International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law

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A. Introduction

International bureaucracies are autonomous actors in a broader process of global governance. Their actions are oftentimes removed from the intentions and control of their creators; they affect other actors and engage in subject matters not formerly within their reach. Their factual impact remains underestimated. Little consolation can be found in the contention that international bureaucracies merely seek the effective implementation of global goals. A yawning gap unfolds between the mechanisms of control, means and ways for contesting the actions of bureaucracies and their actual exercise of public authority. These are the primary contentions motivating research on the development and conceptualization of international institutional law. This contribution sets out to corroborate these underlying contentions from a political science perspective. It subscribes to the approach that the exercise of public authority be framed in a rule-of-law context and highlights the implications of such an approach. It discards an exclusively instrumental view of international institutions that portrays them as tools in the hands of their creators or as mere instruments in pursuit of global goals. In conclusion, it emphasizes law's constitutive role in providing a space for legal and political contestation as an indispensable prerequisite for the normative desirability of autonomous international bureaucracies.

International Relations (IR) scholarship had for some time only provided a rather nebulous view of the performance of international organizations (IOs) and less formal institutions because its focus had rested on the question *why* IOs exist and

persist. The question *what* IOs actually do, a conception of IOs as actors as well as an understanding and explanation of their actions, had long been largely overshadowed by the more fundamental theoretical entanglement of *whether* they matter at all. IR scholarship had been, so to speak, driving with a rearview mirror directed at those primary questions at the beginning of the road.[1] This has certainly benefited our understanding of the importance of IOs but has also come at a regrettable loss. Most importantly, this focus has left IOs as actors in a dead angle from which they have only slowly emerged to attract some attention. This contribution conceptualizes parts of IOs and less formal institutions, in particular administrative or executive organs, as bureaucracies. It thereby elucidates their sources of autonomy and authority and highlights common mechanisms to which international bureaucracies resort in the exercise of public authority. In order to grasp their autonomous actions it appears necessary to divert more attention away from the rearview mirror directed at IOs' embryonic stages under the tutelage of (dominant) constituent members. IOs have grown up. Attention should be given to the perimeters of their action, the sources of their autonomy and to *how* they act. In short, even if it were still doubtful that IOs do matter, it is not a bad idea to at least leer at IOs as actors.[2] Otherwise they might emerge from the dead angle of research agendas to suddenly claim obedience. Jan Klabbers evocatively opens his *Introduction to International Institutional Law* with a quote from Mary Shelly's *Frankenstein*: "You are my creator, but I am your master; obey!"[3]

The aim of this contribution is to build on insights in political science in order to inform the conceptual grasp on the exercise of public authority in legal scholarship. How do international institutions exercise public authority? How can law possibly frame the exercise of such authority? While global challenges call for concerted cooperative action, public law retains and to some extend has to regain its legitimating, that is both enabling and constraining, function in framing the

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[1] *See* Alexander Wendt, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design* 55 INTERNATIONAL ORGANIZATION 1019 (2001).

[2] The performance of IOs and their bureaucracies has attracted a recently growing and renewed interest among political scientists. *See e.g.* AUTONOMOUS POLICY MAKING BY INTERNATIONAL ORGANIZATIONS (Bob Reinalda & Bertjan Verbeek eds., 1998); MICHAEL N. BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD. INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004); Steffen Bauer, *Does Bureaucracy Really Matter? The Authority of Intergovernmental Treaty Secretariats in Global Environmental Politics,* 6 GLOBAL ENVIRONMENTAL POLITICS 24 (2006); Andrea Liese & Silke Weinlich, *Die Rolle von Verwaltungsstäben internationaler Organisationen. Lücken, Tücken und Konturen eines (neuen) Forschungsgebiets, in* POLITIK UND VERWALTUNG 491 (Jörg Bogumil, Werner Jann & Frank Nullmeier eds., 2006); Johan P. Olsen, *Maybe it is Time to Rediscover Bureaucracies,* 16 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY 1 (2006); JOHN MATHIASON, INVISIBLE GOVERNANCE. INTERNATIONAL SECRETARIATS IN WORLD POLITICS (2007).

[3] JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW v (2002).

exercise of public authority. Public international law shares this function with domestic public law.[4] It is argued that the role of IOs, or less formal institutions, in providing the constitutive framework for the formulation and contestation of global or at least shared goals and their implementation be strengthened. This is a task for international institutional law to take.[5] Yet, such legal framing has to be mindful of the particularities of the international context, especially persistent value conflicts and the relatively unmediated impact that power relations might have. While developments in law are prone to reproduce and fosterer power relations, the contribution upholds in conclusion the significance of law in approaching perennial questions of legitimate governance beyond the nation state.

The argument proceeds in three sections. The first explains the autonomy of international bureaucracies with regard to two interrelated sources: self-interested delegation by principals and bureaucracies' authority based on their characteristic traits - their strong repository of knowledge as well as expertise and their civil service. It then concentrates on the actor itself and indicates strategies and mechanisms in the exercise of public authority by which bureaucracies are likely to gain in autonomy (B.). The second section then critically revisits the argument of bureaucracies' autonomy and relates it to the possibilities and limitations of control by constituent members. It also explores whether a lack of control might be compensated by the problem solving capacity of IOs and finds that such argument faces severe factual and normative difficulties. Rather, bureaucracies' autonomy only becomes bearable in an institutional context providing ways to legally and politically contest means and ends of bureaucracies' actions (C.). The last section then draws conclusions from the analysis of the exercise of public authority by international bureaucracies for the development and conceptualization of international institutional law. It will also locate the pitfalls of such a development in the differences between the international and national institutional contexts (D.).

B. Autonomous International Bureaucracies

Several obstacles have for some time impeded the view on autonomous international bureaucracies. The focus of IR scholarship has fallen on the primary

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[4] *See* Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International law: Towards a Legal Framework for Global Governance Activities*, in this issue.

[5] International institutional law is a well-established field within public international law. *See e.g.* IGNAZ SEIDL-HOHENVELDERN & GERHARD LOIBL, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIEßLICH DER SUPRANATIONALEN GEMEINSCHAFTEN (2000); KLABBERS (note 3); INTERNATIONAL INSTITUTIONAL LAW (Henry G. Schermers & Niels M. Blocker eds., 2003). In short and in common understanding, institutional law governs international organisations' legal status, structure and functioning, *id.* at 4.

questions of *why* IOs exist, persist, and *whether* they matter.[6] From the outset, the effect of regimes has been constantly challenged on realist premises. Regimes are arguably an academic fad that distract from the analysis of underlying power structures[7] and institutions have no independent effect on state behavior.[8] The attention given to states and structural explanations for state behavior has further impeded the conceptualization of IOs as autonomous actors.[9] However, with due regard to methodological challenges, empirical research has largely defied at least unqualified arguments on the epiphenomenality of regimes.[10] Moreover, the concepts of regime and governance have provided IOs with minor role scripts in a broader and loosely institutionalized process that again directed attention away from international bureaucracies as autonomous actors.[11] The remainder of this contribution resorts to several studies that share a renewed interest in IOs and international bureaucracies as autonomous actors.

The aim of this section is to corroborate the thesis that, apart from *instruments* in the hands of one or a number of powerful actors or *arenas* for decision-making, IOs can also be autonomous *actors* exercising public authority in a broader governance process.[12] This exercise of public authority demands a legal frame as a precondition

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[6] Bertjan Verbeek, *International Organizations. The Ugly Duckling of International Relations Theory?*, in AUTONOMOUS POLICY MAKING BY INTERNATIONAL ORGANIZATIONS 11 (Bob Reinalda & Bertjan Verbeek eds., 1998); Lisa L. Martin & Beth Simmons, *Theories and Empirical Studies of International Institutions,* 52 INTERNATIONAL ORGANIZATION 729 (1998). For a strong argument of doubt, *see* John J. Mearsheimer, *The False Promise of International Institutions,* 19 INTERNATIONAL SECURITY 5 (1994). For an overview of contrasting positions in the earlier regime debate consult INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983) and REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger ed., 1993).

[7] Susan Strange, *Cave! Hic Dragones: A Critique of Regime Analysis*, in INTERNATIONAL REGIMES 37 (Stephen D. Krasner ed., 1983). *See* Jennifer Sterling-Folker, *Realist Global Governance: Revisiting Cave! Hic Dragones and Beyond*, in CONTENDING PERSPECTIVES ON GLOBAL GOVERNANCE. COHERENCE, CONTESTATION AND WORLD ORDER 17 (Alice D. Ba & Matthew J. Hoffmann eds., 2005).

[8] Mearsheimer (note 6).

[9] *See* ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY 1-20 (1989); Verbeek (note 6).

[10] For an overview of strategies and examples of such research *see e.g.* Robert O. Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory,* 20 INTERNATIONAL SECURITY 39-51 (1995); Beth A. Simmons & Lisa L. Martin, *International Organizations and Institutions*, in HANDBOOK OF INTERNATIONAL RELATIONS 192, 199-200 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002); HELMUT BREITMEIER, ORAN R. YOUNG & MICHAEL ZÜRN, ANALYZING INTERNATIONAL ENVIRONMENTAL REGIMES: FROM CASE STUDY TO DATABASE (2006); Bauer, (note 2).

[11] *See* Friedrich V. Kratochwil & John Gerard Ruggie, *International Organization: A State of Art and an Art of the State,* 40 INTERNATIONAL ORGANIZATION 753, 759 (1986).

[12] CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 68-87 (2001).

for its normative desirability. The exposition of international bureaucracies' autonomy thus serves to inform the development of international institutional law and public international law more generally.

An affirmative argument as to *whether* international bureaucracies matter compels an argument of *why* and *how* they matter. The contention shall rest on two broad and interrelated lines of reasoning. First, under rational choice premises it might simply be instrumentally rational for principals to grant IOs a certain degree of autonomy – the focus thus lies on principals' rationale for granting autonomy to agents (I.). The second line of reasoning fixates on the actor and dwells on the concept of international bureaucracies. It highlights their characteristic traits and emphasizes their strong repository of knowledge as well as expertise as a source of authority and contends that this authority is an important source of autonomy (II.). In its approach this contribution does not build on any particular paradigm in IR theory and does not follow a categorical distinction between instrumentally rationalist and constructivist approaches. It rather credits the explanatory force of each. It claims not to be negligent with regard to most thorough challenges by realists and appreciates their fundamental critique of institutions in order to maintain a beneficial critical distance to its object of analysis.

I. The Delegation of Authority

The most straightforward explanation for bureaucracies' autonomy rests on the reasons principals might have for delegating authority to agents. On the premise that actors act strategically, that is instrumentally rational in pursuit of given interests, several explanations can be offered as to why principals delegate authority. The premise translates more specifically into the claim that constituent actors (principals) delegate authority to bureaucracies (agents) and tolerate a certain degree of autonomy of bureaucracies when they expect instrumental gains. In their rational choice analysis of delegation Hawkins *et al.* define delegation as a "conditional grant of authority from a *principal* to an *agent*"[13] and claim that "[a]ll delegation is premised upon the division of labor and gains from specialization."[14] Principals delegate authority and allow for a margin of autonomy of an agent in order to carry out a task in a way that is more efficient and/or effective compared with the principals themselves carrying out this task. Gains from specialization are

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[13] Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney, *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 7 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006).

[14] *Id*. at 13.

likely to be greatest when the task performed by the agent is frequent, repetitive, and when it requires specific expertise or knowledge.[15]

In most plain cases of coordination problems, for instance, actors have a corresponding self-interest in achieving a particular outcome while being indifferent as to which specific action they undertake as long as the outcome is achieved. Authority might then well be delegated to an independent agent who can determine the terms of coordination.[16] An illustrative example is the drafting of the OECD Model Convention on Double Taxation which is a highly specialized task directed at a particular outcome that is desired by all actors.[17]

In some cooperation games - typically these are variations of the Prisoner's Dilemma - principals have an incentive to cheat on their obligations. In such cases principals might first be interested in ascertaining the actions or intentions of others in order to react. To this end it would be in their respective self-interest to create agents who can provide information about norm compliance.[18] This incentive finds its strongest empirical support in arms control treaties which are frequently linked to forceful monitoring mechanisms.[19] Closely connected to this is the role of agents in enforcing agreements. Bearing in mind that principals might have an incentive to cheat on their commitments, delegating the authority to enforce the terms of an agreement to an autonomous agent increases the credibility of commitments and makes cooperation more likely.[20] This reason for delegation is closely intertwined with the reason of principals to create arbitrating agents.[21] Principals would grant

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[15] *Id.* at 13-15; Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations,* 42 JOURNAL OF CONFLICT RESOLUTION 3, 9-16 (1998).

[16] Hawkins, Lake, Nielson & Tierney (note 13), at 15-16; Jack L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 32-35 (2005).

[17] *See* Ekkehart Reimer, *Transnationales Steuerrecht, in* INTERNATIONALES VERWALTUNGSRECHT, 181 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007).

[18] KEOHANE & MARTIN (note 9), at 43-44.

[19] Harald Müller, *The Evolution of Verification: Lessons from the Past for the Present,* 14 CONTEMPORARY SECURITY POLICY 333 (1993); James D. Fearon, *Bargaining, Enforcement, and International Cooperation,* 52 INTERNATIONAL ORGANIZATION 269 (1998).

[20] Hawkins, Lake, Nielson & Tierney (note 13), at 18-19; George Norman and Joel P. Trachtman, *The Customary International Law Game,* 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 541 (2005); Andrew T. Guzman, *The Design of International Agreements,* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 579 (2005); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions,* 55 INTERNATIONAL ORGANIZATION 761 (2001).

[21] Hawkins, Lake, Nielson & Tierney (note 13), at 17.

an agent the authority to decide on future conflicts over the terms of a contract. Examples for delegation to an (compulsory) arbitrator have grown considerably over the past decade.[22] An incentive for particular political players to delegate to an agent is to create commitments that bind their successors and to thereby put their policy decision largely outside the reach of any new majority or power constellation.[23]

A most pertinent and, with regard to the development of international institutional law, most intriguing explanation for principals' delegation of authority to an international agent is that such an agent might engage in action which would be perceived as illegitimate if it were undertaken unilaterally by the principal itself. This is what Kenneth Abbott and Duncan Snidal call "laundering."[24] For instance, it appears more legitimate if the international financial institutions frequently link loans to the achievement of domestic reforms in the target country.[25] This channel of development assistance appears to be preferable to the imposition of conditionality by one state in relation another – in particular if the colonial past has tainted their bilateral relationship or if the more powerful state sought direct political influence.[26] Even more crucial is such action at the international level that would not only appear illegitimate in bilateral relations but would simply be illegal if it were to be undertaken by the principal itself due to domestic or international legal constraints.[27] Through the Al Qaeda and Taliban Sanctions Committee, a subsidiary organ of the UN Security Council, states can place an individual on the consolidated list of terrorist suspects with immediate consequences for this individual including the freezing of his/her financial assets. This listing is usually not subject to any discussion within the Committee, no judicial review is available

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[22] *See* Bernhard Zangl & Michael Zürn, *Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance*, *in* VERRECHTLICHUNG - BAUSTEIN FÜR GLOBAL GOVERNANCE?, 12 (Bernhard Zangl & Michael Zürn eds., 2004); Bernhard Zangl, *Das Entstehen internationaler Rechtstaatlichkeit?*, *in* TRANSFORMATIONEN DES STAATES? 123 (Stephan Leibfried & Michael Zürn eds., 2006); Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMPARATIVE POLITICAL STUDIES 147 (1999).

[23] Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421, 439 (2000); Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INTERNATIONAL ORGANIZATION 385 (2000).

[24] Abbott & Snidal (note 15), at 18.

[25] Philipp Dann, *The World Bank's Legal Regime*, in this issue.

[26] Abbott & Snidal (note 15), at 18.

[27] *See* Jean D'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INTERNATIONAL ORGANIZATION LAW REVIEW 91 (2007).

and not even minimum procedural guarantees are provided.[28] A similar case in point is the refugee status determination which states increasingly delegate to the UNHCR in order to rid themselves of "unpleasant work" not only well aware but rather embracing the procedural and normative shortcomings after this delegation.[29]

Principals might also have an interest in designing an agent as agenda setter in order to overcome a stalemate in negotiations. The agent could induce an equilibrium which would otherwise not have been achieved. Typically the agenda setting function is delegated to an executive or governing body but also a secretariat might formally or informally take up this role. For instance, the WTO is widely perceived to be a purely member-driven organization and shall only provide a common institutional framework.[30] However, the secretariat does become active on the basis of treaty provisions and beyond. The Dispute Settlement Understanding (DSU) formally provides that the Secretariat propose panelists to the parties to a dispute; should the parties not come to an agreement within 20 days, the Director General may determine the composition of the panel.[31] In so doing he/she enjoys large autonomy and is likely to further the objectives of the organization.[32] Furthermore, at times the secretariat does become active, though cautiously and in acquiescence with at least some member states, even outside any formal basis. It bears on the course of events and substantive decisions taken. In a persistent stalemate during the Uruguay Round, for example, the secretariat came to draft a text which was in line with the prevalent objectives of the organization and which provided the reference point for discussions.[33]

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[28] Clemens Feinäugle, in this issue; Erika de Wet, *Holding International Bureaucracies Accountable: the complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, in this issue.

[29] Maja Smrkolj, in this issue.

[30] Art. II(1) WTO Agreement.

[31] Art. 8(6) and (7) DSU.

[32] Armin von Bogdandy, *Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 609, 615-616 (2001); Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191, 202-206 (2001). An even stronger case could be made on the agency of judges and courts; *cf.* Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 33 (2008); Eyal Benvenisti, *Customary International Law as a judicial tool for promoting efficiency, in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION. THEORETICAL PERSPECTIVES, 85 (Eyal Benvenisti and Moshe Hirsch eds., 2004). On political jurisprudence, *see* ALEC STONE SWEET & MARTIN SHAPIRO, ON LAW, POLITICS, AND JUDICIALIZATION 19-54 (2002).

[33] YI-CHONG XU & PATRICK MORAY WELLER, THE GOVERNANCE OF WORLD TRADE. INTERNATIONAL CIVIL SERVANTS AND GATT/WTO 264-265 (2004).

In sum, a number of interrelated explanations can be offered to explain why instrumentally rational principals would delegate authority to an international agent and bear a corresponding loss of control. The extent of this delegation is then reflected in the institutional design of the organization, for instance, in the agent's formal powers in relation to the principals and in formalized decision-making procedures.[34] An agent can, however, only then sensibly be called autonomous if its actions cannot be reduced to the interests of the principals. This means that even if the interests of the principals were known the action of the autonomous agent could not be predicated.[35] The fact that delegation is a *conditional* grant of authority does not imply that the international bureaucracy necessarily does what principals want or had expected.[36] The term "agency slack" captures actions by the agent that are undesired by the principal.[37] Agents do "implement policy decisions and pursue their own interests strategically."[38] The example of autonomous action by the WTO secretariat has already served as a case in point. In their early study of 1973, Robert Cox and Harold Jacobson pointed out that

> [R]egardless of the rigidity of their charters, … once international organizations are established, in many instances they evolve in ways that could not have been foreseen by their founders. … Thus, once established, organizations take on a life of their own and develop their own inner dynamics.[39]

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[34] *See* Koremenos, Lipson & Snidal (note 20); Guzman (note 20).

[35] *See also* Yoram Z. Haftel & Alexander Thompson, *The Independence of International Organizations: Concept and Applications,* 50 JOURNAL OF CONFLICT RESOLUTION 253, 255-257 (2006) (maintaining that a difference in interest is a constitutive element of IOs' independence).

[36] Certainly there are various mechanisms for principals and other actors to improve the working of conditions and the control of international agents. That is the topic of the contribution by de Wet (note 28). For the limits of contractual or text-based delegation, *see* Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 405 (2005); Richard H. Steinberg, *Judicial lawmaking at the WTO: Discursive, Constitutional, and Political Constraints,* 98 AMERICAN JOURNAL OF LNTERNATIONAL LAW 247 (2004).

[37] Hawkins, Lake, Nielson & Tierney (note 13), at 8.

[38] *Id.* at 5.

[39] ROBERT W. COX & HAROLD K. JACOBSON, THE ANATOMY OF INFLUENCE DECISION MAKING IN INTERNATIONAL ORGANIZATION 7 (1973).

II. The Authority of International Bureaucracies

The most straightforward case for autonomy of international institutions set out above rests on the self-interested reasons principals might have for delegating authority to agents. Drawing attention to the agents themselves, their characteristics and to mechanisms in the exercise of public authority, further contributes to understanding the origins of their autonomy. Conceptualizing agents as international bureaucracies brings to light the characteristic traits of bureaucracies as sources of their autonomy - their apparent rational-legal form of administration and their civil staff (1.) as well as their knowledge and expertise (2.).

1. Bureaucracies as Technical Administrators and their Civil Staff

The concept of bureaucracies has been most thoroughly developed as an analytical tool by Max Weber.[40] His conception of bureaucracies as an ideal type can plausibly guide the analysis of international institutions as actors despite the fact that reality certainly lags behind at the international level even more so than in most domestic contexts.[41] According to Weber's account, bureaucracies are a distinct organizational form. They exercise authority in a larger organizational and normative structure - an apparent rational-legal process of administration that fosters the belief in the rightness of the authority exercised.[42] Furthermore, they are staffed with civil servants who are mostly seen to be objective technocrats. Michael Barnett and Martha Finnemore adopt Weber's conceptualization of bureaucracies and concur that bureaucracies are the product of a rationalizing process and that they are prevalently perceived as part of a rational-legal exercise of power. This perception augments their authority.[43] Barnett and Finnemore define authority as "the ability of one actor to use institutional and discursive resources to induce deference from others."[44] Authority is, again following Weber, legitimated domination and it involves some element of consent.[45] In short, a further source of

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[40] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 1046-1092 (2006).

[41] *Id.*, 14; *cf.* Olsen (note 2). *See*, however, the cautionary remarks in ERNST B. HAAS, BEYOND THE NATION-STATE. FUNCTIONALISM AND INTERNATIONAL ORGANIZATION 96 (1964).

[42] *See*, *supra*, note 39.

[43] BARNETT & FINNEMORE (note 2), 17-22.

[44] *Id.* at 5. *See* Bauer (note 2). Bauer refers to Claire A. Cutler, Virginia Haufler & Tony Porter, *The Contours and Significance of Private Authority in International Affairs*, *in* PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 333, 324 (Claire A. Cutler, Virginia Haufler & Tony Porter eds., 1999) (authority "involves a surrendering of individual judgment, an acceptance of its dictates base not on the merits of any particular pronouncement but on a belief in the rightness of the authority of itself").

[45] BARNETT & FINNEMORE (note 2), at 29.

autonomy can be located, apart from deliberately delegated authority, in bureaucracies' authority and their characteristic traits.

At first glance the conceptualization of parts of institutions as bureaucracies supports the instrumental understanding of agents acting in the service of their principals. The idea of depoliticized IOs that implement the political agreements of constituent members has already figured prominently in the functionalist account of integration set out by David Mitrany. He suggests that states delegate authority to functional organs in pursuit of mutual or global goals. His work was among the first to highlight the agency and impact of institutions, in particular of autonomous bureaucracies with functionally defined tasks. Not unlike most of the explanations offered in response to why principals might delegate authority, Mitrany's functionalism rests on the belief in a separation of practical issues that are aimed at implementing uncontentious welfare goals, on the one hand, and political activities, on the other.[46] International bureaucracies would scrounge moral authority from the perceived moral significance of the goals they pursue.[47] The expansion of technical issues and the contraction of areas for politics would then lead to a true world community.[48] The submission to a technological rationality in Mitrany's functionalism is noteworthy. Functional agencies are "shaped not by any theory of political self-determination of the parties, but by the technological self-determination of each of the matters involved."[49] This distinction and premise is, however, at best only tenable in particular cases and in any event it is most contingent and vulnerable.[50] Some technical international institutions do function smoothly without giving rise to much concern. Yet, even among some usual suspects of regulatory agencies, the pursuit of stated aims is not merely technical but is imbued with politics. In administering domain names and providing for an undisturbed functioning of the internet ICANN also takes decisions on such highly

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[46] DAVID MITRANY, A WORKING PEACE SYSTEM. AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION 19-24 (1943).

[47] *See* BARNETT & FINNEMORE (note 2), at 21-22; Thomas Risse, *Transnational Governance and Legitimacy*, *in* GOVERNANCE AND DEMOCRACY: COMPARING NATIONAL, EUROPEAN AND INTERNATIONAL EXPERIENCES 179, 188 (Arthur Benz & Yannis Papadopoulos eds., 2006); *see also* DAVID KENNEDY, THE DARK SIDES OF VIRTUE. REASSESSING INTERNATIONAL HUMANITARIANISM 111-146 (2004).

[48] DAVID MITRANY, THE FUNCTIONAL THEORY OF POLITICS 113-122 (1975); HAAS (note 41), at 6.

[49] MITRANY (note 48), at 250-251.

[50] HAAS (note 41), at 88. The question of what is political indeed appears to be one of subjective assessment in the eyes of the beholder rather than one of content or issue area. *See* CARL SCHMITT, DER BEGRIFF DES POLITISCHEN. TEXT VON 1932 MIT EINEM VORWORT UND 3 COROLLARIEN 26-37 (1963). On this aspect of Schmitt's concept of the political, *see* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 440-445 (2001).

political and normative questions as to provide for domain names other than in Latin script or to provide domain names for pornographic contents, lastly, it holds the immense power to deny access to new domain names or to delete established ones.[51]

In order to understand international bureaucracies as actors in a broader governance process, it is insightful to further explore another essential part of their technocratic appearance: their staff of civil servants. Arguments relating to international bureaucracies' civil servants have a long tradition but have for some time stood in isolation to the debate on international institutions' autonomy and agency, and have only recently found renewed attention in IR scholarship.[52] The exceptions to this are functionalist accounts of regional and international integration and early studies of formal institutions. Functionalists maintain that individual loyalties are created by the functions an individual carries out. Even if civil servants are sent by national governments or selected on the basis of a national quota, the transfer of functions that comes with taking up a position in an international organization can produce a shift in loyalty.[53] This has been further supported by more sociologically informed accounts that point to the individual socialization of bureaucrats.[54] Numerous studies have been offered to highlight the importance of a dedicated international staff. Yet, they have also indicated the tension between autonomy and membership influence.[55] In his early study of 1945

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[51] Jochen von Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, *in* TRANSNATIONAL FOVERNANCE AND CONSTITUTIONALISM 257 (Christian Joerges, I. Sand & G. Teubner eds., 2004).

[52] *See* (note 2).

[53] HAAS (note 41), at 22.

[54] *See e.g.* Alastair Iain Johnston, *Treating International Institutions as Social Environments,* 45 INTERNATIONAL STUDIES QUARTERLY 487 (2001); Martha Finnemore, *Norms, Culture and World Politics: Insights from Sociology's Institutionalism,* 50 INTERNATIONAL ORGANIZATION 325 (1996).

[55] ALEXANDER LOVEDAY, REFLECTIONS ON INTERNATIONAL ADMINISTRATION (1956); MOHAMMED BEDJAOUI, FONCTION PUBLIQUE INTERNATIONALE ET INFLUENCES NATIONALES (1958); TIEN-CHENG YOUNG, INTERNATIONAL CIVIL SERVICE. PRINCIPLES AND PROBLEMS (1958); GEORGES LANGROD, LA FONCTION PUBLIQUE INTERNATIONALE. SA GENESE, SON ESSENCE, SON EVOLUTION (1963); ROGER BLOCH & JACQUELINE LEFEVRE, LA FONCTION PUBLIQUE INTERNATIONALE ET EUROPEENNE (1963); INTERNATIONAL ADMINISTRATION. ITS EVOLUTION AND CONTEMPORARY APPLICATIONS (Robert S. Jordan ed., 1971); THOMAS G. WEISS, INTERNATIONAL BUREAUCRACY. AN ANALYSIS OF THE OPERATION OF FUNCTIONAL AND GLOBAL INTERNATIONAL SECRETARIATS (1975); YADH BEN-ACHOUR AND SABINO CASSESE, ASPEKTE DER INTERNATIONALEN VERWALTUNG (1985); YVES BEIGBEDER, THREATS TO THE INTERNATIONAL CIVIL SERVICE. PAST PRESSURES AND NEW TRENDS (1988); HANS MOURITZEN, THE INTERNATIONAL CIVIL SERVICE. A STUDY OF BUREAUCRACY; INTERNATIONAL ORGANIZATIONS (1990); JACQUES LEMOINE, THE INTERNATIONAL CIVIL SERVANT. AN ENDANGERED SPECIES (1995); ALAIN PLANTEY AND FRANÇOIS LORIOT, FONCTION PUBLIQUE INTERNATIONALE. ORGANISATIONS MONDIALES ET EUROPEENNES (2005); JOHN MATHIASON, INVISIBLE GOVERNANCE. INTERNATIONAL SECRETARIATS IN WORLD POLITICS (2007).

on administrative bodies in the international realm, Egon Ranshofen-Wertheimer reflects on his experience at the League of Nations and provides a detailed account on the work of its secretariat and the code of international officials.[56] In the same year, Arthur Sweetser pointed out that "[o]ne of the most important but least discussed elements of the general international organization on which the world's hopes are now focused will center around the kind and type of international staff which will constitute its permanent service."[57] Over the 60 years since this contention the dominant structural approaches in IR scholarship and its conceptions of unitary actors, be it states or IOs, have had their merits in their own right to the detriment, however, of an adequate theoretical reception of the impact of secretariats on the ground of their civil service.[58]

The law of many international institutions contains a provision similar to Art. 100 UNC which provides that the "Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the organization."[59] The second paragraph provides that member states should refrain from seeking influence on the Secretary-General and the staff. While practice generally contravenes the latter provision, most accounts of practitioners do point to an international staff dedicated to organizational goals, though in tension with influence of member states.[60]

While the precise impact of the civil staff hinges on the effect of national influence and control, the loyalty of civil staff and in particular the action of the head of bureaucracies is likely to have a significant influence on the autonomy of international bureaucracies.[61] In pursuing their strategies of *inter alia* interpreting their mandates, cooperating with third parties and buffering information, they

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[56] EGON F. RANSHOFEN-WERTHEIMER, THE INTERNATIONAL SECRETARIAT. A GREAT EXPERIMENT IN INTERNATIONAL ADMINISTRATION 239-246 (1945).

[57] Arthur Sweetser, *The World's Civil Service,* 30 IOWA LAW REVIEW 478, 478 (1945).

[58] *See* Liese & Weinlich (note 2), at 491, 500-510.

[59] *See e.g.* Art. 8(2) FAO Constitution; Art. 6(4) WTO Agreement; Art. 4 Section V IBDR Articles of Agreement; Art. 11 Convention on the Organisation for Economic Co-operation and Development.

[60] *See* Karl Th. Paschke, *UNO von innen - die Besonderheiten einer multinationalen Bürokratie, in* PRAXISHANDBUCH UNO. DIE VEREINTEN NATIONEN IM LICHTE GLOBALER HERAUSFORDERUNGEN 553, 565-566 (Sabine von Schorlemer ed., 2003); *see also* (note 55).

[61] *See* Robert W. Cox, *The Executive Head: An Essay on Leadership in International Organization,* 23 INTERNATIONAL ORGANIZATION 205 (1969).

must manoeuvre between competing interests among constituent members as well as third parties. This meets Ernst Haas' conception of politics as "the art of the possible."[62] However, the image of IOs' officials as "missionaries of our time"[63] must not distract from the fact that increased autonomy means less control by principals and contravenes accountability mechanisms. Democratic control cannot be sacrificed to some "heroic administrator."[64] Furthermore, picturing the staff of international civil servants as whole-heartedly dedicated to organizational goals beyond the reach of their respective national governments, might be a step too optimistic. The extent to which a dedicated civil service exists and how it relates to the balance between autonomy and the influence by other actors cannot be specified generally but must be examined in each particular case.[65] However, the dynamic and *esprit de corps* of bureaucracies' civil staff tends to be a further factor contributing to their autonomy.

2. Bureaucracies' Authority Based on Knowledge and Expertise

In addition and related to their apparent rational-legal and technocratic character, international bureaucracies oftentimes command a stronghold on knowledge and expertise which increases their authority. Understanding *how* they exercise authority further adds to the explanation of their autonomy. The question then is not whether agents are a tool in the hands of principals for pursuing a determined goal, but the aim is rather to grasp their decisive role in defining the problems to be solved[66] and to understand how they take part in the construction of social reality. Social action is based on knowledge, views of the world as well as normative and causal convictions. To impact knowledge is to impact the social construction of reality and to thereby influence actors' behavior.[67] Weber has succinctly pointed out that "bureaucratic administration means: exercise of power by way of knowledge."[68]

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[62] *See* HAAS (note 41), at 102.

[63] BARNETT & FINNEMORE (note 2), at 33.

[64] *See* the critique by HAAS (note 41), at 103.

[65] Liese & Weinlich (note 2), at 514-518.

[66] *See* ERNST B. HAAS, WHEN KNOWLEDGE IS POWER. THREE MODELS OF CHANGE IN INTERNATIONAL ORGANIZATIONS (1990).

[67] *See* John Gerard Ruggie, *International Responses to Technology: Concepts and Trends,* 29 INTERNATIONAL ORGANIZATION 557, 569-70 (1975) (an early account). This insight stands unrelated to an actors' mode of action, be it strategic or communicative.

[68] WEBER (note 40), at 226 ("Die bürokratische Verwaltung bedeutet: Herrschaft kraft *Wissen*: dies ist ihr spezifisch rationaler Grundcharakter.").

An illustrative example is the rating of countries by the World Bank (WB) with regard to their eligibility for credits or loans. The WB transforms economic information into qualitative assessments of the financial credibility and economic perspective of states. This classification affects social reality – other actors receive this information and integrate it into their view forming the basis for social action.[69] The information received may be habitually, immediately and uncritically integrated. For other actors it might simply be impossible to gain similar information and resources or the will to do so might be lacking.[70] They would not have the argumentative basis for contesting doubtful claims, or there would be no basis for doubt to arise in the first place. The WB has coined particular conceptions of development, of good governance or of what constitutes a good economy.[71] In retrospect, the catastrophic effects of structural adjustment programs of the 1980s are apparent; yet, at their time they were seen as the necessary programs for achieving a well-functioning economy. Recipient states have largely lacked the resources and expertise to counter these claims.

Moreover, the demand for expert knowledge increases with the complexity and uncertainty in resolving problems or pursuing shared goals.[72] International institutions' bearing on the construction of reality and their resulting influence on actors' behavior has been demonstrated in several of the case studies. Erika de Wet observes that the International Labour Organization (ILO) has found the most effective means of promoting labor standards in promotion and persuasion. She notes that these mechanisms "rest on the assumption that increased awareness, knowledge and expertise are the critical pathways for changing government policies and behaviors."[73] More fundamentally and noteworthy, the ILO has deliberately adopted this strategy rather than aiming at the formal ratification of its conventions with the effect that less conventions are ratified but the standards set out in these conventions are largely implemented in many national labor laws.[74]

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[69] *See* BARNETT & FINNEMORE (note 2), at 73-120.

[70] *See* Roland Vaubel, *Principal-Agent Problems in International Organizations*, 1 REVIEW OF INTERNATIONAL ORGANIZATIONS 125 (2006).

[71] Dann (note 25); BARNETT & FINNEMORE (note 2), at 165.

[72] *See* Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination,* 46 INTERNATIONAL ORGANIZATION 1, 12 (1992).

[73] Erika de Wet, *Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work*, in this issue.

[74] *Id*.

The coining of a particular concept usually unfolds in what can be described as an epistemic community, defined by Peter Haas as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."[75] The authority of bureaucracies and their command over expertise and knowledge increase their autonomy and influence.[76] Empirical studies have demonstrated the effectiveness of regimes with a focus on their impact on norm compliance by way of impacting consensual knowledge. They support the proposition that "scientific knowledge will create a consensual basis for the recognition of new cause/effect links which had not been recognized before."[77] On the basis of an international regimes database, Helmut Breitmeier finds that regimes have been responsible for a significant increase in knowledge of causes and effects with regard to environmental issues; the yardstick of this increase is the knowledge held by transnational research networks.[78]

The role that institutions play in constructing social reality by way of creating meanings, classification and norm-diffusion should be put under scrutiny and cannot comfort itself with a hint at the separation of technical from political issues.[79] Furthermore, power relations are likely to alter prevalent conceptions. These contentions shall be developed in a critical appraisal of international institutions and their exercise of public authority.

C. Critical Reflections on Autonomous International Bureaucracies

The predominant presumption appears to be that international bureaucracies implement the political directives or facilitate their realization on behalf of their constituents and pursue global or at least shared goals. Accordingly, they enjoy a combination of input and output legitimacy. A sociologically informed view of international bureaucracies as autonomous actors set out above casts doubt on this premise.[80] The concept of autonomy encompasses not only that international

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[75] HAAS (note 66), at 3.

[76] BARNETT & FINNEMORE (note 2), at 24-25.

[77] Ernst B. Haas, *Is there a Hole in the Whole? Knowledge, Technology, Interdependence, and the Construction of International Regimes,* 29 INTERNATIONAL ORGANIZATION 827, 858-9 (1975).

[78] BREITMEIER, YOUNG & ZÜRN (note 10); Helmut Breitmeier, *Die Output-orientierte Legitimität des globalen Regierens. Empirische Befunde aus der quantitativen Erforschung internationaler Umweltregime,* 13 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN 39 (2006).

[79] *See* BARNETT & FINNEMORE (note 2), at 31-34; HAAS (note 66), at 11.

[80] *See* Gayl D. Ness & Steven R. Brechin, *Bridging the Gap: International Organizations as Organizations,* 42 INTERNATIONAL ORGANIZATION 245 (1988).

bureaucracies are actors to some degree independent from the will and intentions of their creators but also that their actions and interests do not coincide with the will and intentions of their creators. As actors they develop a dynamic and autonomous strategy of their own. This part of the argument shall be revisited and it shall be highlighted how it turns out to be problematic. Bureaucracies' autonomous action is largely removed from control and from input legitimacy (I.). The presumption that they pursue predefined technical goals might arguably compensate for a lack of control; however, a critical reflection on bureaucracies' exercise of public authority indicates that the underlying separation of technical from political issues is at least doubtful as a categorical premise (II.). Furthermore, this critical reflection will be mindful of the possible impact and functioning of power relations.

I. Bureaucracies Unbound?

Revisiting international bureaucracies as autonomous actors illustrates how they are, to some extent, removed from the intentions and control of their creators. This is also a manifest constraint on sources of input legitimacy. Input legitimacy refers to the participatory quality of the decision-making process leading to the mandate providing a conditional grant of authority to the agent.[81] The conditionality of the authority further implies that the principal has some means of control over the agent. This can be conceptualized more precisely as internal accountability.[82] Reflections on autonomous international bureaucracies pose challenges to their input legitimacy and internal accountability. Four strategies and mechanisms in bureaucracies' exercise of public authority are particularly noteworthy.

First, the discussion of the WB's structural adjustment programs has already stirred the observation that principals or other affected actors frequently do not have the information, resources or knowledge to challenge decisions taken by bureaucracies.[83] The comparative advantage in information and expert knowledge in the hands of bureaucracies is a strategic resource for agents that seek to foster and expand their autonomy. To this effect they might select activities and information that are pleasant to principals and make them public while trying to conceal activities that would be viewed less favorably. Ceremonialism refers to the fact that bureaucracies seek to satisfy formal reporting requirements and allow for

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[81] Fritz Wilhelm Scharpf, Regieren in Europa. Effektiv und demokratisch? 17-20 (1999).

[82] *See* de Wet (note 28); Robert O. Keohane, *Global Governance and Democratic Accountability, in* Taming Globalization: Frontiers of Governance 130 (David Held & Mathias Koening-Archibugi eds., 2002).

[83] *See* Vaubel (note 70).

supervision but do so without revealing too much information.[84] Weber has pointed to the tendency of bureaucracies to increase their exclusive knowledge with the motivation to increase their power.[85] Consequently, he argues, every bureaucracy seeks to increase this comparative advantage by way of secrecy: "Bureaucratic administration tends to be administration to the exclusion of the public."[86] Furthermore, the effective functioning of an agent might call for in-transparency. The work of the OSCE High Commissioner on National Minorities (HCNM) largely depends on intransparency.[87] This is in stark contravention of principal's or a broader public's efforts to hold agents accountable. Also, the HCNM's impact stems in large from his/her authoritative articulation of standards and from determining the performance of states with regard to these standards.[88] To this end, again, he/she enjoys a superior access to information and thus making it hard if not impossible for other actors to challenge the HCNM's authority.

Second, the resort to soft- and non-binding instruments makes the control of bureaucracies more difficult because they are not (yet) subject to similar procedural requirements and would not require any national ratification or implementation process. Nevertheless, their factual impact is oftentimes no less significant than the effect of formal and legally binding instruments.[89] Even more so, it is hardly possible to grasp international institutions' role in the construction of social reality like the World Bank's definition of development, good governance or a well-functioning economy. In addition, the working of power relations must not be neglected. The conceptions endorsed by the WB tend to be aligned with those of powerful constituent members. The exercise of public authority is then usually a mixture of coercive and productive power.[90] The latter refers to a common element of the exercise of authority and power, namely the "production, in and through

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[84] Darren G. Hawkins & Wade Jacoby, *How Agents Matter*, *in* DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 199, 210-212 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006).

[85] WEBER (note 40), at 226, 1081.

[86] *Id*. at 1081 ("Bürokratische Verwaltung ist ihrer Tendenz nach stets Verwaltung mit Ausschluß der Öffentlichkeit").

[87] Anuscheh Farahat, in this issue.

[88] *Id*.; BARNETT & FINNEMORE (note 2), at 6.

[89] *See* Eyal Benvenisti, "*Coalitions of the Willing*" *and the Evolution of Informal International Law*, *in* "COALITIONS OF THE WILLING" AVANTGARDE OR THREAT? (Christian Callies, Georg Nolte & Tobias Stoll eds., forthcoming), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875590.

[90] Dann (note 25); Michael Barnett & Raymond Duvall, *Power in Global Governance*, *in* POWER IN GLOBAL GOVERNANCE, 1, 3 (Michael Barnett & Raymond Duvall eds., 2005).

social relations, of effects that shape the capacities of actors to determine their own circumstances and fate.“[91] The concept of productive power gives credit to the fact that actors take decisions on the basis of a constructed social reality and it suggests that power relations persist in this construction. Bearing in mind the power of rhetoric further corroborates the critique.[92] Emanuel Adler and Steven Bernstein explain and support this suggestion *inter alia* with regard to the categorical claim that an open economy promotes economic growth.[93] Such a claim works to the benefit of powerful actors and has been developed and fostered by international financial institutions to the severe detriment of many recipient countries. Only under prominent expert criticism and protest has this conception started to change.[94] Power relations and the way in which international bureaucracies exercise public power – in part through the construction of social reality by way of creating meanings, classification and norm-diffusion – and their stronghold of knowledge and expertise raise further concerns about the legitimacy of their actions. Again, the argument that bureaucracies merely take executive or facilitative measures in technical issues is weak and expert knowledge might also be an expression of productive power rather than an easy cure to problems of input legitimacy.

Third, the interpretative change (so called "interpretative evolution") of constituent mandates further bears on the quality of input legitimacy.[95] Bureaucracies interpret statutory provisions to their advantage. This is in particular the case where more

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[91] Barnett & Duvall (note 90), at 3.

[92] *See* SEMANTISCHE KÄMPFE. MACHT UND SPRACHE IN DEN WISSENSCHAFTEN (Ekkehard Felder ed., 2006); Eric Naim-Gesbert, *Droit, Expertise et Société du Risque,* 123 REVUE DU DROIT PUBLIC 33, 37 (2007). Apart from a comparative advantage in knowledge, the use of rhetoric might impact the social construction to the benefit of particular actors. *See* Rodger A. Payne, *Persuasion, Frames and Norm Construction,* 7 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 37-61 (2001); Ronald R. Krebs & Patrick T. Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric,* 13 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 35-66 (2007). Such arguments have a long tradition. Quintilianus acknowledges his debt to Cicero and Aristotle's *Art of Rhetoric* and develops a technique of rhetorical rediscription that is aligned with the interest of the speaker; *see* Quentin Skinner, *Rhetoric and Conceptual Change,* 3 FINNISH YEARBOOK OF POLITICAL THOUGHT 60-72 (1999).

[93] Emanuel Adler & Steven Bernstein, *Knowledge in Power: The Epistemic Construction of Global Governance,* *in* POWER IN GLOBAL GOVERNANCE 294 (Michael Barnett & Raymond Duvall eds., 2005).

[94] *See* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); Michael Zürn, *Global Governance and Legitimacy Problems,* 39 GOVERNMENT AND OPPOSITION 260 (2004).

[95] *See* Ian Johnstone, *The Power of Interpretive Communities,* *in* POWER IN GLOBAL GOVERNANCE 185, 186 (Michael Barnett & Raymond Duvall eds., 2005). Johnstone builds on the concept of "interpretative community" developed by Stanley Fish. *See* STANLEY FISH, DOING WHAT COMES NATURALLY. CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERATURE AND LEGAL STUDIES 141-160 (1989).

specific procedural norms are lacking and it is a common characteristic of constituent documents of international organizations or mandating resolutions.[96] Organs of the FAO, for example, have exploited their broad and non-specific mandates in order to produce norms in ad hoc procedures.[97] Cases of interpretative change rest on an informal general consent among the constituent members rather than on parliamentary ratification. Also, the standard activity of Refugee Status Determination carried out by the UNHCR or UN Peacekeeping missions find no mention in the respective constituent documents. Change of this kind is a common phenomenon of growth or mission creep. Arguably, international bureaucracies expand their tasks as societies become more mindful of pressing problems.[98] Another explanation for such expansion might lie in bureaucracies struggle for survival. The CSCE/OSCE as well as NATO, for example, underwent a thorough transformation after their original *raison d'être* dismantled with the end of the Cold War. Bearing in mind power relations directs attention to the interest of powerful actors in the exchange of interpretative claims.[99]

A fourth concern with regard to input legitimacy and internal accountability lies in the fact that a bureaucracy might be captured by one or a number of members, or by third actors, and might act in contravention to the will of other members or third actors. Also, it might be part of an active strategy of bureaucracies to exploit differences between member states or to expand their permeability to third parties – that is non-principals and in particular other international organizations or international NGOs[100] – in order to increase their autonomy.[101] The development and enforcement of OECD Guidelines for Multinational Enterprises provides an example of how institutions can seek the support of NGOs in their relationship with principals. NGOs have been involved in the drafting of the Guidelines and promote them in a larger endeavor to increase corporate social responsibility.[102] However, the interaction with NGOs does not necessarily work to the institutions' advantage and institutions are not themselves immune from the influence of

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[96] Hawkins & Jacoby (note 84), at 206-207.

[97] Jürgen Friedrich, in this issue.

[98] HAAS (note 41), at 90-2.

[99] *See* Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration,* 17 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 197 (2004).

[100] For the functioning and impact of NGOs *see* in particular MARGARET E. KECK AND KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS. ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

[101] Hawkins & Jocoby (note 84), at 208-210.

[102] Gefion Schuler, in this issue.

NGOs. The institution would lose in autonomy in relation to this capturing actor but gain in relation to others. To the extent that the bureaucracy's actions can be reduced to the will of other powerful actors, however, it could no longer sensibly be referred to as autonomous. A mixture between autonomy and capture by powerful actors can be found in the Security Council whose stated purpose is to ensure international peace and security. Its Al Qaeda and Taliban Sanctions Committee administers a consolidated list of terrorist suspects; any individual placed on the list faces immediate consequences in all UN Member States. Terrorism is a threat to international peace and security; yet, it stands undisputed that the vast majority of all terrorist suspects on the list are suggested by the US and included without much discussion. This evokes the thought that it serves as an instrument in the hands of the US rather than as an autonomous actor.

In sum, critical reflections from a political science perspective successfully and helpfully disturb the image of international bureaucracies as simple tools in the service of their creators. The following section will revisit the contention that international bureaucracies gain legitimacy from an effective pursuit of global or at least shared goals.

II. Bureaucracies as Technical Administrators in Pursuit of Global Goals

Output legitimacy refers to the problem solving quality of decisions.[103] It could be argued that international bureaucracies are part of the executive and do precisely what this suggests – they execute. Such an argument has already lost much of its credibility. First, the cases illustrated above show that this can also go wrong and, secondly, the claim to such output legitimacy rests on the contentious and largely untenable distinction between technical and political issues that has already been cast into doubt in the discussion of Mitrany's functionalist theory of international integration. Rather, in some cases the argument could be made that the claim to a seperability of technical from political issues is itself a hegemonic move that attempts to hide political implications and power relations. It is fruitful to recall the political and normative decisions that inevitably arise even if specific goals to be pursued were given. For instance, the Security Council's prime responsibility for the stated goal of securing international peace and security can hardly inform the balance to be struck between pursuing this goal and rights to liberty. These are normative questions and reflect conflicts of interests and ideas. The submission to a "heroic administrator" following a belief in the omnipresence and exclusivity of instrumental rationality in service of a technical implementation of given policy aims is not only unwarranted but also unwelcome - it would gain the critique by

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[103] SCHARPF (note 81), at 20-28.

Hannah Arendt who makes clear that "the self-coercive force of logicality is mobilized lest anybody ever starts thinking – which as the freest and purest of all human activities is the very opposite of the compulsory process of deduction."[104]

Lastly, a focus on the problem solving capacity of IOs presumes that they were in fact created and function for that purpose. This might well be the case but the variety of plausible reasons that principals might have for delegating authority to an autonomous international bureaucracy have already indicated that this must not be the case. Also, institutions are mechanisms for principals to gain or maintain power.[105] A focus on the problem solving capacity would be too narrow.

In conclusion, the conceptualization of international bureaucracies as instruments of their principals or as instruments of a technical world community appears to be insufficient. Bureaucracy can and should also be seen as:

> an institution with a raison d'être and organiza-
> tional and normative principles of its own. Admin-
> istration is based on the rule of law, due process,
> codes of appropriate behavior, and a system of ra-
> tionally debatable reasons. It is part of society's
> long-term commitment to a *Rechtsstaat* and proce-
> dural rationality for coping with conflicts and
> power differentials.[106]

Recently, the call has become louder in IR scholarship to turn to the study in the domestic political context in order to learn about administrative institutions, delegation and agency.[107] A turn to the domestic context for inspiration also draws

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[104] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 473 (1976).

[105] Renate Mayntz, *Governance Theory als fortentwickelte Steuerungstheorie?, in* GOVERNANCE-FORSCHUNG 11 (Gunnar Schuppert ed., 2006).

[106] Olsen (note 2), at 3.

[107] Hawkins, Lake, Nielson & Tierney (note 13), at 4-5 ("Overall, we find the causes and consequences of delegation to IOs to be remarkably similar to delegation in domestic politics. Despite assertions that international anarchy transforms the logic of politics and renders international institutions less consequential, we find considerable overlap between the reasons why principals delegate to domestic agents and why states delegate to IOs."); Simmons & Martin (note 10), at 205 (concluding that "[a]careful look at literatures that develop theories of domestic and transnational politics, for example, should be drawn upon more systematically if we are to understand the sources and effects of international institutionalization."); Jörg Borgumil, Werner Jann & Frank Nullmeier, *Perspektiven der politikwissenschaftlichen Verwaltungsforschung, in* POLITIK UND VERWALTUNG 9, 18 (Jörg Borgumil, Werner Jann & Frank Nullmeier eds., 2006).

attention to the institutional context in which autonomous bureaucracies are embedded, namely the context of a rule-of-law. A functionally equivalent context is blatantly missing at the international level. An elementary function that the national context of a rule-of-law provides is the institutional framework for contesting the actions of bureaucracies – their decisions and interpretations – both in legal and political fora.[108] This makes autonomous bureaucracies bearable. It is more fundamentally a prerequisite for their desirability and a necessary ingredient for individual and collective democratic self-determination.[109] However, some cautionary remarks will be in place with regard to the development and conceptualization of international institutional law to this effect.

D. The Prospect of International Institutional Law in the Face of Autonomous Bureaucracies

The critical reflection on international bureaucracies' autonomy has ended with the suggestion that an institutional framework be developed as a necessary prerequisite for contesting, in legal and political fora, the means and ends of decisions taken by bureaucracies. This suggestion must first posit itself within a predominant IR scholarship that emphasizes effective governance and the role of politics in the strategic pursuit of predefined goals. Secondly, it runs the risk of unduly cloaking the exercise of power within concepts of legality.

The suggestion that institutions provide the framework for contesting the means and ends of policy choices by international bureaucracies stands in contrast to a prevalent research agenda that is focused on institutional design with an aim to increase effectiveness. Most notably, it does not inquire about the origin and constitution of ends.[110] This appears to hold as a general observation for much of the research on global governance. The concept of governance refers to the analysis of the relationship between the institutional design and the efficiency as well as effectiveness of the outcomes produced within and by the structures of the institution under scrutiny.[111] It is directed at the question which mechanisms are

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[108] *See* Nico Krisch, *The Pluralism of Global Administrative Law,* 17 EJIL 247, 266-67 (2006).

[109] *See* Benedict Kingsbury, Nico Krisch & Richard B. Steward, *The Emergence of Global Administrative Law,* 68 LAW AND CONTEMPORARY PROBLEMS 15, 51 (2005).

[110] Wendt (note 1), at 1046. *See* Christian Reus-Smit, *The Strange Death of Liberal International Theory,* 12 EJIL 573, 580-585 (2001).

[111] It builds on Oliver Williamson's definition of governance as "an exercise in assessing the efficacy of alternative modes (means) of organization." OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 11 (1996). Williamson was a student of Ronald Coase who took initial and path breaking steps in exploring the relation between institutional design and efficiency of outcomes. *See* Ronald Coase, *The Nature of the Firm,* 4 ECONOMICA 386 (1937).

suitable to better achieve societal goals – such research does not inquire the goals to be pursued.[112] Moreover, there is a dominant corresponding trend in international law that rests on claims to universal validity of substantive convictions and loudly calls to look for effective implementation.[113] This is a plausible call and a valuable research program in response to the pressing problems of global dimensions that are beyond the reach of unilateral actions. Yet, it sometimes also comes close to what Hedley Bull has called a "premature global solidarism" that is rather oblivious to power relations and conflicting values.[114] This contribution has highlighted that the pursuit of such goals and the exercise of public authority by international bureaucracies inevitably has political and normative implications. In order to increase the legitimacy of international institutions, their conception cannot be confined to instruments for an effective implementation of agreed-upon goals but must equally encompass an arena for debating and contesting such goals and for channeling political conflict.

To the same effect Jan Klabbers has distinguished two conceptions of IOs: first as an instrument in managing common problems and second as providing a space for politics - *agorae* in the Greek ideal of political spaces.[115] The analysis of autonomous

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[112] *See* the conceptions of governance in James N. Rosenau, *Governance, order, and change in world politics*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 4 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); James N. Rosenau, *Toward an Ontology for Global Governance*, *in* APPROACHES TO GLOBAL GOVERNANCE THEORY 287 (Martin Hewson & Timothy J. Sinclair eds., 1999); Alice D. Ba & Matthew J. Hoffmann, *Contending Perspectives on Global Governance. Dialogue and Debate, in* CONTENDING PERSPECTIVES ON GLOBAL GOVERNANCE. COHERENCE CONTESTATION AND WORLD ORDER 249 (Alice D. Ba & Matthew J. Hoffmann eds., 2005); Sweet (note 22); Wayne Sandholtz & Alec Stone Sweet, *Law, Politics, and International Governance*, *in* THE POLITICS OF INTERNATIONAL LAW 238, 245 (Christian Reus-Smit ed., 2004); Gunnar Schuppert, *Governance im Spiegel der Wissenschaftsdisziplinen*, *in* GOVERNANCE FORSCHUNG. VERGEWISSERUNG ÜBER STAND UND ENTWICKLUNGSLINIEN 371 (Gunnar Schuppert ed., 2006).

[113] This appears to be the predominant drive of Anne-Marie Slaughter, *A Liberal Theory of International Law,* 94 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 240 (2000); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 11 (2004); Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law),* 47 HARVARD INTERNATIONAL LAW JOURNAL 327, 335 (2006). *See* Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention,* 11 EJIL 3 (2000). For a critique, *see* Andrew Hurrell, *International Law and the Changing Constitution of International Society*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 327, 336-46 (Michael Byers ed., 2000); Benvenisti (note 89); Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization,* 8 THEORETICAL INQUIRIES IN LAW 9 (2007).

[114] ANDREW HURRELL, ON GLOBAL ORDER. POWER, VALUES AND THE CONSTITUTION OF INTERNATIONAL SOCIETY 55 (2007).

[115] Jan Klabbers, *Two Concepts of International Organization,* 2 INTERNATIONAL ORGANIZATIONS LAW REVIEW 277 (2005).

bureaucracies supports the suggestion that the latter conception be strengthened in relation to a dominant image of international organizations as managers.[116] The alternative then lies in a reappraisal of the formal - the formal basis for ethical and purposive politics.[117] One function of international institutional law then is to provide for the legal constructions constituting a space for politics. This corresponds to the conception of law as the city wall that protects the *polis*. Hanna Arendt writes on "the Greek solution":

> In their opinion, the lawmaker was like the builder of the city wall, someone who had to do and finish his work before political activity could begin. … Before men began to act, a definite space had to be secured and a structure built where all subsequent actions could take place, the space being the public realm of the *polis* and its structure the law; legislator and architect belonged in the same category.[118]

In the development of such legal structures, this project turns to the national context for inspiration. The above insights suggest that the development of international institutional law take the direction of filling in the yawning gaps in the legal structures that a comparison with the national context indicates. However, a number of remarks are in place that caution against granting unwarranted and illegitimate actions undertaken by international bureaucracies the benefit of being perceived as lawful.[119] While no uncontroversial yardstick is readily available for a normative assessment of such actions outside a framework of law and political process[120] a look at the differences between the national and international contexts indicates the limits to what a development of institutional law can achieve.

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[116] Jan Klabbers, *The Changing Image of International Organizations*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 221 (Jean-Marc Coicaud & Veijo Heiskane eds., 2001).

[117] *Id*. at 243-45; KLABBERS (note 3), at 329-334. *See* Christian Reus-Smit, *The Politics of International Law, in* THE POLITICS OF INTERNATIONAL LAW 14, 24-31 (Christian Reus-Smit ed., 2004); Martti Koskenniemi, *Global Governance and Public International Law,* 37 KRITISCHE JUSTIZ 241 (2004); Koskenniemi (note 113); Hurrell (note 113), 312-14.

[118] HANNAH ARENDT, THE HUMAN CONDITION 194-95 (1958).

[119] *See* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values,* 17 EJIL 187, 214 (2006).

[120] Only the substantive yardstick of human rights might be applicable; *see* Jochen von Bernstorff, in this issue; Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, in* DER GESPALTENE WESTEN 113, 142 (Jürgen Habermas ed., 2004).

First, power relations are much more persistent and unmediated than in the national context. Institutional design is most likely the outcome of strategic bargaining reflecting power relations rather than a consideration of what is suitable to ensure legitimacy.[121] Furthermore, civil society and public scrutiny are not available to the same extent in order to perform a complementary legitimating function. Secondly, the heterogeneity of normative and factual convictions among actors is most likely higher. Third, the concept of a separation of powers can hardly be applied. Administrative and executive organs are likely to be more politicized.[122] The concept of a separation of powers is insufficiently realized in international polities that usually lack a legislative body that is functionally equivalent to democratic parliaments.[123] Fourth, when actors interpret and enforce the law and even more so when enforcement is decentralized, power relations are again reflected in interpretations.

These differences amount to the foremost obstacles in following the call for a legal framework for contesting means and ends as well as for channeling political conflict. They expose the risk of translating power relations into legal relations. Thereby they might unduly grant an imprimatur of legality and rightness.[124] While power relations and their influence on institutional design and on meanings of legal texts must not be neglected, this contribution sides with Andrew Hurrell that "power expressed through shared rules and norms is potentially more acceptable than power unmediated by rules."[125] Also, the legal form provides some armour against an easy translation of power relations into law.[126] At the international level it is thus suggested that international institutional law be developed to provide structures to make politics possible – to find institutional arrangements that bring political actors together and to provide the basis for meaningful contestation.

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[121] *See* Eyal Benvenisti, *The interplay between actors as a determination of the evolution of administrative law in international institutions,* 68 LAW AND CONTEMPORARY PROBLEMS 319 (2005).

[122] Borgumil, Jann & Nullmeier (note 107), at 18.

[123] *See* von Bernstorff, in this issue; von Bogdandy (note 32), at 625-650.

[124] *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field,* 38 HASTINGS LAW JOURNAL 814, 838 (1987) ("Law is the quintessential form of the symbolic power of naming that creates the things named … It confers upon the reality which arises from its classificatory operations the maximum permanence."). *See also* Richard H. Steinberg and Jonathan M. Zaslof, *Power and International Law*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 64 (2006).

[125] Hurrell (note 113), at 314.

[126] *See* Ingeborg Maus, *Das Verhältnis der Politikwissenschaft zur Rechtswissenschaft: Bemerkungen zu den Folgen politologischer* Autarkie, *in* POLITIK UND RECHT 76-120 (Miachel Becker & Ruth Zimmerling eds., 2006).

Yet, the argument that IOs or even more loosely regulated institutions and a development of institutional law could respond to this task faces further practical difficulties. It is precisely the stalemates and inefficiency of formal decision-making that has lead to a "flight from the plenary."[127] An administrative space for routine decision-making is indispensable for an effective response to pressing global challenges. International institutions will continue to be torn between demands for more efficiency and effectiveness and the need for an institutional framework for political contestation that can contribute to the legitimacy of decisions taken. However, an increasing resistance to or at least uneasiness concerning the legitimacy of actions undertaken by international bureaucracies also affects their effectiveness.[128] For example the Advocate General of the European Court of Justice has suggested that the Security Council's listing of terrorist suspects remain inapplicable and consequently ineffective as long as there are only insufficient procedural guarantees at the international level.[129] Thus, while powerful actors might well be reluctant to accept more formal institutionalized processes, such reluctance also forecloses some of the benefits.

E. Conclusion

The conceptualization of parts of international institutions as bureaucracies provides a beneficial grasp on their sources of autonomy, authority and on the way in which they exercise public authority, which might otherwise remain unseen. This is a promising emergent approach in IR scholarship. To analyze administration as a policy process further provides the basis for combining insights from domestic institutional analysis and traditional IR scholarship.[130] While bearing in mind particularities of the international context and being mindful of the pitfalls set out above, such a turn to the domestic context opens the avenue for combining political and legal scholarship on the same recurrent pivotal question:

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[127] von Bernstorff, in this issue; Benvenisti (note 113).

[128] Zürn (note 94) (pointing to concerns about legitimacy as a significant source of non-compliance). *See also* Michael Zürn, *Introduction: Law and Compliance and Different Levels*, in LAW AND GOVERNANCE IN POSTNATIONAL EUROPE: COMPLIANCE BEYOND THE NATION-STATE 1 (Michael Zürn & Christian Joerges eds., 2005). To the same effect Thomas Frank makes the prominent argument for a compliance pull stemming from the legitimacy of international law. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 193 (1990).

[129] Opinion of Advocate General Poiares Maduro, delivered on 16 January 2008, Case C-402/05 P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities. *See* De Wet (note 28).

[130] *See* Borgumil, Jann & Nullmeier (note 107), at 18.

how is legitimate governance beyond the nation state possible? This contribution has attempted to provide a better view of the problems and to inform the development and conceptualization of international institutional law in response to the exercise of authority by international bureaucracies. It contends that the argument on the crucial role of law as a constitutive construction for political action is also instructive for future research in international relations.