasoning need to meet high standards given that the Committee enjoys little democratic legitimacy relative to that of domestic courts - at least in democratic States.[54] By contrast, the Committee's strength is its expertise and independence, which needs to be reflected in high procedural standards and a compelling style of reasoning. The margin of appreciation doctrine might enhance the latter.

II. Towards a Margin of Appreciation Doctrine for the CERD?

The margin of appreciation is a doctrinal tool that allows international courts, but also quasi-judicial institutions like the CERD Committee, to legitimize their exercise of public authority over States. The European Court of Human Rights (ECtHR) developed this doctrine in order to exercise self-restraint when reviewing domestic legislation or court decisions. It grants discretion to the domestic level that depends on the level of consensus; on the significance of the right at stake for society and the individual; and on the particular constellation of the case. The margin is larger to the extent that a Europe-wide consensus is lacking on the issue at stake.[55] The ECtHR's concept of a "living consensus" takes account of the fact that the meaning of human rights provisions changes over time.[56] This process does not occur at the same speed in all jurisdictions. If a Europe-wide consensus emerges on a certain human rights

52 Cf. A. v. Bogdandy, P. Dann & M. Goldmann, *supra* note 43, 1381, 1382. Such international acts might be binding or non-binding.

53 On the dual subject of legitimacy see A. v. Bogdandy & I. Venzke, *In wessen Namen?*, *supra* note 43, 41.

54 On the democratic significance of international court's reasoning, see A. v. Bogdandy & I. Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking', in A. v. Bogdandy & I. Venzke, *International Judicial Lawmaking* (2012), 473, 477.

55 *Handyside v. UK*, ECtHR Application No. 5493/72, Judgment of 7 December 1976. For earlier case law of the Commission see J. A. Brauch, 'The margin of appreciation and the jurisprudence of the European Court of Human Rights: threat to the rule of law', 11 *Columbia Journal of European Law* (2004) 113, 116-118.

56 On indeterminacy as a requirement for the margin of appreciation doctrine, see Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* (2005) 907, 914.

issue, the margin of appreciation granted to the domestic level will decrease. The ECtHR establishes by means of a comparative review of domestic law whether and how much consensus there is among its member States on a certain issue.[57] By contrast, there is a wider margin where a sensitive ethical issue is concerned, unless an important aspect of an individual's existence is affected.[58] The margin is also wider where domestic courts are required to strike a balance between competing rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to another.[59]

By now, the margin of appreciation doctrine has become more and more popular among international courts and tribunals.[60] In the view of Yuval Shany, the margin of appreciation doctrine finds a legal basis in the inherent powers of international courts.[61] There are good reasons why other international courts should use this power and also grant the domestic level a margin of appreciation when they apply international legal rules like human rights which genuinely address domestic issues.[62] In such "inward-looking cases",[63] international courts and quasi-judicial bodies located at considerable distance from domestic institutions and connected only by a long chain of legitimacy are charged with reviewing the decisions of domestic institutions with high democratic legitimacy. This constellation calls for the application of a doctrinal principle ensuring that the international court or quasi-judicial body exercises

57 A. Nußberger, 'Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte', 2 *Rechtswissenschaft* (2012), 197, 205; further references in J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17 *European Law Journal* (2011) 80, 108.

58 *Christine Goodwin v. the United Kingdom*, ECtHR Application No. 28957/95, Judgment of 11 July 2002, paras 85, 90.

59 *Odièvre v. France*, ECtHR Application No. 42326/98, Judgment of 13 February 2003, para. 46.

60 Shany, *supra* note 56, 926 *et seq*.

61 Shany, *supra* note 56, 911; for the European Court of Justice cf. Gerards, *supra* note 57.

62 Shany, *supra* note 56; v. Bogdandy & Venzke, *supra* note 43, 274-5; S. Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012), 577; comparing the margin of appreciation doctrine with alternative standards of review: W. Burke-White & A. von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', 35 *Yale Journal of International Law* (2010), 283.

63 Shany, *supra* note 56, 920; E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Values', 31 *New York University Journal of International Law and Politics* (1999) 843, 846.

its competence with some degree of subsidiarity.[64] The doctrine of the margin of appreciation puts this idea into legal practice and allows domestic policy-making greater leeway, although not without limits.[65] This leeway might refer both to the factual and the normative aspects of a case.[66] The argument in favor of a margin of appreciation applies *a fortiori* where the applicable international law consists in vague, evolving standards, such as human rights.[67] Reading a margin of appreciation doctrine into human rights treaties would correspond to their object and purpose,[68] which is to find a balance between human rights protection and maintaining State sovereignty.[69]

Granting deference to domestic authorities in such a setting does not impede compliance with international law or 'soften' its normativity.[70] That presupposition would require that the international law in question has a fixed, universally accepted meaning. The application of the margin of appreciation doctrine rests on the insight that this is not the case.[71] Further, the margin of appreciation doctrine might allow States to reconcile their various international obligations in situations of constitutional pluralism, which would enhance overall compliance.[72] In any event, the core of each international legal rule applied with a margin of appreciation granted to States should remain untouched. In case of human rights, this means that the minimal protection necessary for the protection of human dignity must always be respected.[73]

By contrast, the margin of appreciation should not be applied in cases where domestic institutions cannot *per se* claim to have greater legitimacy. Thus, where cross-border externalities are at stake, the margin of appreciation

64 M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 907; M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2009), 44; A. Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (2012), 61.

65 Survey on case law in Legg, *supra* note 64, 75 *et seq*.

66 Shany, *supra* note 56, 917; Gerards, *supra* note 57, 110; M. Ambrus, 'The European Court of Human Rights and Standards of Proof: An Evidentiary Approach towards the Margin of Appreciation', in L. Gruszczynski & W. Werner (eds), *Deference in International Courts and Tribunals* (2014), 235.

67 Shany, *supra* note 56, 914.

68 Cf. Art. 31(1) VCLT.

69 Legg, *supra* note 64, 58 *et seq*.

70 See, however, Benvenisti, *supra* note 63, 844.

71 Shany, *supra* note 56, 913.

72 Gerards, *supra* note 57, 102, 103.

73 See Gerards, *supra* note 57, 113; Nußberger, *supra* note 57.

doctrine does not seem to be warranted. Domestic actors do not possess particular legitimacy to make decisions affecting persons or entities outside their jurisdiction. Only the idea of the separation of powers between the judiciary and other branches of government supports the case for executive discretion in such settings.[74] By contrast, democratic legitimacy requires a margin of appreciation where international tribunals scrutinize domestic measures which affect non-citizens within the jurisdiction of the respective State just as much as its own citizens. This explains the trend towards the margin of appreciation in investment arbitration,[75] although the lack of a single, hierarchical court structure at times produces inconsistent standards of review.[76] Some also argue that the application of the margin of appreciation would be inappropriate in cases involving minority issues. The requirement of a Europe-wide consensus for the exercise of full judicial review would impede the protection of minorities, since the consensus of the majority might not necessarily reflect the interests of minorities.[77] It should, however, be kept in mind that the ECtHR has always used the idea of a Europe-wide consensus as a means of enhancing its scrutiny of domestic decisions and fostering human rights, not in order to give majority positions prevalence over minority interests.

In the light of these considerations, it seems that the CERD would have reason to apply the margin of appreciation doctrine in cases confronting free speech with the need to protect against racial discrimination. First, like human rights courts, the CERD Committee engages in domestic policy review and therefore has to meet the challenge of assessing domestic judicial decisions from considerable distance.[78] In this respect, a margin of appreciation would reduce, second, the risk of fragmentation in international human rights law.[79] Third, both the prohibition of racial discrimination and the guarantee of free speech include a relatively high degree of vagueness and interpretative leeway, for which the *Sarrazin* Case as well as previous case law of the CERD Committee on the issue provide ample evidence.[80] Fourth, whether certain limits to political discourse are acceptable depends on many contextual factors such as a country's particular

74 Shany, *supra* note 56, 925; Schill, *supra* note 62, 592.

75 Schill, *supra* note 62, 592 *et seq*.

76 J. Arato, 'The Margin of Appreciation in International Investment Law', 54 *Virginia Journal of International Law* (2014) 545-579.

77 Benvenisti, *supra* note 63, 850-853; Shany, *supra* note 57, 920.

78 Tomuschat, *supra* note 9, 262.

79 M. Payandeh, 'Fragmentation within International Human Rights Law', in M. Andenas & E. Bjorge, *A Farewell to Fragmentation* (2015), 297.

80 See above part B., see also Vasquez, *supra* note 34, para. 10.

history. This calls for a high level of democratic legitimacy for the determination of the limits of free speech. Fifth, even if one follows those who advocate that the margin of appreciation should not apply in cases concerning minorities,[81] the CERD Committee would still have reason to use it in cases like the ones under consideration, where one human right stands against another. Those invoking free speech for their controversial views – hopefully – also represent just a minority of society. In spite of this, the CERD Committee has never recognized the margin of appreciation despite party submissions to that effect, deeming the definition of racial discrimination to be clear and any argument relating to free speech inacceptable.[82] Only recently the Committee came as far as stating that it should not review the interpretation of facts or domestic law by domestic courts unless they were manifestly absurd or unreasonable.[83] But this is not the same as recognizing that the concretization of international human rights might give member States some leeway and allow for a certain plurality of views.

III. Comparative Perspective on Racially Discriminating Speech

The precondition for applying a margin of appreciation is the absence of a common line among States, both in respect of the scope given to free speech and the measures taken in case of racially discriminating statements. This is examined here for a number of jurisdictions. A look at how legislators and courts in other legal orders balance the freedom of expression with the fight against racial discrimination shows considerable differences.[84] The overview starts with the most permissive jurisdiction.

In the eyes of many observers, this is clearly the United States. In the United States, there is no prohibition of racially discriminating hate speech, unless it amounts to an incitement to illegal acts.[85] This rule applies to all kinds of discriminating speech. The Supreme Court does not want to give different

81 Benvenisti, *supra* note 63, 847.

82 CERD, *Summary record of the 1323rd meeting*, UN Doc CERD/C/SR.1323, 19 March 1999, para. 60.

83 CERD, *Combating racist hate speech*, *supra* note 42, para. 17.

84 Overview of older case law in S. Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992).

85 O. Bakircioglu, 'Freedom of Expression and Hate Speech', 16 *Tulsa Journal of Comparative and International Law* (2008) 1, 1, 13 *et seq.* with further references on the earlier "clear and present danger test"; A. v. Ungern-Sternberg, 'Öffentliche Auseinandersetzung um Religion zwischen Freiheit und Sicherheit' in F. Arndt et al. (eds), *Freiheit – Sicherheit – Öffentlichkeit* (2009), 61, 73.

treatment to some forms of discriminating speech as opposed to others.[86] This follows its general rule to not only protect a plurality of views on a particular issue ("viewpoint neutrality"), but also to comprehensively protect free speech regardless of the issue ("content neutrality").[87] For this reason, the United States has submitted a reservation to CERD.[88]

Most other countries adopt more restrictive approaches.[89] The solutions adopted depend to some degree on the national context, both the political situation and legal tradition.[90] In many countries, free speech does not allow statements which might lead to violence.[91] But the precise contours of such exceptions might vary. For example, in Latin America, some countries prohibit incitement to violence, while Argentina draws the exception more narrowly and requires discriminating acts.[92] In Great Britain, statements involving race or religion can only be prohibited when they become "threatening, abusive or insulting." It is not enough that they have an outrageous or offensive character.[93]

More restrictive is Germany. German criminal law prohibits incitement of the people to hatred against ethnic, racial, religious and other groups of the population.[94] This prohibition is not only intended to protect public security, but also human dignity. This illustrates a much-noted decision of the Federal Constitutional Court (FCC) of 2010.[95] The case originated in the city of Augsburg, where a right-wing association mounted a campaign advocating the "Repatriation of Foreigners" under the motto "For a livable German Augsburg". Several courts found the members of the association guilty of incitement of the

86 *R.A.V. v. St. Paul*, (1992) 505 U.S. 377.

87 M. Hong, 'Hassrede und extremistische Meinungsäußerungen in der Rechtsprechung des EGMR und nach dem Wunsiedel-Beschluss des BVerfG', 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010), 73, 117.

88 *United Nations 2. International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 36.

89 K. Boyle, 'Overview of a Dilemma: Censorship versus Racism', in S. Coliver (eds), *Striking a Balance* (1992), 1, 4.

90 *Ibid.,* 5.

91 A. v. Ungern-Sternberg, *supra* note 85, 66; Payandeh, *supra* note 10, 985.

92 P. Martins, 'Freedom of expression and Equality: The Prohibition of Incitement to Hatred in Latin America', Study prepared for the regional expert meeting on article 20, organized by the OHCHR (2011) 6-8; S. J. Roth, 'Laws against Racial and Religious Hatred in Latin America: Focus on Argentina and Uruguay', in S. Colliver (ed.), *Striking a Balance* (1992), 197, 198.

93 *Brutus v. Cozens*, [1973] AC 854.

94 Sec. 130(1) lit. 2 German Criminal Code.

95 *Meinungsfreiheit bei Volksverhetzung*, (2010) 1 BvR 369/04. (German only).

people, holding that the motto violated the human dignity of foreigners living in Augsburg. However, the FCC decided otherwise. While it agreed with the previous courts that the motto expressed skepticism towards migrants, it held that this did not suffice for a conviction. One could also understand it as stating that the city was not livable because of wrong immigration policies, making it a legitimate contribution to a political debate.[96] The similarity with the *Sarrazin* Case is evident. While being aware of the need to protect human dignity, the FCC granted the accused the benefit of the doubt. By contrast, German courts apply much stricter standards in cases against holocaust deniers. Not only human dignity, but also Germany's particular history justify such a stance.[97]

A similar case arose in Brazil, yet with a very different conclusion. In the *Ellwanger* Case, a habitual holocaust denier and author of books spreading his crude ideas faced criminal prosecution. In a heavily debated decision, the Supreme Court upheld Ellwanger's conviction by 8 votes to 3.[98] In their opinions, Judges disagreed on the proportionality of criminal prosecutions. Some observers like Celso Lafer support the decision, arguing with the context: Brazil as a multi-ethnic State needs to ensure that there is trust among the various communities.[99]

Broadly in line with the Brazilian case, and in difference to German law, French law defines the freedom of expression more narrowly. Accordingly, strong, emotional statements against migrants entail criminal charges. In one case, a person was convicted who spoke about immigrants in French suburbs as "the idle people looking with hatred at the rare intruders with a white skin", even though she did not incite to violence.[100] In another case, the authors of a book entitled *La Colonization de l'Europe. Discours vrai sur l'immigration et l'islam* were convicted by a domestic court.[101] The book dealt with the alleged incompatibility of European and Muslim societies and defended the right of

96 *Ibid.*, paras 32 & 33.

97 *Wunsiedel*, (2009) 1 BvR 2150/08.

98 *Ellwanger*, (2004) Supremo Tribunal Federal, HC 82.424-2-RS. DJU.

99 M. N. Machado, 'Liberdade de expressão e restrições de conteúdo análise do caso Ellwanger em diálogo com o pensamento de Celso Lafer**',** 931 *Revista dos Tribunais* (2013), 159.

100 Paris Court of Appeals, 17 June 1974, cited after R. Errera, 'In Defence of Civility: Racial Incitement and Group Libel in French Law', in S. Coliver (ed), *Striking a Balance* (1992), 144, 151.

101 See U. Belavusau, 'A *Dernier Cri* from Strasbourg: An Ever Formidable Challenge of Hate Speech (Soulas & Others v. France, Leroy v. France, Balsyte-lideikiene v. Lithuania)', 16 *European Public Law* (2010), 373, 375.

European citizens to preserve their identity. The case went up to the ECtHR. In its *Soulas* Judgment, the Court recognized that integration is a long and politically contested process which puts domestic courts in a better position to designate the limits of free speech. It therefore applied a wide margin of appreciation when deciding on the limits to free speech necessary in a democratic society. The Court considered it as its task to verify whether France had made reasonable use of its margin.[102] In doing so, the Court took note of the social and political measures France had taken in order to integrate its large number of immigrants.[103] In light of that, it took no issue with a conviction for statements which accused young muslims of "ritual rapes of European women".[104]

The ECtHR has in fact left States considerable leeway in the application of the freedom of expression guaranteed in Art. 10 of the ECHR. Its case law emphasizes that States need to grant free speech to the extent "necessary in a democratic society".[105] This includes the spread of offending, scandalizing or disturbing ideas.[106] However, Art. 17 ECHR prohibits the abuse of convention rights. Although the ECtHR does not always refer to this provision, its case law establishes criteria allowing States to impose relatively far-reaching restrictions upon the freedom of expression.[107] In the *Jerslid* Case, the ECtHR recognized the significance of CERD for determining the limits of free speech.[108] But in contrast to CERD, its decisions show much sensitivity for the particular historic, social and political context of the statement in question as well as for the manner in which it was made.[109] Thus, while the ECtHR accepted the conviction by French courts in the *Soulas* Judgment,[110] it held in the case of *Perincek* that Switzerland enjoyed only a limited margin of appreciation given that the controversial statement had relevance for a debate of public interest. It

102 *Soulas et al. v. France*, ECtHR Application No. 15948/03, Judgment of 10 July 2008, paras 32 & 33 (French only).

103 *Ibid.*, para. 37.

104 *Ibid.*, para. 43.

105 J. Frowein, 'Art. 10 EMRK', in J. Frowein & W. Peukert (eds), *Europäische Menschenrechtskonvention Kommentar*, 3rd ed. (2009), para. 31.

106 *Ibid.*, para. 27. Accordingly, Frowein argues that only statements could be prohibited which do not contribute to the political debate. *Ibid.*, para. 33.

107 Overview: Hong, *supra* note 87; R. Grote & N. Wenzel, *Konkordanz-Kommentar* (2006), Ch. 18, No. 106 *et seq*.

108 *Jersild v. Denmark*, ECtHR Application No., Judgment of 23 September 1994, para. 30.

109 Instructive overview on the ECtHR's jurisprudence in *Perincek v. Switzerland*, ECtHR Application No. 27510/08, Grand Chamber, Judgment of 15 October 2015, paras 205-207.

110 ECtHR, *Soulas et al. v. France*, supra note 102.

decided that Switzerland had not shown a pressing social need for a conviction.[111] From the viewpoint of someone who considers uniform standards as desirable, the ECtHR might appear as applying inconsistent criteria.[112] But from a more pluralistic angle, its decisions appear as context-sensitive uses of the margin of appreciation.

In contrast to the ECtHR, the UN Human Rights Committee, the body responsible for the implementation of the ICCPR, does not grant its States parties any kind of margin of appreciation as regards exceptions to free speech.[113] Notable textual differences between Arts. 19 and 20 ICCPR and Art. 10 ECHR might justify the different approach. The ICCPR defines the range of possible exceptions to the freedom of speech much more narrowly,[114] broadly reflecting the legal situation in the United States.

All in all, this short comparative overview shows that the legal reaction to allegations of racially discriminating speech depends to a considerable extent on the historic, social and political situation of the country concerned. From the viewpoint of an international court or tribunal, it is difficult to generalize about the limits of free speech that might be necessary and reasonable for a particular society. Criminal sanctions, including convictions for crimes against humanity,[115] appear as more appropriate in some contexts than in others, depending on how they might augment or reduce the risk of emotional counter-reactions on the part of the perpetrator and his or her sympathizers. The ECtHR has taken account of this by applying the margin of appreciation doctrine in its decisions on hate speech. At the same time, its case law shows that a margin of appreciation does not necessarily amount to lower overall standards. All this militates in favor of a margin of appreciation for the application of CERD.

D. Conclusion: Strengthening the CERD Committee Through a Margin of Appreciation Doctrine

Let us summarize: the CERD Committee's neglect for free speech as well as for the context of the particular case in its reasoning on the merits led us to

111 ECtHR, *Perincek v. Switzerland*, Application No. 27510/08, Second Chamber, Judgment of 17 December 2013, paras 112, 129. This was confirmed by the Grand Chamber in its judgment of 15 October 2015, para. 241.

112 Hong, *supra* note 87, 108.

113 UN Human Rights Committee, *General Comment no. 34 concerning Article 19 of the Covenant*, UN Doc CCPR/C/GC/34, 21 July 2011, para. 9.

114 See above Nowak, *CCPR Commentary*, *supra* note 37 and accompanying text.

115 Cf. *Prosecutor v. Ruggiu*, Judgment, ICTR-97-32-I, 1 June 2000, paras 20-24.

question the legitimacy of its decisions. Given that they constitute exercises of international public authority similar to the judgments of international courts or tribunals, one can argue that they should respect similar standards which ensure their legitimacy. One such standard is the margin of appreciation doctrine, which the ECtHR applies in cases where there is no consent among its member States about restrictions of human rights. As the survey of domestic and international law shows, the relationship between racially discriminating statements and free speech is such a case. The CERD Committee would therefore be well advised to grant States a margin of appreciation: first, with respect to the role they assign to free speech in the identification of racially discriminating speech; second, with respect to the consequences they attach to such acts.

The legitimacy that a margin of appreciation doctrine might provide to the CERD Committee is not an end in itself. A wave of migrants and refugees and a corresponding wave of xenophobic sentiment in quickly pluralizing societies make a strong CERD Committee more necessary than ever. At the same time, the margin of appreciation might provide the CERD Committee with a tool commensurate to the difficulty of its task. The population of States struck by increasing xenophobia, whether caused by rising numbers of migrants and refugees or not, might not necessarily welcome decisions of international institutions which try to teach them a lesson without taking their particular context into account, including the reactions of its government to public statements that might be racially discriminating. This calls for a more pluralistic approach as suggested by the margin of appreciation doctrine.

Regarding the *Sarrazin* Case, the Committee might have acted politically and legally imprudent by narrowly advising Germany to review its criminal sanctions. If one considers the purpose of the Convention, criminal law is and can be only one means of fighting against racial discrimination. Certainly, the CERD is quite explicit in requiring States to adopt legislation criminalizing racial discrimination. And the CERD Committee is correct in emphasizing that the Convention requires member States to also enforce those laws. But there is nothing in the text preventing States parties from handling the application of criminal sanctions with care with a view to their potentially counterproductive consequences, and of course within the limits set by their constitutions. Instead of replacing the assessment of the State party and its competent authorities with its own, the CERD Committee should take a step back and focus on the reaction of the State party.[116]

[116] Cf. CERD, *Individual Opinion of Vasquez*, *supra* note 34, para. 12; A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009), 173.

This does not mean that the CERD Committee should have acquitted Germany in the *Sarrazin* Case. One might very well argue that Germany failed in identifying Sarrazin as one of the 'intellectual arsonists' responsible for the current backlash in some parts of German society against migrants, refugees and everything that looks foreign. But this would have required a different line of argument on the part of the CERD Committee. It would have had to assess whether the German authorities were sufficiently aware of such risks, and whether their assessment of such risks appeared flawed under the given circumstances. The margin of appreciation does not give States parties leeway to hide and do nothing. It only leaves them a choice of the appropriate means for fighting racial discrimination effectively.

Goettingen Journal of International Law 7 (2016) 1, 157-185

The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction From an International Public Authority Perspective

Clemens A. Feinäugle*

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* Clemens A. Feinäugle is a Senior Research Fellow and the Coordinator of Scientific Research at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. An earlier version of this paper was presented as part of the Workshop "International Public Authority – Part 3+" on 25 October 2013 at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. The author thanks Professor Armin von Bogdandy, Matthias Goldmann, and the other participants of the workshop as well as especially the blind reviewer for their most useful comments on an earlier version of this paper.

doi: 10.3249/1868-1581-7-1-feinaeugle

Abstract

The UN Declaration on the rule of law at the national and international levels seems to open new possibilities for listed terrorist suspects claiming legal protection or those seeking damages for harm caused by UN peacekeepers because the Declaration provides that the rule of law applies to the United Nations itself. However, the Declaration raises questions regarding the elements of the rule of law, its legal basis, and binding nature. This paper attempts a reconstruction of the UN Declaration and relevant UN practice under an international public authority perspective to explain and develop elements of the rule of law applicable to the UN, to determine its legal basis, and to investigate its binding nature. It argues, that since measures under Chapter VII must be effective if the UN wants to fulfil its purpose (Article 1 (1) *UN Charter*), the UN is bound by the rule of law insofar as "effective" measures require that related legitimacy concerns are addressed by rule of law safeguards.

A. Introduction

"[T]he rule of law applies to […] the United Nations and […] should guide all of [its] activities."[1] This is a statement that sounds like a wonderful and far-reaching promise: many States that were addressees of United Nations (UN) sanctions might have wished more than once to find a convincing argument to stop the Security Council from adopting measures which in their view were unfair or inappropriate. Others might have wanted to hold the Security Council accountable for actions under a UN mandate that caused damage to innocent people.[2] Still others have hoped to find a way to "democratize" Security Council composition and procedure.[3] UN staff, in turn, had an interest in an internal judicial mechanism against the UN as an employer not subject to national jurisdiction.[4] Furthermore, most strikingly, individuals listed as terrorist

1 General Assembly (GA) Res 67/1, UN Doc A/RES/67/1, 30 November 2012, para. 2.

2 See, e.g., *Behrami and Behrami v. France*, ECtHR, Application No. 71412/01, Decision as to the Admissibility of 2 May 2007.

3 Algeria (GA, 5th Plenary Meeting (67th Session), Official Records, UN Doc A/67/PV.5, 24 September 2012, 7). See on the discussion of the UN Security Council (SC) reform J.-P. Cot, 'United Nations, Reform', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 428, 439-441.

4 *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, Art. 105 [UN Charter]; see also H. Schermers & N. Blokker, *International Institutional Law*, 5th ed. (2011), para. 1611.

suspects long for due process and legal protection.[5] The question whether there is something like the rule of law in the international sphere has been discussed earlier[6] but has more recently gained momentum.[7] Now, the application of the rule of law to the UN seems to have become a reality: the "Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels" adopted as a resolution by the UN General Assembly on 24 September 2012 (UN Declaration) declares the rule of law applicable to the UN itself and its principal organs.[8] But what seems to be a long-awaited breakthrough raises questions upon closer examination: Why is the rule of law relevant for the UN? What is its legal basis? Is it binding? And what are its elements?

This paper examines the UN Declaration from an international public authority (IPA) perspective. By way of reconstruction, it investigates whether there were legitimacy concerns regarding UN activities during the debate at the UN, and whether in the adopted text and other UN practice the rule of law was seen as the suitable answer to address such concerns. To that end, I will sketch the basics of the international public authority perspective (B.), briefly examine the nature of the UN Declaration (C.), analyze the UN Declaration's genesis and its text from an IPA perspective by reference to specific exercises of public authority by the UN and the surrounding debates (D.), and address the question of the legal basis and the binding nature of the rule of law for the UN (E.) before drawing conclusions (F.).

5 The still most prominent case in that regard is the Kadi I Case, *Kadi and Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, & Kadi II, *Commission and Others v. Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P.

6 J. Halderman, *The United Nations and the Rule of Law* (1966); A. Watts, 'The International Rule of Law', 36 *German Yearbook of International Law* (1993), 15 & 45.

7 See, e.g., F. Kratochwil, *The Status of Law in World Society - Meditations on the Role and Rule of Law* (2014); L. Grenfell, *Promoting the Rule of Law in Post-Conflict States* (2013); M. Zürn, A. Nollkaemper & R. Peerenboom, *Rule of Law Dynamics: In an Era of International and Transnational Governance* (2012); G. Lautenbach, *The Rule of Law Concept in the Case Law of the European Court of Human Rights* (2012); A. Nollkaemper, *National Courts and the International Rule of Law* (2012); T. Bingam, *The Rule of Law* (2011); R. McCorquodale, *The Rule of Law in International and Comparative Context, British Institute of International and Comparative Law* (2010); C. Bull, *No Entry Without Strategy: Building the Rule of Law under UN Transitional Administration* (2008); J. M. Farrall, *United Nations Sanctions and the Rule of Law* (2007); J. Crawford, 'International Law and the Rule of Law', 24 *Adelaide Law Review* (2003) 1, 3.

8 See GA Res 67/1, *supra* note 1, para. 2.

B. Basics of the International Public Authority Perspective and the Public Law Approach

An increasing transfer of competences to international institutions through globalization has resulted in the growing political significance of these institutions. Some of their acts, such as sanctions imposed on individuals, can be classified as exercises of public authority, understood as actions which determine others and reduce their freedom.[9] Such activities have triggered concerns about their legitimacy[10] as can be seen from cases filed before European courts. Targeted sanctions, for example, met with resistance since legal remedies against them did not exist.[11] The research project on international public authority[12] examines exercises of international public authority and strives to determine a normative justification for them by using a public law approach. The goal is to develop a legal framework for the exercise of international public authority which mitigates the legitimacy concerns.[13] The public law approach encompasses the debate about the constitutionalization of international law, administrative law perspectives, as well as insights from international institutional law.[14]

The UN Declaration presents the public law approach with an unusual case: so far, the international public authority project has mainly examined phenomena in different fields of international law by applying the public law approach in order to find the appropriate rules to tame the exercise of

9 A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010), 3, 8-9 & 11.

10 Legitimacy is understood in the international public authority project as relating to the expectation concerning who, with what qualifications and mode of selection, is competent to make which decision by what criteria and what procedures, see *supra* note 9, footnote 18 on page 11. This concept of legitimacy can be said to incorporate elements of legal ('qualifications', 'selection', 'competence'), moral ('criteria') and social approaches ('expectation') to legitimacy. On these different approaches, see C. Thomas, 'The Uses and Abuses of Legitimacy in International Law', 34 *Oxford Journal of Legal Studies* (2014) 4, 729, 734-742.

11 See in detail below, Section D. II. 2. a.

12 See on the project A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010) and A. von Bogdandy & I. Venzke (eds), *International Judicial Lawmaking* (2012).

13 Von Bogdandy, Dann & Goldmann, *supra* note 9, 16-17.

14 Von Bogdandy, Dann & Goldmann, *supra* note 9, 21.

international public authority.[15] The UN Declaration with its reference to the rule of law seems to establish such a legal framework for UN activities, while one might consider it at the same time as an exercise of public authority vis-à-vis the UN Member States as it urges them to implement the rule of law at the national level. An analysis of the UN Declaration from an IPA perspective thus needs to examine whether the order to respect the rule of law contained in the UN Declaration can be connected to instances of criticized UN exercise of public authority for which the rule of law was seen as the suitable solution.

C. The Authoritative Character of the UN Declaration

Before analyzing the UN Declaration in detail, the nature of the UN Declaration as a resolution of the UN General Assembly should be considered. In order to fulfill its task of making recommendations to UN Members or to the Security Council for matters within the scope of the *UN Charter*,[16] the UN General Assembly may adopt resolutions which are - contrary to the powers of the UN Security Council[17] - in principle non-binding.[18] This finding from the *UN Charter* does not mean, however, that the UN Declaration is without any legal or factual effects. As an outcome document of a high-level meeting of heads of state and government that saw broad participation and a unanimous adoption,[19] the UN Declaration has strong authority and might be seen to have at least some legal implications since it purports to set forth legal rules. Also, the document is identified as a "Declaration,"[20] which reflects its particular importance for international law similarly to past Declarations such as the Universal Declaration of Human Rights of 1948[21] or the Friendly Relations Declaration of the General Assembly of 1970.[22] One might therefore conclude that the UN Declaration has strong authority, while leaving the question of the

15 See the thematic studies, A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010), 99-658.

16 See Art. 10 *UN Charter*.

17 See Art. 25 *UN Charter*.

18 See Schermers & Blokker, *supra* note 4, § 1217.

19 GA, 3rd Plenary Meeting (67th Session), Official Records, UN Doc A/67/PV.3, 24 September 2012, 3 [GA, 3rd Plenary Meeting (67th Session)].

20 C. Tomuschat, 'United Nations, General Assembly', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 371, 376 para. 22.

21 GA Res. 217 A (III), UN Doc A/810 at 71, 10 December 1948.

22 GA Res. 2625 (XXV), UN Doc A/RES/25/2625, 24 October 1970.

binding nature of the rule of law addressed therein open for the moment.[23] This allows for the application of the IPA approach.

D. Analysis of the UN Declaration Under an International Public Authority Perspective

This part examines the UN debate that led to the Declaration being adopted and analyzes the Declaration text. For a reconstruction in light of the IPA approach, it will be of particular interest to see whether legitimacy concerns existed regarding UN activities which represent exercises of public authority and whether the rule of law was seen by the UN as the suitable answer to address such concerns.

I. Reconstruction Based on the Debate in the United Nations

Before analyzing the UN Declaration text itself, it is worth looking at the debate leading up to the UN Declaration to find out what the considerations were behind the adoption of the Declaration. This might help to reconstruct whether there was the same or a similar motivation as that underlying the public law approach to the exercise of international public authority, i.e. to find a legal framework for such exercise in order to address legitimacy concerns.[24]

As early as the late 1940s, the preamble of the Universal Declaration of Human Rights stressed as essential "that human rights should be protected by the rule of law."[25] The Friendly Relations Declaration of 1970 stated that the adoption of the Declaration constituted a landmark "in promoting the rule of law among nations."[26] While the rule of law was already mentioned in these documents, both Declarations were only addressed to UN Member States.

Only in recent years has discussion started on the rule of law that also addresses its application to the UN itself. In 2003, the Security Council held its first thematic debate on the rule of law, entitled "Justice and the Rule of Law: the United Nations Role" and stressed the

> "vital importance of these issues, recalling the repeated emphasis given to them in the work of the Council, for example in the

[23] See below, Section E.
[24] See von Bogdandy, Dann & Goldmann, *supra* note 9, 16.
[25] GA Res. 217 (III), *supra* note 21, preamble.
[26] GA Res. 2625 (XXV), *supra* note 22, preamble.

> context of the protection of civilians in armed conflict, in relation to peacekeeping operations and in connection with international criminal justice."[27]

Following the Security Council's wish to receive more expertise and experience on these matters,[28] the Secretary-General delivered a report in 2004 under the title "The rule of law and transitional justice in conflict and post-conflict societies."[29] This report was seen to provide for the first time a common definition of the rule of law.[30] In an address to the UN, the Secretary-General said that it had to be ensured that law enforcement personnel and peacekeepers did not contribute to the suffering of the vulnerable, including women and children, and that those who abused them were to be held accountable.[31] In his view, the rule of law meant that no one was above the law and that therefore the Secretary-General had to set out minimum standards of behavior expected of all UN personnel.[32]

The topic of the rule of law took a more prominent position in the World Summit Outcome document of the General Assembly in 2005[33] where "human rights and the rule of law" was identified as one of four problematic areas in which multilateral solutions should be provided.[34] The general spirit of the outcome document, however, was to recognize the need for UN Member States to adhere to the rule of law at the national and international levels, by calling on them, for example, to become parties to international treaties or to consider accepting the jurisdiction of the International Court of Justice,[35] rather than

27 SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2003/15 (2003), 24 September 2003.

28 See *ibid*.

29 SC, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc S/2004/616 (2004), 23 August 2004 [SC, The rule of law and transitional justice].

30 M. Wood, 'Public International Law and the Idea of the Rule of Law', in M. Pogačnik & E. Petrič, *Challenges of Contemporary International Law and International Relations: liber amicorum in Honour of Ernest Petrič, Evropska pravna fakulteta* (2011), 431, 442; T. Fitschen, 'Inventing the Rule of Law for the United Nations', 12 *Max Planck Yearbook of United Nations Law* (2008), 347, 350.

31 See SC, *The rule of law and transitional justice*, *supra* note 29, para. 33.

32 UN Secretariat, *Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse*, UN Doc ST/SGB/2003/13, 9 October 2003.

33 GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005.

34 *Ibid.*, para. 16.

35 *Ibid.*, para. 134.

addressing the UN itself, let alone specifying precise obligations of the UN under the rule of law.

In 2006, the Security Council held an open debate on 'Strengthening international law: rule of law and the maintenance of international peace and security' for which the then Danish presidency submitted a discussion paper including as one topic the legitimacy and efficiency of the Council's endeavors to maintain international peace and security.[36] The paper stressed that due process guarantees would enhance the credibility of sanctions regimes and, as targeted sanctions which were seen as credible were more likely to be implemented, credibility would in turn enhance the efficiency of sanctions regimes.[37] In its presidential statement after the debate, the Security Council emphasized the importance of promoting the rule of law and confirmed it would ensure that sanctions were carefully targeted in support of clear objectives and were implemented in ways that balanced effectiveness against possible adverse consequences.[38] The Council said that it was committed to ensuring that fair and clear procedures existed for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.[39]

Targeted sanctions of the UN can be seen as exercises of international public authority. Denmark spoke of credibility concerns and said that due process safeguards would enhance credibility. This shows that the considerations behind the UN Declaration are similar to those underlying the international public authority perspective.[40]

36 *Strengthening international law: rule of law and the maintenance of international peace and security (Discussion paper for the open debate in the Security Council on 22 June 2006 under Denmark's presidency)*, Letter dated 7 June 2006 from the Permanent Representative of Denmark to the United Nations addressed to the Secretary-General, UN Doc S/2006/367 (2006), 7 June 2006, 2.

37 *Ibid.*, 4. Similar concerns were expressed two years later by the Secretary-General, see GA Report, UN Doc A/63/226, 6 August 2008, para. 28, and four years later by Mexico, see *Concept note for the open thematic debate in the Security Council to be held on 29 June 2010 under the presidency of Mexico, on the promotion and strengthening of the rule of law in the maintenance of international peace and security*, Annex to the letter dated 18 June 2010 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General, UN Doc S/2010/322, 21 June 2010, 5.

38 SC, UN Doc S/PRST/2006/28 (2006), 22 June 2006, 2.

39 *Ibid.* Details for the introduction and implementation of sanctions presenting more or less the status quo in the Al Qaida sanctions regime at that time were later set out in GA Res. 64/89, UN Doc A/RES/64/115, 15 January 2010, Annex.

40 See further to targeted sanctions below, Section D. II. 2. a.

In 2008, an inventory of the current rule of law activities of the UN requested by the General Assembly[41] and delivered by the Secretary-General[42] did not bring any new insights as to the idea behind the concept of the rule of law at the UN level. In a later report delivered the same year, the Secretary-General said that

> "[t]he Organization has little credibility if it fails to apply the rule of law to itself. The United Nations is a creation of international law, established by treaty, and its activities are governed by the rules set out in its Charter. Appropriate rules of international law apply mutatis mutandis to the Organization as they do to States."[43]

He continued,

> "In the light of its responsibilities, the United Nations has a special duty to offer its staff timely, effective and fair justice through its internal justice system."[44]

While this is a statement by the Secretary-General and not by the Security Council or the General Assembly, it nonetheless gives an idea of the aspects that might have played a role in the rule of law discussion. UN staff are subject to the authority of the Secretary-General,[45] which can be classified as international public authority since it is exercised on the basis of a competence instituted by an international act of States,[46] namely the *UN Charter* (Article 97). Thus, UN internal affairs can also be examined under the international public authority perspective. However, the Secretary-General only speaks generally about the credibility of the UN without specifying concerns regarding staff matters.[47]

The debate of the high-level meeting in 2012 entitled "The rule of law at the national and international levels", which led up to the adoption of the

41 GA Res. 61/39, UN Doc A/RES/61/39, 18 December 2006, para. 2.

42 GA, *The rule of law at the national and international levels*, Report of the Secretary-General, UN Doc A/63/64, 12 March 2008.

43 GA, *Strengthening and coordinating United Nations rule of law activities*, Report of the Secretary-General, UN Doc A/63/226, 6 August 2008, para. 27.

44 *Ibid.*, para. 28.

45 Secretary-General, *Secretary-General's bulletin: Staff Rules and Staff Regulations of the United Nations*, UN Doc ST/SGB/2014/1, 1 January 2014, Regulation 1.2 (c).

46 Von Bogdandy, Dann & Goldmann, *supra* note 9, 13.

47 See further on the internal administration of justice below, Section D. II. 2. c.

UN Declaration, was opened with the President of the General Assembly stating that

> "[w]ithin States, the just application of the rule of law stands at the foundation of responsible governance. In the international arena, it helps ensure the predictability of actions and the legitimacy of outcomes."[48]

The argument was reiterated that the rule of law had to apply to the UN itself for reasons of credibility: "Only an organization that upholds the highest standards itself can be credible in promoting those standards elsewhere."[49] This argument phrases a lack of credibility as a legitimacy concern in cases when the UN does not practice what it preaches, even though it was not expressly connected to the exercise of public authority here. That the rule of law can be seen to mean different things was shown by States stressing that the rule of law could not be strengthened without making global institutions more democratic, i.e. without reforming the Security Council.[50]

In conclusion, this review of the debate that led to the adoption of the UN Declaration reveals that the application of the rule of law to the UN itself and its activities was one aspect of the discussion. Other aspects addressed, among others, the rule of law as it applies to UN Member States, calling on them, for example, to consider accepting the jurisdiction of the International Court of Justice. The discussion was characterized by rather general statements on the rule of law, neither specifying why the rule of law should be applied, nor going into detail as to the elements of the rule of law. Despite this lack of precision by the General Assembly and the Security Council, the Secretary-General in his reports on the rule of law presented cases of UN activities that can be seen, from an IPA perspective, as exercises of public authority, such as targeted sanctions, UN peacekeeping, and the internal administration of justice in the UN. Regarding these UN activities, several comments can be identified that highlighted legitimacy concerns and requested remedying them by introducing rule of law elements in the work of the UN. The debate and

48 GA, 3rd Plenary Meeting (67th Session), *supra* note 19, 1.

49 Swiss Confederation (GA, 4th Plenary Meeting (67th Session), Official Records, UN Doc A/67/PV.4, 24 September 2012, 2 [GA, 4th Plenary Meeting (67th Session)]) & Luxembourg (GA, 4th Plenary Meeting, *supra* this note, 7).

50 Gabonese Republic, (GA, 3rd Plenary Meeting (67th Session), *supra* note 19, 22) & Bolivarian Republic of Venezuela (GA, 3rd Plenary Meeting (67th Session), *supra* note 19, 40.

comments reveal that such rule of law elements include accountability, minimum standards of behavior and respect for the rights of the people protected by UN personnel and UN peacekeepers in their operations, as well as due process guarantees in sanctions regimes and timely, effective, and fair internal justice for UN personnel in affairs internal to the organization. These elements will now be further examined in connection with the text of the UN Declaration and additional UN practice.

II. Reconstruction Based on the Text of the UN Declaration and Relevant Practice

The IPA perspective can yield further insights by examining the text of the UN Declaration itself in respect of concrete UN activities representing exercises of public authority, and by addressing the legitimacy concerns raised by these activities and the reactions to them within the UN to see whether these concerns have been considered referring to the rule of law. Only in this case, the rule of law would seem to provide an adequate legal framework for these UN activities.

1. Initial Stumbling Blocks

Under the IPA perspective, one could argue that as far as the UN Declaration addresses the rule of law at the national level, the Declaration itself is an exercise of public authority. It urges UN Member States to follow and implement a certain rule of law standard in their territory. Even if the UN Declaration is seen as non-binding[51] so that it does not modify the legal situation of UN Member States,[52] it might condition their behavior[53] since a deviation from the Declaration might come at some reputational cost. The rule of law as an ideal is hard to object to.[54] The paper, however, does not focus on this dimension of the UN Declaration but investigates how the rule of law according to the UN Declaration applies to the UN and its activities as a legal framework for the exercise of its public authority.

51 See above, Section C.

52 See von Bogdandy, Dann & Goldmann, *supra* note 9, 11-12.

53 See von Bogdandy, Dann & Goldmann, *supra* note 9, 12.

54 See M. Kanetake, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions', 9 *International Organizations Law Review* (2012) 2, 267, 275.

The Secretary-General repeated in a report of 2012 the definition of the rule of law from his earlier[55] report:

> "The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[56]

This broad definition covers both procedural requirements, such as equal enforcement of laws and independent adjudication, and substantive elements, such as consistency with human rights. It was, however, not included in the Declaration. The high-level meeting only took note of the report of the Secretary-General,[57] certainly because the definition only addressed the rule of law at the domestic level in conflict and post-conflict societies.[58] The program of action to strengthen the rule of law proposed in this report[59] which made detailed suggestions with regard to, e.g., the delivery of public services, was also not adopted by the General Assembly.[60] Only parts of the broad definition above made their way into the Declaration:

55 SC, *The rule of law and transitional justice*, *supra* note 29, para. 6.

56 GA, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General, UN Doc A/66/749 (2012), 16 March 2012, para. 2 [GA, Delivering justice, Report of the Secretary-General].

57 See GA Res 67/1, *supra* note 1, para. 39.

58 Cf. J. Crawford, 'Chance, Order, Change: The Course of International Law', 365 *Recueil des Cours de l'Académie de Droit International* (2013), 13, 262 [Crawford, Chance, Order, Change]; P. Bodeau-Livinec & S.Villalpando, 'La promotion de l'"Etat de droit" dans la pratique des Nations Unies', in *Société Française pour le Droit International*, L'Etat de droit en droit international (2009), 81, 93.

59 GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56.

60 See GA Res 67/1, *supra* note 1, para. 39.

> "[A]ll persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law."[61]

In addition to lacking a comprehensive definition of the rule of law, this sentence uncovers another difficulty in determining the elements of the rule of law applicable to the UN. The Declaration deals with the "rule of law at the national and international levels" at the same time, and it addresses both UN Member States and the UN itself.[62]

Since the concrete design of the rule of law in the national constitutional order of a UN Member State is a matter of the internal affairs of that State,[63] the Declaration reference to the rule of law at the national level can only entail general obligations for UN Member States, such as accountability for just, fair, and equitable laws[64] without prescribing too many details. In contrast, the rule of law at the international level implies for UN Member States in particular respect for their obligations under international law, e.g. to respect the sovereign equality, territorial integrity, and political independence of all States, or to refrain from the threat or use of force if inconsistent with the purposes and principles of the United Nations, etc.[65] What the rule of law in the UN Declaration could mean for the UN is examined subsequently with regard to specific UN activities.

2. The Reconstruction of Elements of the Rule of Law in the Declaration in Light of UN Activities Which Represent an Exercise of Public Authority

This section examines the elements of the rule of law in the UN Declaration in light of some of the most important UN activities which represent exercises of public authority.

61 See GA Res 67/1, *supra* note 1, para. 2.

62 On the international reception of national rule of law practices regarding the rule of law, see Kanetake, *supra* note 54, 267-338. On the distinction between the rule of law at the national level and the rule of law at the international level Wood, *supra* note 30, 434.

63 S. Besson, 'Sovereignty', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. IX (2012), 366, 383 para. 121. See also GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56, para. 48: "The rule of law is at the heart of State sovereignty […]."

64 See GA Res 67/1, *supra* note 1, para. 2.

65 See GA Res 67/1, *supra* note 1, paras 3, 4 & 20.

a. Targeted Sanctions

From an IPA perspective, the UN Declaration text seems to suggest first and foremost an examination of targeted sanctions. Targeted sanctions are adopted by the UN Security Council and are directed against individuals whose behavior is deemed a threat to international peace and security.[66] These individuals are listed by the UN sanctions committees, subsidiary bodies of the Security Council. As a consequence, these individuals are subject to sanctions such as a freezing of their assets, a travel ban or an arms embargo. When a sanctions committee on behalf of the Security Council identifies an individual to be targeted and puts the individual on the list, it exercises international public authority in the sense that it reduces this individual's freedom in a determinative way.[67] Targeted sanctions can thus be seen as exercises of international pubic authority by the UN.[68] The objections raised against targeted sanctions in the political arena as well as before national and regional courts mainly concerned the manner in which individuals were selected for listing without the possibility of formal review.[69] Sanctions thus did not meet the expectations of targeted individuals and of many States pertaining to adequate procedural safeguards and thus gave rise to concerns regarding their legitimacy.

Having identified targeted sanctions as exercises of international public authority, it remains to be seen in a second step whether the UN Declaration provides a sufficient legal framework to alleviate such legitimacy concerns related to targeted sanctions. Paragraph 29 of the UN Declaration stipulates that sanctions have to be (a) carefully targeted, in support of clear objectives, (b) be designed carefully so as to minimize possible adverse consequences, and that (c) fair and clear procedures have to be maintained and further developed.[70]

66 See, for example, the sanctions regime concerning Liberia, established by SC Res. 1521, UN Doc S/RES/1521 (2003), 22 December 2003, or the sanctions regime pursuant to SC Res. 1267, UN Doc S/RES/1267 (1999), 15 October 1999, and SC Res. 1989, UN Doc S/RES/1989 (2011), 17 June 2011 concerning Al-Qaida and associated individuals and entities.

67 See von Bogdandy, Dann & Goldmann, *supra* note 9, 11.

68 C. Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?', 9 *German Law Journal* (2008) 11, 1513, 1514 [Feinäugle, UN Security Council Al-Qaida and Taliban Sanctions Committee].

69 Kanetake, *supra* note 54, 283; S. Chesterman, '"I'll take Manhattan": The International Rule of Law and the United Nations Security Council', 1 *Hague Journal on the Rule of Law* (2009) 1, 67, 70.

70 See GA Res 67/1, *supra* note 1, para. 29.

This means that there must be a clear objective for the adoption of sanctions, the sanctions must be suitable to attain this objective, and the sanctions must be designed with as little adverse consequences as possible. This is reminiscent of the elements of a proportionality test which is known, for example, from human rights protection at the international level.[71] The expression "fair and clear procedures" refers to what is known as due process in national constitutional law.

This raises the question of the significance of a proportionality test for the public law approach. As noted above, the public law approach relies on, *inter alia*, constitutionalist perspectives to build a legal framework for international public authority.[72] In respect of proportionality and due process, a comparison of domestic constitutional law shows that the principle of proportionality[73] and the guarantee of due process[74] are, while not denying existing variations between different national traditions, common features these days in national constitutional law. Under the public law approach, proportionality and due process can contribute to the legitimacy of public authority and should therefore be part of a legal framework applicable to UN targeted sanctions.[75] This insight is not just theoretical but also practical: if the rule of law standards established in an IPA perspective prove useful, additional principles applicable to UN sanctions can be similarly identified, which will refine the legal framework for sanctions.[76]

The further question arises whether the proportionality test required by para. 29 of the UN Declaration is sufficient to accord legitimacy to UN targeted

71 *Handyside v. the United Kingdom*, ECtHR Application No. 5493/72, Judgment of 7 December 1976, para. 49. For the elements of proportionality in public international law E. Crawford, 'Proportionality', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII (2012), 533, 534 para. 2.

72 See von Bogdandy, Dann & Goldmann, *supra* note 9, 21.

73 M. Cohen-Eliya & I. Porat, *Proportionality and Constitutional Culture* (2013), 10-13.

74 B. Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights', 3 *International Organizations Law Review* (2006) 2, 437, 457; stating that notwithstanding differences in definition there was today a universal minimum standard of due process.

75 For the application of the principle of proportionality in the 1267 sanctions regime: Feinäugle, 'UN Security Council Al-Qaida and Taliban Sanctions Committee', *supra* note 68, 1539.

76 See for such elements for the 1267 sanctions regime C. Feinäugle, *Hoheitsgewalt im Völkerrecht* (2011), 358-359 (*Summary: The Exercise of Public Authority in International Law*) [Feinäugle, Hoheitsgewalt im Völkerrecht].

sanctions. If we look at the example of the Al-Qaida targeted sanctions regime,[77] the changes introduced with regard to fair and clear procedures have on the one hand led the Advocate-General in Kadi II to conclude that these improvements in the procedure before the Sanctions Committee militated in favor of a limited review.[78] On the other hand, the Court of Justice did not follow this opinion. Listings are still challenged before courts,[79] which indicates that the legal framework might have to be further improved if the UN wants to avoid that the effective implementation of its measures is jeopardized. One option would be to give the Ombudsperson the power to delist persons with binding effect for the Sanctions Committee.

b. UN Peacekeeping

Another core field of activity of the UN is peacekeeping. Peacekeeping operations are meant to assist States in transition from conflict to peace; they are a technique designed to preserve the peace where fighting has been halted.[80] Over the years, different types and forms of peacekeeping have developed, which has led to the notion of multi-dimensional peacekeeping:[81] while the traditional "passive" mandate of UN peacekeepers was mostly limited to monitoring local police forces and compliance with peace agreements, under "transformational" mandates, UN police and justice experts provide advice and guidance on restructuring and reforming the law enforcement sector as well as operational support to law enforcement agencies of the host State when needed.[82] The

77 *Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities*, available at https://www.un.org/sc/suborg/en/sanctions/1267.

78 *Commission and Others v. Kadi*, *supra* note 5, Opinion of Advocate General Bot of 19 March 2013, para. 81.

79 See Security Council, *Sixteenth Report of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resolution 2161 (2014) concerning Al-Qaida and associated individuals and entities*, UN Doc S/2014/770, 29 October 2014, para. 74-76.

80 Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations - Principles and Guidelines* (2008), 18.

81 *Ibid.*, 22.

82 See T. Fitschen, 'Taking the Rule of Law Seriously: More Legal Certainty for UN Police in Peacekeeping Missions', Geneva Center for Security Policy (GCSP) Law Papers, Research Series No. 9, December 2012, 7-8 [Fitschen, More Legal Certainty for UN Police].

UN Missions in Kosovo[83] and Timor-Leste[84] had an even stronger mandate, including the provision of public security and law enforcement.[85]

At least some UN activities in peacekeeping missions can be classified as exercises of pubic authority. When UN peacekeepers have an explicit mandate "to contribute to the protection of civilians and the restoration of security and public order, through the use of appropriate measures," their operations typically involve measures determining individuals and reducing their freedom.[86] This authority is "public"[87] as it is exercised on the basis of a UN Security Council resolution adopted under the competences of the Security Council provided by the *UN Charter* which, in turn, was concluded as a multilateral treaty in the public interest of international peace and security. Concerns about the legitimacy of peacekeeping played a role in the debate leading to the adoption of the UN Declaration[88] since especially cases of alleged sexual abuse by UN staff ran counter to expectations placed on the work of UN peacekeepers and their observance of their mandate and their appropriate behavior.[89] The connection to the rule of law was made by the Secretary-General in another report when he has said:

> "Since the rule of law is an essential element of lasting peace, United Nations peacekeepers and peacebuilders have a solemn responsibility to respect the law themselves, and especially to respect the rights of the people whom it is their mission to help."[90]

83 The mission was established by SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999.

84 The mission was established by SC Res. 1704, UN Doc S/RES/1704 (2006), 25 August 2006.

85 See SC Res. 1244, *supra* note 83, para. 9(d) on Kosovo and SC Res. 1704, *supra* note 84, para. 4(c) on Timor-Leste. On the UN administration of territories, see below, Section D. II. 2 d.

86 See as a recent example SC Res. 2127, UN Doc S/RES/2127 (2013), 5 December 2013, para. 28(i). For the elements of such exercise of authority see von Bogdandy, Dann & Goldmann, *supra* note 9, 11.

87 Von Bogdandy, Dann & Goldmann, *supra* note 9, 13.

88 See above, Section D. I.

89 The legal framework established as a consequence can be found at UN Secretariat, *Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse*, UN Doc ST/SGB/2003/13, 9 October 2003.

90 GA, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc A/59/2005, 21 March 2005, para. 113.

With regard to peacekeeping, the UN Declaration in para. 18 only emphasizes "the importance of the rule of law as one of the key elements of […] peacekeeping […] and peacebuilding" and stresses that "justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations"; para. 19 mentions peacekeeping operations "in accordance with their mandates." While the first statement that the rule of law is a key element of peacekeeping does not provide any new insight on the content of the rule of law, the claim that peacekeeping operations should act in accordance with their mandates reminds of the primacy of the law as an element of the rule of law, a well-known constitutional principle.

The obligation to respect the primacy of the law has developed well beyond the actual mandate text laid down in a Security Council resolution. The model memorandum of understanding that governs the relationship between the UN and the troop-contributing State, for example, specifies that UN peacekeeping personnel have to respect local laws but must at the same time comply with the Guidelines on International Humanitarian Law for Forces Undertaking United Nations Peacekeeping Operations and the applicable portions of the Universal Declaration of Human Rights.[91] The policy for Formed Police Units provides that their operations will always be based on the principles of necessity, proportionality/minimum level of force, legality and accountability.[92] This shows that, in addition to the quite general section in the Declaration, further elements of the rule of law have developed in the context of UN peacekeeping.

As to the question whether the provisions of the UN Declaration regarding UN peacekeeping are sufficient or have to be further developed, the answer

[91] Special Committee on Peacekeeping Operations and its Working Group, *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session*, UN Doc A/61/19 (Part III), 12 June 2007. Likewise, UN support to non-UN security forces has to be consistent with the UN's obligation to respect human rights and humanitarian law, see GA & SC, *Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council*, UN Doc A/67/775-S/2013/110, 5 March 2013, Annex on Human rights due diligence policy on United Nations support to non-United Nations security forces, para. 1. This policy was later adopted as a standard for the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, see SC Res. 2098, UN Doc S/RES/2098 (2013), 28 March 2013, para. 12, lit. b.

[92] UN Department of Peacekeeping Operations & Department of Field Support, *Policy (revised): Formed Police Units in United Nations Peacekeeping Operations*, Ref. 2009. 32, D.2.1, para. 28, effective as of 1 March 2010, revised 1 March 2013, available at http://www.un.org/en/peacekeeping/sites/police/documents/formed_police_unit_policy_032010.pdf (last visited 18 October 2015).

depends - under the public law approach - again on whether peacekeeping operations are seen as sufficiently legitimate. In this respect, the question of judicial review of UN peacekeeping actions is a crucial issue. The peacekeeping mission deployed to Haiti in 2004 shows why judicial review might be necessary.[93] Soldiers sent to Haiti as part of the UN mission after the earthquake of 2010 are alleged to have been the source of a cholera outbreak which has killed thousands of people. This has led to a number of lawsuits against the UN before national courts. Under the public law approach, judicial review may be based on a comparison of domestic constitutional law. It shows that judicial review of public authority is guaranteed in most States which respect the rule of law. The UN enjoys immunity, however. The idea of the rule of law raises the question whether this is acceptable. The requirement of judicial review might compel a narrow interpretation of Article 105 *UN Charter* granting the UN "such privileges and immunities as are necessary for the fulfilment of its purposes."[94]

But overly optimistic ideas about the further elaboration of the rule of law for peacekeeping operations will likely prove naïve. A realistic perspective has to consider that peacekeepers in many instances work under extremely difficult conditions in the field, often experiencing undue time pressure and insufficient funding. The UN is dependent on UN Member States which have to provide the preconditions that enable the UN to abide by the rule of law in the first place.

c. Internal Administration of Justice

Another UN activity relevant for the rule of law is the internal administration of justice within the UN. UN staff are subject to the authority of their superiors and ultimately of the Secretary-General. This enables supervisors to exercise international public authority, as seen above.[95] Legitimacy concerns relate to the lack of adequate remedies available to UN staff. The former justice system was criticized because it did "not provide proper or adequate remedies

[93] The United Nations Stabilization Mission in Haiti (MINUSTAH) was established in 2004 by SC Res. 1542, UN Doc S/RES/1542 (2004), 30 April 2004. Its mandate has been extended by SC Res. 2119, UN Doc S/RES/2119 (2013), 10 October 2013.

[94] Also arguing for limited immunity of international organizations in such cases: International Law Association (ILA), Berlin Conference, 'Accountability of International Organizations, Final Report' (2004), available at http://www.ila-hq.org/en/committees/index.cfm/cid/9 (last visited 18 October 2015), 41.

[95] See above, Section D. I.

and failed to guarantee individual rights."[96] As a consequence, it did not enjoy the confidence or the respect of staff, management or Member States.[97] It was said to generally lack transparency and to fail to satisfy minimum requirements of the rule of law, to be extremely slow, under-resourced, inefficient and, thus, ineffective.[98] Staff members, including staff unions and managers, voiced strong support for a professional, independent, and adequately-resourced system of internal justice that guaranteed the rule of law within the United Nations.[99] Shortly after, the Secretary-General included the matter in one of his reports on the rule of law,[100] as seen above.[101]

Concerning the applicability of the rule of law to the internal administration of the UN, para. 35 of the UN Declaration on good governance could be relevant. It reads that "good governance at the international level is fundamental for strengthening the rule of law" and stresses in this context the importance of "continuing efforts to revitalize the General Assembly" and "to reform the Security Council." But "good governance" is deemed here as a precondition for the rule of law rather than an element of it. Apart from para. 35, the right of equal access to justice mentioned in para. 14 might give rise to rule of law requirements for UN internal administration. However, para. 14 refers to "vulnerable groups", obviously addressing the national context, be it as an obligation of States or of UN missions. The only additional hint we receive from the UN Declaration in respect of the internal administration is that the rule of law should "accord predictability and legitimacy" to the actions of the UN (para. 2).

The UN Declaration thus does not give sufficient details on the rule of law as it could and should apply to the internal administration of justice. Nevertheless, a reform of the internal justice system[102] on the basis of the rule of

96 GA, *Report of the Redesign Panel on the United Nations system of administration of justice*, UN Doc A/61/205, 28 July 2006, para. 73 [GA, Report on the UN system of administration of justice]. Another point of criticism was the lack of independence of the UN administrative tribunal from the Secretary-General and the senior UN staff, see E. Benvenisti, 'The law of global governance', 368 *Recueil des cours de l'Académie de droit international de La Haye* (2013), 47, 230.

97 GA, *Report on the UN system of administration of justice*, *supra* note 96, para. 73.

98 *Ibid.*, para. 5.

99 *Ibid.*, para. 6.

100 GA, *Strengthening and coordinating United Nations rule of law activities*, Report of the Secretary-General, UN Doc A/63/226, 6 August 2008, para. 28.

101 See above, Section D. I.

102 GA Res. 62/228, UN Doc A/RES/62/228, 6 February 2008.

law has taken place in the UN in the meantime. The General Assembly stressed in the relevant resolution that it had decided

> "to establish a new, independent, transparent […] system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members."[103]

This reform includes classic procedural rule of law elements such as the independence of judges,[104] oral hearings, publication of judgments, procedures for maintaining the confidentiality of statements,[105] and the option of appeal.[106]

In a later report, the UN Secretary-General stressed that it was important for the Security Council, in addition to the other principal organs of the United Nations, to fully adhere to applicable international law and basic rule of law principles to ensure the legitimacy of their actions and that in this connection the Secretary-General fully supported the new system of administration of justice and would ensure that the principles of the rule of law were consistently applied throughout the United Nations.[107] This statement can be seen as a confirmation that the mentioned improvements on the basis of the rule of law were deemed successful in addressing the legitimacy concerns.

Nevertheless, a comparison of national administrative law would help to further develop elements of the rule of law applicable to the UN. The Council of Europe has adopted a Code of good administration that provides, albeit not a global, at least a broad European perspective. The elements of an effective, just and non-discriminatory administration are contained in the Code in Articles 7, 4 & 3.[108] Using this line of argument which this paper can only sketch

103 *Ibid.*, preamble.

104 GA Res. 62/253, UN Doc A/RES/63/253, 17 March 2009, Annex I, Article 4 & 9.

105 *Ibid.*, 10.

106 *Ibid.*, 18.

107 GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56, 3-4. Another important aspect of the internal administration of justice is the question by whom and how internal investigations can be conducted, see M. Waechter, 'Due Process Rights at the United Nations: Fairness and Effectiveness in Internal Investigations', 9 *International Organizations Law Review* (2012) 2, 339 et seq.

108 Committee of Ministers, *Appendix to Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration*, 20 June 2007, Art. 5(2), available at https://wcd.coe.int/ViewDoc.jsp?id=1155877 (last visited 18 October 2015).

and which will need further elaboration, the rudimentary content of para. 35 of the UN Declaration could be further refined.

d. UN Administration of Territories

In contrast to targeted sanctions where the listing or delisting of an individual follows specific guidelines,[109] UN staff members in the post-conflict administration of territories often find themselves in an unclear legal situation: if a mission is mandated to "ensure public safety and order,"[110] as in Kosovo, it is often difficult to identify the applicable law. This legal vacuum[111] is detrimental, among other things, to the realization of legal certainty as one element of the rule of law.[112] The security and civil presences provided by the UN, as in Kosovo, replace to some extent the local authorities and undertake executive functions. This kind of UN peacekeeping thus seems to be the UN activity closest to actions of organs of a nation state. Therefore, the view can be taken that in this specific context the contents of the rule of law which apply to UN staff should more or less be congruent with those the rule of law in the UN Declaration provides for States on the national level.

The administration of territories, like in Kosovo, where the task to "ensure public safety and order" is part of the mandate,[113] constitutes one of the clearest and most-intrusive exercises of international public authority by the UN.[114] The Secretary-General expressed legitimacy concerns when he said that peacekeepers should not contribute to suffering and be held accountable.[115]

With regard to a legal framework, the UN Declaration does not specifically address the administration of territories. But what has just been said in respect of peacekeeping would apply also here. In addition, one should

109 At least in some sanctions regimes there exist such guidelines; the most elaborated guidelines in that respect are the guidelines of the SC Committee pursuant to SC Res. 1267 (1999) and SC Res. 1989 (2011) concerning Al-Qaida and associated individuals and entities, available at https://www.un.org/sc/suborg/en/sanctions/1267/committee-guidelines.

110 SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999, para. 9(d).

111 See Fitschen, 'More Legal Certainty for UN Police', *supra* note 82, 9 et seq.

112 See the definition of the Secretary-General in GA, *Delivering justice*, Report of the Secretary-General, *supra* note 56, para. 2.

113 SC Res. 1244, *supra* note 110, para. 9(d).

114 Cf. also Kanetake, *supra* note 54, 303.

115 SC, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, para. 33; also above, Section D. I.; C. Stahn, *The Law and Practice of International Territorial Administration* (2008), 749, shares this view with regard to the UN as a holder of public authority.

consider Resolution 1244 (1999) which provides that the international civil presence in Kosovo has the responsibility to protect human rights.[116] As far as UN peacekeeping, as in Kosovo, assumes the role of domestic administrations, the provisions of the Declaration which principally address the rule of law in the Member States, such as the commitment to a principle of good governance and to an "effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice" (para. 12) could arguably also apply to the administration of territories. Thus, human rights and the effective, just, non-discriminatory, and equitable delivery of public services emerge as core principles of the rule of law. They could be further specified by means of a comparative constitutional and administrative perspective[117] to the extent necessary to address further concerns regarding the UN administration of territories.

e. Use of Force

The decision to authorize the use of force by the UN Security Council under Chapter VII of the *UN Charter* constitutes an exercise of public authority as it typically reduces the freedom of others, e.g. when UN missions are mandated to take security and defense measures against third persons.[118] Legitimacy concerns regarding the use of force were not raised during the debate on the rule of law.

The only reference to the use of force in the UN Declaration concerns the confirmation of the Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the *UN Charter* (para. 3). As a result, with regard to the use of force by the UN, again only para. 2 of the Declaration applies which demands that the rule of law should "accord predictability and legitimacy" to UN actions.

With regard to the use of force, the Secretary-General identified deep divisions among the Member States on the appropriateness of the use of force to address threats to peace[119] and asked a high-level panel of eminent persons

116 SC Res. 1244, *supra* note 110, para. 11(j).

117 This comparative approach is only mentioned in this paper. Details are subject to further research.

118 Like in SC Res. 1744, UN Doc S/RES/1744 (2007), 21 February 2007, para. 4, on Somalia authorizing AU member States to take all necessary measures to, *inter alia*, protect the personnel and ensure their security; see for the elements of the exercise of public authority von Bogdandy, Dann & Goldmann, *supra* note 9, 11.

119 See GA, *Report of the High-level Panel on Threats, Challenges and Change*, UN Doc A/59/565, 2 December 2004, para. 1.

to make recommendations for strengthening the UN so that it could take more effective measures in the interest of collective security.[120] The report of the high-level panel, which was commended by the Secretary-General,[121] indeed also turned to the question of legitimacy of UN Security Council decisions authorizing the use of force. It said that the effectiveness of collective security measures depended also on the common perception of their legitimacy - their being made on solid evidentiary grounds and for the right reasons, morally as well as legally.[122] If the Security Council was to win the respect necessary as the primary body in the collective security system, its most important decisions needed to be better made, better substantiated and better communicated.[123] For the authorization of the use of force, the Council should adopt and systematically address a set of guidelines, dealing not with the question whether force could be used legally, but whether it should be used in good conscience and good sense.[124]

The guidelines were meant to maximize the possibility of achieving Security Council consensus on when it would be appropriate to use coercive action, to maximize international support for the decisions of the Security Council, and to minimize the possibility of individual Member States bypassing the Security Council.[125] As guidelines for deciding on the use of force, the report suggested five basic criteria of legitimacy: a) seriousness of the threat (is the threat to State or human security sufficiently clear and serious to justify prima facie the use of military force?); b) proper purpose of the use of force (is the primary purpose of the proposed military action to halt or avert the threat in question?); c) use of force as last resort (has every non-military option for confronting the threat in question been explored, and are there reasonable grounds to believe that it will not succeed?); d) proportional means (do the scale, duration and intensity of the proposed military action represent the minimum necessary to meet the threat in question?); e) balance of consequences (is there a reasonable chance that military action will be successful in averting the threat in question, and will the consequences of action not be worse than the consequences of inaction?).[126]

The legitimacy concerns related to decisions on the use of force can be interpreted as indirect concerns regarding the exercise of public authority which

120 *Ibid.*, para. 1 & 3.
121 *Ibid.*, para. 24.
122 *Ibid.*, para. 204.
123 *Ibid.*, para. 205.
124 *Ibid.*, para. 205 (emphasis in the original text).
125 *Ibid.*, para. 206.
126 *Ibid.*, para. 207.

usually follow from the use of force in a concrete case. The deep divisions among the Member States on the appropriateness of the use of force uncovered different expectations about what criteria should apply when the Security Council has to decide on the use of force. The five criteria through which the legitimacy concerns are addressed represent an elaborate proportionality principle and thus an important element of the rule of law. The principle of proportionality has been identified above under the public law approach as a common feature in national constitutional law.[127]

3. Conclusion

This reconstruction of elements of the rule of law according to the Declaration and additional UN practice in relation to the exercise of public authority by the UN leads to the following conclusions.

The text of the UN Declaration does not produce much insight for the application of the rule of law to the UN, especially as to the question whether a thin definition confining itself to formal aspects like decision-making based on accessible and clear laws[128] or a thick definition comprising in addition substantive elements like the protection of human rights[129] should apply. The only rule of law elements which can be identified with reasonable certainty are the principles of due process and proportionality applying to targeted sanctions regimes (para. 29). Apart from that, many other aspects which could be relevant for the application of the rule of law, such as good governance (paras 12 & 35), are phrased too vaguely or do not clearly apply to the UN.

A thin, formal definition of the rule of law, including mainly procedural requirements, seems to reflect current public international law.[130] The finding

127 See above, Section D. II. 2. a.

128 See, e.g., S. Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2008) 2, 331, 342 [Chesterman, International Rule of Law?].

129 See, e.g., European Commission for Democracy through Law ("Venice Commission"), *Report on the Rule of Law*, adopted by the Venice Commission at its 86th Plenary Session, Venice, 25-26 March 2011, CDL-AD(2011)003rev, 12-13, paras 59-61 which looks, though, in a broader manner at national and international legal instruments and different legal traditions in order to find a definition of the rule of law.

130 See, e.g., Crawford, 'Chance, Order, Change', *supra* note 58, 277; M. Kanetake, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions', 9 *International Organizations Law Review* (2012) 2, 267, 271 & 276; M. Wood, *supra* note 30, 450; *The UN Security Council and the Rule of Law, The Role of the Security Council in Strengthening a Rules-based International System*, Annex to the letter dated 18 April 2008 from the Permanent Representative of Austria to the United Nations

that only proportionality and due process can be identified as rule of law elements in the UN Declaration seems to confirm this for the rule of law in the UN.

Yet, as I have tried to show in this paper, there are exercises of public authority by the UN besides the imposition of targeted sanctions which raise legitimacy concerns and for which the UN itself, in the person of the Secretary-General, has suggested solutions on the basis of the rule of law. Those solutions have been partly implemented: peacekeepers must act within their mandate (government of law) and are bound by human rights;[131] the UN has reacted to staff concerns with an internal administration reform; and for decisions on the use of force a procedure based on the principle of proportionality has been proposed.

This calls for further action by the UN and might give reason to expect that the understanding of the rule of law as applied to the UN might develop into a thicker, more substantive rule of law conception.[132] By virtue of its comparative perspective, the public law approach might support such a development. At the same time, the examples show that the rule of law means different things for different UN activities. With this, we come back to the question of the legal basis of the rule of law and its potentially binding nature on the UN.

E. Legal Basis and Binding Nature of the Rule of Law in the *UN Charter*

The legal basis for the rule of law in the UN is not evident from the UN Declaration. Its text says that the rule of law belongs to the principles of the United Nations.[133] According to the Secretary-General, rule of law at the international level was the very foundation of the *UN Charter*.[134] The public law approach might help to identify which provisions of the *UN Charter* can serve as a legal basis for the rule of law.

addressed to the Secretary-General, UN Doc A/63/69-S/2008/270, 7 May 2008, 3-4 [The UN Security Council and the Rule of Law].

131 See above, Section D. II. 2. b.

132 J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *European Journal of International Law* (2015) 1, 9, 72, & 75, has recently identified a trend of an increased influence of human rights in relation to the activities of international organizations and the necessity to reconsider the traditional functionalist approach in international institutional law in the interest of third parties.

133 See GA Res. 67/1, *supra* note 1, para. 5.

134 GA, *Strengthening and coordinating United Nations rule of law activities*, Report of the Secretary-General, UN Doc A/66/133, 8 August 2011, para. 6.

Part of the public law approach is the idea of an internal constitutionalization of international organizations in the form of a legal framework for the exercise of public authority based on the founding document.[135] For the rule of law and more particularly for human rights, different articles of the *UN Charter* have been discussed in the past as potential legal bases.[136] Since this paper focuses on the exercise of public authority, Article 1 (1) *UN Charter* might provide for a new perspective. It defines the purpose of the UN as being to maintain international peace and security and says that, to that end, the UN should take

> "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

The provision does not mention the rule of law. The context shows that only the peaceful settlement of disputes mentioned in the second half of the sentence must conform with the principles of justice and international law – which might, if any, include the rule of law. By contrast, these requirements do not seem to apply to collective measures taken in the interest of international peace and security.[137] But the Security Council is bound[138] by Article 1 (1) *UN Charter* to take "effective collective measures for the prevention and removal of threats to the peace". That such measures have to be "effective" can be interpreted in light of the object and purpose of the *UN Charter*.[139] The emphasis on such a teleological interpretation could take into consideration the important connection of the Council's effectiveness and the legitimacy of its acts.[140] Since the UN has to rely on its Member States for the implementation of its measures, these measures

135 See von Bogdandy, Dann & Goldmann, *supra* note 9, 22-23.

136 See for an overview Feinäugle, *Hoheitsgewalt im Völkerrecht*, *supra* note 76, 82.

137 See recently Kanetake, *supra* note 54, 278.

138 A. Paulus, 'Article 2', in B. Simma, *The Charter of the United Nations, commentary*, 3rd ed. (2012), para. 13; see also *UN Charter*, Art. 24(2): "2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

139 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Art. 31(1).

140 This relationship was already rightly highlighted in *The UN Security Council and the Rule of Law*, *supra* note 130, 19. Less convincing seems the argument that the Security Council was most effective if it ignored any rule of law standards.

can only be effective if they are considered legitimate.[141] Otherwise they will be resisted and will thus not be successful. As the examples shown above demonstrate, concerns about the legitimacy of different UN activities made, or might have made, these exercises of authority in pursuit of the UN's Charter obligations less effective. Targeted sanctions under the Al-Qaida sanctions regime have faced legal challenges in Europe, and improvements on the basis of the rule of law were suggested and implemented to remedy these problems.[142] Since UN activities under Chapter VII must be effective if the UN wants to fulfil its purpose (Article 1 (1) *UN Charter*), the UN is bound by the rule of law insofar as "effective" measures require that legitimacy concerns are addressed by actions based on the rule of law.[143]

F. Conclusion

An analysis of the UN Declaration on the rule of law at the national and international levels reveals that the rule of law as it applies to the UN itself is still in a rudimentary stage of development, amounting to not much more than requiring due process and proportionality for UN sanctions regimes. An investigation of various UN activities from an international public authority perspective shows that concerns exist with regard to their legitimacy and that the UN has discussed measures based on the rule of law to address such concerns.

The rule of law for the UN can further be developed in line with the public law approach by drawing comparative insights from national administrative and constitutional law. This would allow the argument for human rights obligations of the UN in peacekeeping missions, in the administration of territories or for the application of the proportionality principle to the making of Security Council

141 In that sense also *ibid.*: "Member States' preparedness to recognize the authority of the Council depends in significant part on how accountable it is or is seen to be".

142 See above, Section D. II. 2. a.

143 This corresponds partly to the recently stated view by Farrall – who, however, does not address the question of the legal basis of the rule of law – that it will be more fruitful to advance arguments that appeal to the self-interest of the Security Council and its members since they were more likely to be responsive to appeals to improve the Security Council's effectiveness by inducing greater legitimacy to their action thus commanding greater compliance than to respect the rule of law as an ideal, see J. Farrall, 'Rule of accountability or rule of law? Regulating the UN Security Council's accountability deficits', 19 *Journal of Conflict & Security Law* (2014) 3, 389, 407. With regard to the case of the internal administration of justice the Security Council is not acting under Chapter VII, of course, but effective measures under Art. 1(1) *UN Charter* require that also staff concerns are addressed as the UN depends on effective work by its staff.

decisions on the use of force. The public authority perspective and the search for a legal framework thus enable the channeling of legitimacy concerns into legal arguments and eventually into workable rules.[144]

With regard to the legal status of the rule of law in the framework of the *UN Charter*, a teleological interpretation of Article 1 (1) *UN Charter* in light of the object and purpose of the Charter could allow for the principle of the rule of law to be read from the Charter. This might seem bold at first glance and from a traditional perspective but could in the end represent a plausible and realistic view. Namely, the Security Council is bound by Article 1 (1) *UN Charter* to take "effective collective measures" for which it has to rely on its Member States for implementation. This means that the measures have to be seen as legitimate in order to be implemented. Since UN activities under Chapter VII must be effective if the UN wants to fulfil its purpose (Article 1 (1) *UN Charter*), the UN is bound by the rule of law insofar as "effective" measures require that legitimacy concerns are addressed by an application of the rule of law. The rule of law is thus not a precise legal principle as we know it from domestic constitutions. It is rather a principle providing broad guidance to the Security Council which leaves enough room for maneuver according to the political context in which the UN acts. This understanding does not render the rule of law meaningless. It is not only up to the UN to decide what is effective but also those on which the UN is dependent, i.e. the States. For the UN, the rule of law is thus a means to an end, to an effective fulfilment of its statutory purpose.[145] The IPA perspective and the public law approach might serve the further development of the rule of law applicable to the UN.

144 See von Bogdandy, Dann & Goldmann, *supra* note 9, 20, taking into account the divergence of legality and legitimacy. Legality first and foremost means conformity with legal standards while common understandings of legitimacy also involve moral and social aspects, see C. Thomas, 'The Uses and Abuses of Legitimacy in International Law', 34 *Oxford Journal of Legal Studies* (2014) 4, 729, 738-742.

145 In that sense also Chesterman, 'International Rule of Law?', *supra* note 128, 331.