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PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS

Cross-cutting Analyses

General Principles of International Public Authority: Sketching a Research Field

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A. Introduction

The term *principle* is ubiquitous in the thematic studies and the cross-cutting studies of this research project on the exercise of public authority by international institutions. Apparently its legal analysis and normative framing is difficult to achieve without principles. This is no specificity of this undertaking: Legal research on the public authority of international institutions regularly deals with the issue of principles.[1] *General* principles for all international institutions are of specific interest as they might tie the various institutions into one legal universe. Yet, precisely their variety, even heterogeneity raises the question if such principles can be anything but "stars which give little light because they are so high." This quotation from Francis Bacon's "On the Advancement of Learning" precedes Edward Carr's classical study on the problems of a sweeping, *principled* and idealistic approach to international phenomena.[2]

The aim of this contribution is therefore not so much a discussion of individual principles, which is done in other studies of this research project. A first aim is to

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[1] Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, Institute for International Law and Justice (New York University School of Law) Working Paper 2004/1, available at: http://www.iilj.org/papers/2004/2004.1.htm, later published in 68 LAW AND CONTEMPORARY PROBLEMS 2 (2005); Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 DER STAAT 315 (2006); Eberhard Schmidt-Aßmann, in this issue; Giacinto della Cananea, *Dai vecchi ai nuovi principi generali del diritto*, *in* I PRINCIPI DALL'AZIONE AMMINISTRATIVA NELLO SPAZIO GIURIDICO GLOBALE 11 (Giacinto della Cananea ed., 2007).

[2] Francis Bacon, *On the Advancement of Learning*, cited according to EDWARD HALLET CARR, THE TWENTY YEARS' CRISIS. AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 302-307 (1940), vii.

study more closely how principles are used in legal discourses (B.). I will distinguish between structural principles, guiding principles and legal principles. This makes it easier to grasp the various meanings and scholarly agendas pursued under the term *principle*. In section C. I discuss the impact of emerging principles of international authority on the general evolution of public international law and its scholarship in times of global governance. Thereby I hope to add further support to our general approach and to prepare the ground for the most difficult part of this contribution, the one on the development of general principles (D.). In section D., I will first review possible legal bases of general principles (D.I.), suggesting *internal* constitutionalization as the best path in light of the heterogeneity and fragmentation of international law. Second (D.II.), I will discuss the roles of international and domestic judges in that process, stressing their common, but differentiated responsibility. Eventually, some individual principles of international institutions will be outlined in light of the principles of the European Union (E.).

B. Object and Interests

The word *principle* defines only vaguely an object and a scholarly interest. Legal theory is not very helpful here, since it offers a plenitude of diverging and even contrasting conceptualizations.[3] This can be no different for such a basic legal term like "principle." This study employs an inductive approach focussing on the actual usages of the term within this research project. Here three main usages of the term and three corresponding concepts can be distinguished: Principles in the sense of structural principles, in the sense of guiding principles and in the sense of legal principles. These categories are not mutually exclusive, and normatively it appears desirable that those principles which convey the fundamental ideas of liberal democracies are at the same time structural, guiding and legal principles. Sadly, this is not always the case on the international level.

I. Structural Principles for Doctrinal Constructions

A scholarly, doctrinal interest aims, above all, at principles in the sense of structural principles (*Ordnungsprinzipien*). Structural principles are scholarly abstractions which define legal structures within the positive law in the sense of significant regularities. The primary aim is to order the legal material via a system based on

[3] On such theories, *see* RICCARDO GUASTINI, DISTINGUENDO. STUDI DI TEORIA E METATEORIA DEL DIRITTO 115 *et seqq.* (1997); András Jakab, *Prinzipien*, 37 RECHTSTHEORIE 49 (2006). In international law, *see* Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, *in* SOURCES OF INTERNATIONAL LAW 359, 361 *et seq.* (Martti Koskenniemi ed., 2000).

principles.[4] Examples include recurrent important norms concerning the relationship between international institutions and states, such as the principle of attributed competence, their internal organization or recurrent patterns of procedure or decision-making, such as the principle of consensus.

There is, at least in continental Europe, a general understanding that the identification and elaboration of such principles by means of abstraction, labelling, extrapolation, and arrangement of material belongs to the core areas of legal research. Many texts that aim at presenting an entire field of law often already exhibit the term "principle" in their title.[5] Many believe that the functional legitimacy of legal scholarship depends on this activity. Legal material needs to be arranged and thereby rationalized according to principles, and this scholarly arrangement is understood as essential for the law to fulfil its function of social ordering. Such abstractions appear particularly important in a field as heterogeneous and fragmented as the one of this study. Contrary to an occasionally voiced suspicion, such a systematic approach implies neither positivistic restrictions nor innovation-adverse conservatism. Rather such doctrinal constructions may help to apply principles established in one international legal regime on other regimes thereby furthering their progressive development.

II. Guiding Principles and the Framing of Discourses

In the international discourse, and correspondingly in the studies of this research, objectives pursued via an international legal regime are often called principles; they can be labelled *guiding principles*.[6] Such objectives can be found in the constituent treaties, in secondary legislation, but often also in legal instruments devoid of a binding character; in all cases these objectives are legally established, and hence part of the law. Thus, Article 3 of the United Nations Framework Convention on Climate Change lays down *principles* which are to guide the Parties, and the World

[4] Koskenniemi (note 3), at 381 *et seq.*; EBERHARD SCHMIDT-AßMANN, ALLGEMEINES VERWALTUNGSRECHT ALS ORDNUNGSIDEE, margin number 3, 5 (2nd ed., 2004). Sometimes the term *principle* only indicates something like *general features*. *See* RICCARDO MONACO, SCRITTI DI DIRITTO DELLE ORGANIZAZZIONI INTERNAZIONALI 279 *et seqq.*, 459 *et seq.* (1981).

[5] The book that founds the discipline in Germany carries the title FRIEDRICH FRANZ VON MAYER, GRUNDSÄTZE DES VERWALTUNGSRECHTS 46 *et seq.* (1862). For today, *see* CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (2nd rev. ed., 2005); ALVIN LEROY BENNETT & JAMES K. OLIVER, INTERNATIONAL ORGANIZATIONS – ISSUES AND PRINCIPLES (7th ed., 2002).

[6] On this type, *see* Riccardo Monaco, *Sources of International Law*, *in* IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (EPIL) 467, 473 (Rudolf Bernhardt ed., 2000).

Bank commits to the principles on development aid of the *Paris Declaration*.[7] The *International Law Association* also uses the term in this sense.[8] Such principles seek to line up a specific activity without providing for possible sanctions in case of non-observance. As regards domestic law, including for present purposes the law of the European Union, it appears preferable to distinguish doctrinally between objectives and principles. However, this is not the case on the international level, which is less differentiated.

Guiding principles, even if they do not aim to determine the line between legal and illegal behaviour, are important, since they structure and focus the discourse in an international institution.[9] In order to better understand this point, the metaphor of international law as a "universal language" is helpful.[10] Communication is a process ridden with prerequisites, in particular at the international level, and principles constitute a form of "vocabulary" by means of which the diverse political, economic, or ethical concerns can be introduced into the international process and treated in a common mode of communication. This is particularly important as international institutions do not aim at the application of largely predetermined law, but at political design.

III. Legal Principles and the Dual Function of Public Law

The third group consists of legal principles. Legal principles are general and important norms whose main function is the attribution of the binary qualification of legal/illegal in light of overarching values.[11] For sure, principles do not determine any such attribution in a mechanical or deductive sense, but they are often crucial in arguing about such attribution. They operate therefore at the core of the legal system. To many they appear as the most promising tool to frame the action of international institutions in a way that makes them efficient as well as

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[7] For instance, in the case of the UNESCO World Heritage Convention the Preamble sets out the principle of ecologically sustainable development, which is consolidated by the precautionary principle and the inter-generational principle, the principle of cooperation, and the principle of subsidiarity. *See* Diana Zacharias, in this issue.

[8] International Law Association, *Accountability of International Organisations*, Final Report, 2004, available at: http://www.ila-hq.org/html/layout_committee.htm.

[9] Erwin Grochla, *Organisationstheorie*, *in* HANDWÖRTERBUCH DER ORGANISATION 1797 (Erwin Grochla ed., 2nd ed. 1980).

[10] On the understandings of international law based on communication theory, *see* Friedrich Kratochwil, *How do Norms Matter?*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW, 35 (Michael Byers ed., 2000).

[11] Koskenniemi (note 3), at 368 *et seq*.

respectful of liberal and democratic values. By developing such principles which transcend the legal practice of individual international institutions, legal scholarship performs its critical function vis-à-vis legal practice and stimulates its further development. However, unlike political claims or philosophical constructions, the concrete potential within the legal realm needs to be kept in sight: to postulate utopian ideas as legal principles usually harms the normativity of law.

Legal principles of international public authority have engendered interest in the past primarily out of a hope of supporting within international law a realm of administrative rationality in the tradition of functionalist conceptions of peace.[12] Accordingly, principles of international public authority aim to further their effective operation; the principle of implied powers and that of cooperation might serve as examples. This supportive attitude has determined the scholarly interest in the principles of international institutions for a long time.

More recent is the concern that the operation of these institutions might conflict with the values of the rule of law or democracy.[13] The activities of the sanctions' committee of the UN Security Council or the Codex Alimentarius Commission are important examples.[14] Some even suspect that the operation of some international institutions might be potentially authoritarian.[15] For that reason legal principles now have the additional function of helping to meet a potential bureaucratic unlashing on the international level. This is particularly true for politics which eventually concern the individual citizen. Since many international institutions are only rudimentarily constrained by their founding treaties a taming via general principles appears as a possible alternative. Legal principles have been crucial in taming national bureaucracies as well as the institutions of the European Union. It appears apposite to develop such principles also with respect to the authority of international institutions. Yet, the specificities of international institutions need to be addressed, such as their heterogeneity or the lack of a common legal basis.

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[12] EDWARD HALLET CARR, THE TWENTY YEARS' CRISIS. AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 302-307 (1940). For a path breaking work, *see* DAVID MITRANY, A WORKING PEACE SYSTEM, AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION (4th ed., 1946).

[13] Matthias Ruffert, *Perspektiven des Internationalen Verwaltungsrechts*, *in* INTERNATIONALES VERWALTUNGSRECHT 395, 404 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007).

[14] *See* Clemens Feinäugle, in this issue; Ravi Afonso Pereira, in this issue; Jochen von Bernstorff, in this issue; Erika de Wet, in this issue; Ingo Venzke, in this issue; Rüdiger Wolfrum, in this issue.

[15] MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2001); Anthony D'Amato, *On the Legitimacy of International Institutions*, *in* LEGITIMACY IN INTERNATIONAL LAW 83, 92 (Rüdiger Wolfrum & Volker Röben eds., 2008).

There is certainly a tension between the two objectives of an efficient and at the same time liberal operation of an international institution. This tension is not to be understood as a paradox. Rather, one here finds a general feature of public law thinking as this tension represents a basic characteristic of public (and particularly administrative) law.[16] Yet, even if there is consonance between international and domestic public law on this point, one needs to see that at the international level not only the protection of individuals is at stake, but also the protection of democratic self-determination of political collectives. In light of this the present contribution investigates general principles, i.e. principles which can apply to all forms of international public authority. Specific principles of individual fields of international law are not considered, such as the principle of sustainable development[17] or the principle of common but differentiated responsibility.[18]

C. Public Law Principles and the Evolution of the Field

I. Developing the Publicness of Public International Law

As argued in the contribution that sets out our general research agenda, we believe that a public law approach to the law of international institutions is a way to further legal understanding of the phenomena of global governance.[19] A reflection on principles supports this approach. The development of general principles of international public authority, such as the principle of attributed competence, or of human rights protection, aims at the strengthening of the publicness of public international law.[20] So far the general principles of international law correspond mainly to private law principles or principles of litigation between equal subjects, i.e. private law litigation.[21] The emergence of the public law component together with principles of international public authority is not just a sectoral phenomenon since international institutions are of considerable importance in many fields of

[16] SCHMIDT-AßMANN (note 4), at 16 *et seq*.

[17] Friedrich, in this issue; Christine Fuchs, in this issue. For principles in international environmental law, *see* Ulrich Beyerlin, *Principles, in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Jutta Brunnée, Daniel Bodansky & Ellen Hey eds., 2007).

[18] Láncos, in this issue.

[19] *See* von Bogdandy, Dann & Goldmann, in this issue.

[20] On the concept of publicness, see *id*. at Part A III.

[21] Hermann Mosler, *General principles of Law*, *in* II EPIL 511, 518 *et seq*. (Rudolf Bernhardt ed., 1995).

international law.[22] Therefore this development heralds an overall strengthening of the publicness of public international law and evolves the general principles of international law.

We propose as the disciplinary point of departure for studying global governance phenomena the discipline of international institutions. This approach is confirmed when studying the relevant principles since that discipline presents studies on the principles of cooperation, of attributed competence, or of accountability. At the same time the new interest in international institutions in light of the phenomenon of global governance should result in a development of these principles.[23] Therefore one should not only study principles of such international institutions which are subjects of international law but also of other institutions such as treaty organs or informal institutions which exercise public authority.[24] Above all, the demands resulting from these principles should be framed in more stringent ways.

This approach seeks principles which guide and tame the public authority of international institutions. Yet, its objective is not a general rollback of such institutions. In this respect it is different to, for example, Anne-Marie Slaughter's approach, which locates public authority above all in networks of domestic administrations emasculating international institutions.[25] Our approach, by contrast, does not question the public authority of international institutions as such.

II. Principles of Domestic Authority: The Role of Comparative Thinking

The development of principles of international authority raises the question of comparison: what is the role of domestic public law principles in this process? Not considering such principles would be adverse to the "nature" of legal thinking since comparison is one of its most important features. Not taking into account the domestic context would furthermore miss the point that international institutions have been modeled on domestic experiences.[26] That is why a comparative method is promising. At the same time it is a truism that the principles of international public authority cannot be simple copies of domestic principles because

[22] José Alvarez, *International Organizations: Then and Now*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 324 (2006); JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 184 *et seq.* (2005).

[23] As example, *see* UGO DRAETTA, PRINCIPI DI DIRITTO DELLE ORGANIZZAZIONI INTERNAZIONALI (2nd ed., 2006).

[24] *See* Farahat, in this issue.

[25] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[26] *See* von Bernstorff, in this issue.

international institutions are different: the domestic analogy, based on the assumption that an exercise of international authority parallels an exercise of domestic authority in all essential elements, cannot convince in most cases. This leads to the question of a framework for comparison between international institutions and those of nation states or the European Union.

So far the most important application of public law principles beyond the nation state has happened with respect to the European Union. Therefore the relevant discussion might provide guidance for our topic. Within the framework of the public law of the European Union the development of public law principles is mainly due to the phenomenon of the Union's public power over private legal subjects. Such authority is the keystone of the dominant understandings of public law. European as well as national authorities can affect citizens or private enterprises without their consent. This unilateral power conflicts with the fundamental idea of modern constitutionalism: the freedom of the individual. This issue defines the core problem of public law. The corresponding *leitmotiv* of principles of public law is how to constitute, organize and channel this troublesome unilateral power. In fact, much of the current interest in international institutions is based on the concern that these institutions might evade the legal framing of public authority.

The acts of international institutions only very rarely bind individuals directly. One of the exceptions is the law of international public service. Thanks to well-established international administrative tribunals a satisfactory set of principles exists.[27] Far more critical is international public authority exercising administrative functions over individuals in cases of failed states or similar situations.[28] Both cases remain sidelined in this study, which is mainly concerned with the "routine" situation of functioning statehood. In this "routine" situation direct exercise of authority by international institutions over individuals is extremely rare. Examples include the determination of the refugee's status by the UNHCR in states which have delegated this task to this institution.[29] For the rest, not even the sanction lists of the UN Security Council bind individuals directly[30]. The WIPO trade mark

[27] *See* CHITTHARANJAN FELIX AMERASINGHE, I THE LAW OF INTERNATIONAL CIVIL SERVICE (2nd ed. 1994); ROBERTO MALKASSIAN, EL FUNCIONARIO INTERNACIONAL 63 (1980) (assuming the emergence of common general principles for all international organizations).

[28] On this, *see Restructuring Iraq. Possible Models based upon experience gained under the Authority of the League of Nations and the United Nations*, 9 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (MAX PLANCK UNYB) (Armin von Bogdandy & Rüdiger Wolfrum eds., 2005).

[29] Smrkolj, in this issue.

[30] Feinäugle, in this issue.

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unfolds legal consequences directly for individuals, but national institutions can suspend the effect.[31] Therefore the principles of international institutions concern actions for which the implementing states or the implementing European Union have at least some political and legal responsibility, precisely because there is no direct effect and supremacy. This lack of direct authority of international institutions needs to be reflected in the relevant principles.

If comparability between domestic public authorities and international institutions were to exist only in case of a legal determination of individual legal positions, an international public law would remain a very limited phenomenon, at least with respect to most countries of the world. However, it appears outdated to consider only acts directly binding individuals as the exclusive focal point of public law. In fact recent research on domestic public law is expanding beyond this focus. Hence the research on international or global administrative law rests on the plausible assumption that the exclusive focus on legal determination of individuals is too restrictive in light of liberal democratic principles: As developed in the contribution on the research agenda (A. II.), an exercise of public authority can also occur through a non-binding act which only *conditions* another legal subject.[32] In this *authority of public institutions to determine others* by binding, but also by non-binding acts whenever put in a constraining framework, we see the level of comparison between domestic authorities and international institutions.

Yet, in most cases arguments against strictly analogical reasoning abound. Any comparison must take into account that acts of international institutions come neither with direct effect nor with supremacy and that the legal situation of the individual is mostly framed by the domestic implementing measure. The construction of analogies is further complicated by the fact that – as comparative administrative law tells us – there are few generally recognized principles for such types of administrative activities which are not directly binding on individuals. As a consequence, any transposition of domestic legal doctrine needs to be carefully construed.

Summing up, I submit that any domestic principle applicable to domestic public authority provides for a perspective to juridically examine international public authority. This can be seen as quintessential to the public law approach to international law with its constitutionalist disposition. There is a presumption that an established principle of domestic public authority raises an issue to which the law of an international institution should provide a principled answer, which,

[31] Kaiser, in this issue.

[32] Similarly, *see* della Cananea (note 1); Ruffert (note 13), at 407, 414.

however, in most cases will differ from that given in domestic legal orders. At the same time, the more an international authority impacts an individual, the stronger the assumption is that international principles require legal arrangements which are functionally equivalent to what is to be expected in the domestic realm. But a strict analogy can almost never apply for reasons which also militate against a broad category of principles of global administrative law, to which I turn now.

III. Principles of an International or Global Administrative Law?

A much further reaching and bolder approach is presented by the proposal of an international administrative law, and even more so the idea of a global administrative law as a new field of research or even a new discipline.[33] In discussing these approaches further aspects of the principles of international institutions come to light. Here, the public authority of international institutions is conceived as a mere aspect of a much broader phenomenon. In contrast to the traditional separation of domestic (national or unional) law and international law, a field emerges which embraces international and domestic administrative activity. Such a novel field implies a claim of overarching principles: the establishment of a specific field of legal research goes hand in hand with the formulation of principles which shape the entire field.

Eberhard Schmidt-Aßmann's approach conceives an international administrative law as "administrative law originating under/in *international law*" and divides it into three "functional circles," following the logic of his doctrine on European administrative law: a body of law governing international administrative institutions, a body of law *determinative* of national administrative legal orders, and a body of law on *cooperative* handling of common problems.[34] On the horizon appears a new jurisprudential sub-discipline focussing on – inter alia – overarching principles of international and national administration. The international development would thus *in principle* reproduce the European one, a widespread aspiration not only in Europe.[35]

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[33] This topic was one of the main themes of the German public law association in 2007. *See* Giovanni Biaggini & Claus Dieter Classen, *Die Entwicklung eines Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft*, 67 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER (forthcoming 2008).

[34] Schmidt-Aßmann (note 1), at 336.

[35] 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 (2006). Similarly the report of the International Law Association (note 8).

This understanding leans, however, towards a proto-federal conception of global order which I do not think tenable. This becomes particularly evident with respect to general principles. The development of overarching principles has been a pillar of a common administrative law in a federal state[36] as well as in the European Union.[37] In particular the development of a supranational composite administration rests – from a legal perspective – on the function and competences of the EJC and common principles of an integrated legal order, as enshrined in Art. 6 EU. The idea of a fundamental consonance of European and national administration under the EC Treaty has been established for some time and is promoted by the constitutionalization of the respective legal positions.[38] This is an important element furthering the federal unity within the process of European integration.

Should there be similar overarching principles on the international level that would be a considerable step towards a world federation. Yet there is very little evidence for such an evolution. The proto-federal global administrative law rests on assumptions which appear to me even more problematic than the constitutional understanding of international law which is not, by necessity, federal.[39] Similarly, the proponents of a global administrative law assert the advent of a „single, if multifaceted global administrative space distinct from the domains of international law and domestic law," built by overarching principles.[40] The term "space" is revealing: *space* or *area* have become the proxy for *federal* in *Eurospeak*: the EU is an *area* of freedom, security and justice, a research *area*, not least an *area* of free movement, each with its administrative dimension.[41]

In my understanding, there is little ground for a global doctrine of principles encompassing international and domestic public authorities. The respective general

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[36] ERNST FORSTHOFF, I LEHRBUCH DES VERWALTUNGSRECHT 40 *et seq.* (10th ed. 1973).

[37] SCHMIDT-AßMANN (note 1), at 393 *et seq.*

[38] *See*, e.g., Case C-28/05, Dokter, 2006 E.C.R. I-5431, paras. 71-75. The administrations of the Member States are bound by the principles developed for the EU's own administration: a federal constellation through and through.

[39] *See* Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARVARD INTERNATIONAL LAW JOURNAL 223, 232 *et seq.* (2006).

[40] Kingsbury, Krisch & Stewart (note 1), at 2, 13, 16, 24 *et seq.*; SABINO CASSESE, OLTRE LO STATO 38 *et seq.*, 55 (2006). Later Krisch appears to have noticed the problem. *See* Nico Kirsch, *The Pluralism of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 247 (2006).

[41] For the close link between global administrative law and international constitutionalism, *see* CASSESE (note 40), at 185 *et seq.*

legal and institutional context appears to be too diverse: European administrative law is based upon the principles of direct effect and supremacy, on the principle of vertical and horizontal constitutional compatibility (Article 6 TEU), on the essentially uniform political system of the EU, which is rooted in its territory and citizens, on a judiciary endowed with strong competences, and on a largely parliamentary legislature. All this, in short: a federal unity, cannot be traced beyond the Union.[42]

If global administrative law is in some respects too broad, it appears too narrow in others. It appears of little use; useful only to investigate principles which deal exclusively with administrative activity. Given the under-developed differentiation of public authorities on the international level, general principles remain crucial, for example human rights. At stake are general principles of public authority, i.e. principles of public law.

This argument does not deny that many international norms, and in particular international principles, are important, even determinative for domestic administrative procedures. For examples, the law of the WTO[43] or the human rights instruments establish some principles[44]; moreover, some international treaties lay down specific requirements for domestic administrations.[45] Yet these norms explicitly address only domestic administration.

Is it possible to assert a principle of parallelism so that international law addressed to domestic administrations applies also to international institutions? That might be a possible political or moral maxim. In the legal context, however, as set out in B.2.,

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[42] And its assumption is not prevalent among international law scholars, *see* only the contributions by Eyal Benvenisti, Stefan Kadelbach, Helen Keller, Thilo Marauhn, Georg Nolte, Stefan Oeter, Andreas Paulus, Anne Peters, Erika de Wet & Andreas Zimmermann, 67 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 585-824 (2007).

[43] *See e.g.*, WT/DS2/AB/R *US – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body adopted on 29 April 1996; WT/DS58/AB/R *United States – Import Prohibition of certain Shrimp and Shrimp Products, Recourse to Article 21.5 DSU*.

[44] Such as procedual guarantees binding upon national administrations emanating from Art. 6 ECHR. On this aspect, *see* Christoph Grabenwarter & Katharina Pabel, *Art. 6*, *in* EMRK/GG, KONKORDANZKOMMENTAR 653 (Rainer Grote & Thilo Marauhn eds., 2006).

[45] *See Aarhus-Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 38 INTERNATIONAL LEGAL MATERIALS 517 (1999). *See also* Christian Walter, *Internationalisierung des deutschen und europäischen Verwaltungsverfahrens- und Verwaltungsprozessrechts – am Beispiel der Arhus-Konvention*, 40 EUROPARECHT 302 (2005); Rüdiger Wolfrum, *Ansätze eines allgemeinen Verwaltungsrechts im internationalen Umweltrecht*, *in* ALLGEMEINES VERWALTUNGSRECHT – ZUR TRAGFÄHIGKEIT EINES KONZEPTS (Thomas Groß, Christoph Möllers, Christian Röhl & Hans-Heinrich Trute eds., 2008).

the legal basis as well as the legal and factual context of domestic principles on the one side and international principles on the other side appear to be so diverse that it is more promising to conceive different, although interlinked phenomena. As a consequence one should not strive for overarching principles, even if there is some overarching consolidated law in particular in human rights guarantees.[46]

I agree with the proponents of a global administrative law that there should be a theoretical and doctrinal framework for international, supranational and national public law which conceptualizes their linkages and which guides the transfer of insights as well as the construction of analogies. Yet, I find neither the theory nor the doctrine of administrative law convincing at this point in time in this respect. Moreover, this approach blurs categories which are indispensible for attributing political and legal responsibility: The lack of an elaborate doctrine of sources as well as the lack of a doctrine of direct effect is no coincidence.

IV. Public Law Theory as the General Framework

The framework should be developed as an overarching theory and doctrine of public law. The phenomenon of interest is less that of *administration* but rather the more general phenomenon of public authority. Public authority, i.e. the competence to unilaterally determine the conduct of others, is the fundamental problem of public law as it collides with the fundamental idea of constitutionalism: freedom. The phenomenon of public authority corresponds to the phenomenon and the discipline of public law. This understanding flows from the tradition of the *Ius Publicum*[47] which aims at establishing a legal framework for any exercise of public power. This approach opens broad interfaces both within and outside legal scholarship. Moreover it avoids the problems of delimitation which the concept of *administration* and the corresponding concept of *constitution* give rise to. The debate on a European Constitution revealed how problematic it is to use the concept of a constitution even within a supranational context.[48] This problem grows worse with respect to a field of law which – due to its sources – belongs to international law. This problem cannot be avoided by simply using the complementary concept of *administration*. Hence the principles of international institutions should be understood as concretizations of general principles of public law formulated in the

[46] Ruffert (note 13), at 415.

[47] *See* MICHAEL STOLLEIS, NATIONALITÄT UND INTERNATIONALITÄT. RECHTSVERGLEICHUNG IM ÖFFENTLICHEN RECHT DES 19. JAHRHUNDERTS 20 *et seq.* (1998).

[48] Christoph Möllers, *Pouvoir Constituant – Constitution – Constitutionalisation, in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 183 (Armin von Bogdandy & Jürgen Bast eds., 2006).

tradition of liberal constitutionalism and adapted to the structures and requirements of multilevel systems and global institutions.

In the formulation of international principles for the exercise of public authority one can distinguish between three basic constellations. The first is the one pursued in this contribution: Principles to guide and frame the activities of international institutions which need to be implemented by domestic institutions to have legal effects with respect to the individual.

The second constellation concerns international principles for international institutions whose acts directly affect private subjects in particular the international administration of territories.[49] The third constellation consists of international legal principles for domestic administrative activity.[50] In this third constellation again three situations might be distinguished: a) principles for a basic rule of law standard (e. g. Article X GATT, Art. 14 ICCPR, b) principles that force domestic administrations to consider extra-territorial interests as a response to global interdependence,[51] and c) principles regarding the cooperation of domestic administrations within composite administration.[52]

D. On the Development of General Principles

I. On the Legal Bases

Structural principles can be generated through scientific abstraction. By contrast, for guiding principles and particularly for legal principles scientific efforts do not suffice. The problem is related to the issue of how to deal with gaps in international law, i.e. situations in which decision according to the letter of the positive legal texts appears unsatisfactory.[53] I will argue that, given the lack of an overarching international constitution, of a general international judiciary as well as in light of the heterogeneity of international institutions, their *internal* constitutionalization appears to be the most promising avenue for developing general principles to

[49] Von Bogdandy & Wolfrum (note 28); Smrkolj (note 29).

[50] CASSESE (note 40), at 67 *et seq.*

[51] On this problem in the context of the WTO, *see* L. Bartels, *Art. XX of GATT and the Problem of Extraterritorial Jurisdiction. The Case of Trade Measures for the Protection of Human Rights*, 36 JOURNAL OF WORLD TRADE 353-403 (2002).

[52] For duties to cooperation, *see* von Bogdandy & Dann, in this issue.

[53] ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT 125 *et seq.* (1991); Koskenniemi (note 3), at 372.

constrain their exercise of public authority. This is best explained in the context of other approaches.

1. Traditional Approaches

One of these other approaches is the "mortgage theory" (or "theory of technical-legal delegation").[54] It comes in two versions: In a first, radical version, the competences of international administrative institutions are understood as domestic competences delegated by the states as if the international institution were a domestic agency;[55] the international institution would then have to comply with all the legal obligations that are incumbent upon its member states under domestic law.[56] This understanding is rarely championed today, confirming an important principle: the principle of the autonomy of international institutional activity vis-à-vis internal law. The second version of the "mortgage theory" contends that international institutions are subject to the international law obligations of the states supporting them. The legal basis of this is in itself a general principle, i.e. the principle that a legal subject cannot free itself from a legal obligation towards a third subject by creating a new subject of law. Henry Schermers and Niels Blokker hold that "[s]tates which have founded an international organization are bound by general principles of law. These principles will also be applicable in the legal order of the organization."[57] This approach certainly lies within the limits of what is legally tenable; however, because of the vagueness of the statement "general principles of law," it only provides a platform for further reasoning in the context of art. 38 § I lit. c ICJ-Statute. In this sense the ICJ states in a classical obiter dictum "international organisations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law (…)."[58]

One line of concretizing thought is based on qualitative comparative methodology, comparing domestic principles of public law of different domestic orders. *Global* or *international administrative law*, to take a recent example, is the desire to transpose

[54] KATHRIN OSTENECK, DIE UMSETZUNG VON UN-WIRTSCHAFTSSANKTIONEN DURCH DIE EUROPÄISCHE GEMEINSCHAFT 222 *et seq*. (2004).

[55] This was in fact the dominant understanding in the 19th and early 20th century. *See* Part D.I.1.

[56] There are tendencies in this direction in DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 33 *et seq*. (2005).

[57] HENRY SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 1575 (3rd ed., 1995).

[58] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, ICJ Reports 1980, 73, 89-90.

established principles of domestic administrative law to international institutions. Another school operates in the framework of natural law theory. Important authors include Alfred Verdross or Hersch Lauterpacht;[59] this approach remains important.[60] The best case in this respect can be made for principles of human rights applying to international institutions, by now often considered independent from domestic law.[61] A similar argument is developed within the framework of international customary law in the sense of art. 38 § I lit b ICJ-Statute. Human rights laid down in international treaties are interpreted as customary law principles and – by way of progressive development – enriched with requirements for international administrative action.[62]

These lines of thinking can be attacked on good grounds. In the methodical canon of a positivism focused on legal texts or state will, it is usually possible to negate the legal relevance of general principles, if their validity has not been ordered explicitly.[63] Conceptions which see international law as being largely fragmented tend to a similar position.[64] But problems also abound under different methodological premises. Natural law arguments are beset with well known difficulties. In a similar line, the comparison of administrative legal systems can easily conclude that there are hardly principles in the sense of art. 38 § I lit. c ICJ-Statute.[65] Comparative research is largely limited to a few legal systems and its findings mostly regard administrative action directly affecting the legal positions of individuals, which is rarely the case with international institutions. Similarly the

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[59] For a reconstruction of the positions, *see* Béla Vitanyi, *Les positions doctrinales concernant le sens de la notion de principes généraux de droit reconnus par les nations civilisées*, 86 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 48 *et seq*. (1982).

[60] *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50 *et seq*. (1991).

[61] For a path breaking treatment, *see* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 82 (1992); Niels Petersen, *Customary Law Without Custom?*, 23 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 275 (2008).

[62] Alexander Orakhelashvili, *The Acts of the Security Council: Meaning and Standards of Review*, 11 MAX PLANCK UNYB 143, 177 (2007).

[63] HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 438 *et seq*. (1966); Gabriel H. Oosthuizen, *Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW 549 (1999).

[64] HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT 83 *et seq*. (1899); MYRES MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER 987 (1960); IBRAHIM SHIHATA, THE WORLD BANK LEGAL PAPERS 265 *et seq*. (2000).

[65] Carol Harlow, *Global Administrative Law: the Quest for Principles and Values*, 17 EJIL 168 (2006). *See also* the contributions in the Symposium Issue of the EJIL, 2006, Number 1.

proof of international customary law is beset with chronic difficulty,[66] and the expansive interpretation of human rights is met with vehement critique from important states.

This is maybe why the European Court of First Instance, in its judgment of 21 September 2005,[67] has chosen the approach of examining the compatibility of decisions by UN bodies with *jus cogens*. The result of this judgment is unsatisfactory from a human rights perspective, but it reflects the vagueness and the problems of this legal construction[68] as well as the hegemonic structure on which important parts of international law rest. There seems to be a hardly resolvable tension between the suitability of *jus cogens* to tame the actions of international institutions and its universal credibility, a tension which should be resolved, in case of doubt, in favor of universal credibility.

2. The Promise of Internal Constitutionalization

A more promising approach aims at the internal constitutionalization of international institutions; it features prominently in a report of the International Law Association.[69] This constitutionalization is usually based on the institution's constituent instrument, and enriches its often rudimentary requirements through progressive interpretation in light of other important international norms, but also in light of requirements formulated by domestic legal orders for the acceptance of the institution's acts. Internal constitutionalization seeks to develop the operation of an international institution in light of the values of constitutionalism.

This approach needs to be distinguished from a constitutionalization of an international treaty with respect to a domestic legal order, in particular via direct effect and supremacy. Heralded by European Union law, this has been proposed as a possible route for other international institutions, in particular the UN and the WTO. I am doubtful whether such constitutionalization of international treaties is

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[66] Koskenniemi (note 3), at 359, 387; Holger Hestermeyer, *Access to Medication as a Human Right*, 8 MAX PLANCK UNYB 101, 158 (2004).

[67] Case T-306/01, Yusuf, 2005 E.C.R II-3533, paras. 304 *et seq*.

[68] Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 21 (Christian Tomuschat & Jean Marc Thouvenin eds., 2006).

[69] *See* International Law Association (note 8). For the UN, *see* ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 191 *et seq.* (2004).

legally and politically convincing for institutions such as those investigated in this research.[70]

In contrast to constitutionalization as a general approach, internal constitutionalization is far more circumscribed since it does not affect the position of international law in the domestic systems. With respect to the development of general principles framing the exercise of international authority, this approach has three main advantages. First, it is based on the constituent treaty and therefore provides for a firm legal basis, not beset with the problems of the sources under art. 38 § I lit. b and c ICJ-Statute. Second, it is highly flexible. It leaves room for the specific logic and settings of the various institutions. In most constituent instruments, one will find a basis to argue the applicability of general normative considerations, but these bases vary, as well as the institutional practice on which any argument should build upon. Third, this approach fits with the largely fragmented state of international law without giving up the project of a public law framework. Granted, this pluralist approach will not yield a universe of general principles in a strict sense as they are known under domestic constitutions. Yet, striving for general principles which apply equally for all the exercises of any international authority might be a fruitless project given the diversity within the international legal order.[71] This pluralist understanding does not assert a uniform set of international principles for the exercise of international authority, but rather a pluriverse of general principles of different international institutions, which are, however, interlinked, thereby forming an overarching layer of common legal arguments.

Under this pluralist approach, I see much potential for a framing and taming of international institutions based on general principles. I do not know of an international institution today that would simply repudiate the demand for an embedding of its activity in the *rule of law* or in *good governance*; this can be interpreted as an acknowledgement of principles. It is obvious that otherwise the institution would loose legitimacy and endanger its existence. Notwithstanding a range of theoretical questions as to the formulation of principles, there seem to be, from a practical point of view, sufficient legal bases for a principle-oriented embedding of the exercise of international authority.[72] A historic perspective shows

[70] *See* Armin von Bogdandy, *Law and Politics in the WTO. Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK UNYB 609 (2001); Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (forthcoming 2008).

[71] *Report of the Study Group of the International Law Commission*, U.N. GAOR, 58th Sess., U.N. Doc. A/CN.4/L.682 (13 April 2006); Nico Kirsch, *The Pluralism of Global Administrative Law*, 17 EJIL 247 (2006).

[72] Numerous legal starting points can be found in the report of the International Law Association (note 8).

that development of principles has mostly started with the scholarly assertion of a principle.[73] But much more important than the scholar has been the judge in that process, to whom I now turn.

II. Who Should do What: The Role of International and Domestic Judges

A structuring and framing of the activities of international institutions by principles is possible and meaningful. At the same time, limits and problems have come to light. Legal principles require institutions which impose them on the acting public authorities. Erika de Wet's contribution on accountability shows that this can be done by various institutions. Yet, a principle-oriented embedding of international administrative activity is hardly feasible without a strong judiciary.[74]

A uniform set of general principles has in the past always required a powerful overarching court capable of exercising judicial review. The lack of such an institution on the international level is a further reason why general principles of international public authority will be different to those in domestic settings. But the problem is even more serious: As only a few international institutions are subject of direct judicial review, indirect control is of utmost importance. This control can be exercised by international courts, in particular the International Court of Justice or the European Court of Human Rights. Given, however, that international acts require in most instances domestic implementation, the task of indirect control mostly lies with the domestic judiciary, the ECJ included.
At this point the question is how and to what extent the domestic judiciary should compensate the lack of an international judiciary and under which principles it should examine international acts. The domestic courts could use international legal principles. The European Court of First Instance has followed this approach albeit limiting itself to principles of *jus cogens*.[75] The advantage of this approach is that it contributes to a more rapid development of such principles as there will be more decisions. Its disadvantage is that it might disrupt the development of international institutions. Moreover it could appear paternalistic with respect to other domestic legal orders since stating illegality on the basis of international law entails a universal claim. Less disruptive and less paternalistic might be the

[73] Cananea (note 1), at 42.

[74] Erika de Wet & André Nollenkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 166 (2002); Christian Walter, *Grundrechtsschutz gegen Hoheitsakte internationaler Organisationen*, 129 ARCHIV DES ÖFFENTLICHEN RECHTS 39 (2004); Sienho Yee, *The Responsibility of States Members of an International Organization for Its Conduct*, *in* INTERNATIONAL RESPONSIBILITY TODAY 435 (Maurizio Ragazzi & Oscar Schachter eds., 2005).

[75] *See* (note 67).

definition of requirements of application within the domestic legal order. This is the approach of the German Federal Constitutional Court, and it is shared by Advocate General Maduro in his opinion on Kadi.[76] Under this approach domestic judicial decisions contribute indirectly to the development of international principles by defining domestic requirements for acceptance to which the interpretation of the constituent treaty can respond, and which eventually might even become relevant via the legal source of art. 38 § I lit. c ICJ-Statute. This approach appears better in tune with the limited competences of most courts.

On this path, it will take more time to develop international legal principles. At the same time, this winding path might prove more successful since it responds better to the complexities of the formation of international legal principles in a heterogeneous world. The drawback of this approach might be a further fragmentation of the law and a reversion to traditional dualism that might damage the linkages between domestic and international law. This danger can be met if the domestic courts interpret the pertinent domestic principles in light of international law, contributing thereby to the global, but pluralistic debate. Thus domestic courts could participate together with legal scholarship in a development of international principles which guide and frame international institutions without endangering them.

E. Some General Principles – A Sketch

The following text presents some general principles for the exercise of international authority as an overarching layer of common legal arguments for different international institutions. At the same time, it is based on the insights of research on the principles of the European Union.[77] There are many texts which conceive the European Union as a simple species of the genus *international institution*.[78] Although I do not share this understanding for the reasons to be developed, a comparative presentation appears promising. The aim is to indicate parallels, but also differences in order to grasp the specific quality of international public authority. Due to reasons of space these issues can only be sketched out briefly.

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[76] AG Poires Maduro, in Case C-402/05 P, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Union, 16 January 2008.

[77] For that field of research, *see* Armin von Bogdandy, *Constitutional Principles*, *in* von Bogdandy & Bast (note 48), at 3.

[78] *See* MANUEL DIEZ DE VELASCO VALLEJO, LAS ORGANIZACIONES INTERNACIONALES 137 *et seq.* (12th ed. 2006); SCHERMERS & BLOKKER (note 57), at § 58.

Research on the principles of the public authority of the European Union has revealed that the relationship between the Union and its Member States deeply affects all principles of the Union's public authority. Therefore a comparative inquiry with respect to international institutions should start with this issue.

I. The Relationship Between International Institution – Member State

1. Autonomy and Sovereignty

The principle of the autonomy of community law is fundamental to the European legal order. It is a structural principle which explains many features of that legal order, and it is a legal principle which the ECJ defends emphatically. While international institutions were for a long time considered common institutions of the Member States,[79] their autonomy has become a legal principle within the law of international institutions. First of all there is a principle of legal autonomy of legal acts of international institutions with respect to domestic law. Due to their legal basis in an international source of law the validity of such acts is independent from domestic sources. This independence is an important functional prerequisite of international institutions as the alternative clearly demonstrates. If the action of international institutions occurred on the basis of delegated domestic competences, i.e. in sense of the strict mortgage theory, efficient action on the international level would hardly be possible given the differences between the various domestic legal orders. The example of European integration also shows that this legal autonomy is one of the reasons why national governments pursue political projects on the international level. The legal scope for action is far broader, and it is usually more difficult for affected domestic groups to organise resistance on the international level. The importance of this autonomy is well evidenced by the UN sanctions lists.[80] In most domestic legal orders a similar act would be unlawful for many reasons.

The autonomy of the legal validity of international legal acts based on an international source is a general structural principle and a general legal principle; it is at the basis of art. 27 of the Vienna Convention on the Law of Treaties. Many decisions of international and domestic courts ascertain this autonomy. To my knowledge, no domestic court has ever examined the validity of an act of an international institution on the basis of its domestic law. Either the court examines its legality under international law; here the court examines whether the act

[79] David Kennedy, *The Move To Institutions*, 8 CARDOZO LAW REVIEW 841, 962-964 (1987).

[80] *See* Feinäugle, in this issue.

conforms to superior international law.[81] Or the international act is examined on the basis of domestic law; the domestic court then does not discuss legality or validity, but rather the applicability within the domestic legal order.[82] Another part of this autonomy is that international institutions enjoy broad immunities before domestic courts.[83]

The principle of autonomy can also be observed in the organizational structure of international institutions. The capacity to form an independent will is constitutive for an international organization; this entails by necessity some autonomy with respect to the member states.[84] Every institution discussed in this research project has some autonomy with respect to its member states. There is always a secretariat with some autonomous range of action. CITES is important in this respect as it is one of the first treaty regimes with a professional full-time secretariat.[85] Moreover in many international organizations some majority decisions are possible. This latter form of autonomy can, however, only be formulated as a structural principle. A legal principle that forces states to provide some autonomy to international institutions does not exist. Yet if there is a complete lack of autonomy, international law does not permit to conceive an institution as an international organization with the consequence that any decision is directly attributable to the member states.
Whereas the principle of the autonomy of international law is well established, a principle of the autonomy of internal law appears doubtful. Granted, hardly anybody will argue that an act by an international institution determines the validity of national law. In that respect autonomy exists. However, a principle of the autonomy of domestic law has been argued as a principle under the law of the European Union with the aim to protect certain topics against supranational interference. So far the proponents of such a principle have not succeeded in demonstrating such a principle beyond the principle of subsidiarity.

Different to European Union law, the acts of international institutions do not have direct effect and supremacy within the domestic legal order. This autonomy of domestic law is important for international law as the lack of direct effect and supremacy provides for relief regarding pressures of legitimacy. The lack of direct

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[81] *See* (note 67).

[82] AG Poires Maduro, in Case C-402/05 P, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Union, 16 January 2008, paras. 24, 38 *et seq*.

[83] *See* AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (2000); KIRSTEN SCHMALENBACH, DIE HAFTUNG INTERNATIONALER ORGANISATIONEN 69 *et seq*. (2004).

[84] SCHERMERS & BLOKKER (note 57), at § 44. On autonomy, *see* Venzke in this issue.

[85] *See* Fuchs, in this issue.

effect and supremacy can be seen as a structural principle which distinguishes international institutions from supranational ones. The Court of First Instance misses this point in its decision in the Yussuf case. Its decision is trapped in an antiquated monism irreconcilable with the autonomy of community law. This should not be interpreted as singing the praises of dualism; I rather advocate a conception of the interaction along the lines of a legal pluralism that acknowledges the many linkages between the different legal orders.[86]

With respect to the protection of the autonomy of states against interference from international institutions, there is certainly the principle of sovereignty. Yet, all expressions of that principle in the context of the law of international organizations, such as the principle of domestic jurisdiction (domaine réservé) have proven to be an ineffective protection.[87] The same holds true for the emerging principle of subsidiarity in international law; it does not limit the intensity by which international actions might impact on domestic politics.[88]

2. Loyal Cooperation and Procedural Principles

International institutions, similar to the European Union, hardly ever act alone and directly with respect to private legal subjects. They operate in most cases together with domestic institutions, be it in the shaping of politics, be it their implementation. This requires coordination, and correspondingly the thematic studies reveal detailed duties of cooperation. The various forms of interaction can be summarized by the concept of composite administration.[89] The concept rests on the insight that global governance needs the autonomy of the component institutions as well as their capacity for common action. Whereas the element of independence finds expression in the principle of autonomy, the interaction of the different authorities can be brought together under the principle of cooperation. The fundamental idea of such composite authorities is that public duties can be better discharged in cooperation between domestic and international institutions rather than by an isolated domestic administration. This also justifies the ensuing drawbacks of national self-determination.

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[86] In detail Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (forthcoming 2008).

[87] von Bernstorff, in this issue.

[88] Isabel Feichtner, *Subsidiarity*, *in* EPIL (Rüdiger Wolfrum ed., forthcoming 2010).

[89] Bogdandy & Dann (note 52).

These duties can be interpreted as an expression of a general principle of cooperation.[90] In fact, many years ago the ICJ declared that „the very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon the Organization."[91] There are remarkable attempts to establish the principle of cooperation as a general principle of international law even beyond the law of international institutions. According to Wolfgang Friedmann's famous categorization of international law, the cooperation between states is the defining principle of an era which has overcome the more traditional international law focused on mere coexistence or coordination.[92] The principle of cooperation has the character of a structural, guiding, and legal principle. The latter entails a common responsibility of all participating authorities for the realization of the objectives of the international regime in question.

If there exits a principle of cooperation its importance should, however, not be exaggerated, as the limits of such a principle's functional capacity are evident. The principle of federal loyalty alone cannot organize administrative cooperation within a federal state[93], and the principle of loyal cooperation alone does not provide the basis for an effective supranational polity.[94] Only in very few cases can such an abstract principle have a direct regulatory function or even determine a certain behavior as illegal; far more detailed and precise rules are required for day-to-day business. This is especially so for forms of cooperation beyond national borders, which can not rely on either a basic trust or an intuitive reciprocal acquaintance on the part of the various authorities; rather a good measure of ignorance and mistrust often dominates the relationships.

Nevertheless it is possible to deduce from the abstract principle of cooperation in extreme situations some specific duties as the ECJ has shown on the basis of art. A0 EC.[95] With respect to international compound administration one can deduce from

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[90] Konrad Ginther, *Mitgliedschaft in Internationalen Organisationen, Grundfragen*, 17 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT (REPORTS OF THE GERMAN SOCIETY OF INTERNATIONAL LAW) 13, 21 (1975).

[91] ICJ (note 58), at 93.

[92] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE (1964).

[93] BERNHARD SCHLINK, DIE AMTSHILFE 145 *et seq.* (1982).

[94] Gert Meier, *Europäische Amtshilfe – Ein Stützpfeiler des Europäischen Binnenmarktes*, 24 EUR 237, 245 *et seq.* (1989).

[95] Armin von Bogdandy, *Links between National and Supra-national Institutions*, *in* LINKING EU AND NATIONAL GOVERNANCE, 24 (Beate Kohler-Koch ed., 2003).

the principle of cooperation in particular procedural rights of states.[96] Of special importance appear to be rights to information, a right to be heard and a right to contest, if the action of an international institution affects an individual state.

The principle of cooperation has – similar to the principle of autonomy – an institutional expression. In all institutions one finds organs, staffed with officials from the members. Most thematic studies show that these organs play a leading role in the shaping of politics. The preeminence of states in the organs of an international institution is only a structural principle, not a legal principle.

3. The Principle of Attributed Competence

Competence is the legal cipher for power. Accordingly any insight into the public authority of international institutions must lead to a legal interest in their competences. Well established and undisputed is the principle that international institutions are not original subjects of power. Neither are their actions protected by human rights guarantees. Hence the legal principle that an international institution only acts legally if there is a legal base: the principle of attributed competence.[97] The thematic studies show a consistent practice that this applies not only to international organizations, but also to the actions of treaty organs or non-formalized organizations.[98] Furthermore, the studies show that non-binding acts also require some legal basis, i.e. acts commonly qualified as soft law.[99] This confirms the premise of the study to use a broad concept of public authority.

Unfortunately, many features of this principle are vague. The vagueness of the principle of attributed competence is no coincidence but rather the expression of a fundamental tension within the law of international organization between its functional autonomy and its guidance through its founding treaty which conveys democratic legitimacy.[100] In that respect the principle of attribution is undermined by the principle of implicit competence which allows the deduction of powers to act from the general aims of an international institution. Many activities described in

[96] *See* von Bernstorff, in this issue; CASSESE (note 40), at 108 *et seq.*

[97] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, 174, 185; Eckart Klein, *Reparation for Injuries Suffered in Service of the UN (Advisory Opinion)*, *in* IV EPIL 174-176 (Rudolf Bernhardt ed., 2000); DE VELASCO VALLEJO (note 78), at 137.

[98] Láncos, in this issue; Fuchs, in this issue; Farahat, in this issue.

[99] For the legal basis for the guidelines of the OECD, *see* Schuler, in this issue; Farahat (note 24).

[100] *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 60 *et seq.* (2002).

the studies of this research find their legal basis only in such an implicit competence.

At this point a fundamental difference with respect to the law of the European Union comes to the fore. European constitutional law knows *the principle of constitutional legality*. This principle has two aspects: negative and positive legality.[101] According to the *principle of negative legality*, every act that can be attributed to the Union must be consistent with higher ranking law, i.e. the totality of the current treaty norms as well as those general principles of law to be found at the same level as the treaty norms. This creates a strict internal hierarchy within Union law. The tremendous success of the constitutionalization of the EC Treaty is revealed by the fact that today the principle of negative legality appears trivial in the EU context. Yet, obvious as the validity of this institute may appear today, it was anything but evident to the early Community.[102] Such hierarchization is due to the ECJ's rigorous "hierarchization" case law. Starting from the premise of an autonomous legal order, the ECJ consistently concluded that the procedures for amending the treaties are exclusively those foreseen and provided for by the treaties (now Art. 48 EU Treaty). This jurisprudence prevents any extra-legal influence on the part of the Member States. The treaties' strict normativity does not permit the temporary suspension of the treaties' provisions by informal agreements,[103] nor can a persistent practice by the institutions derogate primary law.[104] Even acts enacted unanimously by the Council are completely subject to primary law. This leads to a striking dichotomy, well-known in constitutional theory, between the Member States' status and their capacities to act. As treaty-creating and -amending actors they remain largely outside the scope of the Union's jurisdiction, yet they can only exercise this capacity according to the difficult procedure foreseen in Art. 48 EU Treaty; in substance this means that the Union's constitutional order is largely protected. At the same time, the Member States' representation through the Council means that they are at the focal point of the public power constituted by the treaties. In this capacity, however, they are fully subject to the Union's primary law. This simultaneous exclusion and inclusion of the "masters of the Treaties" bears a remarkable resemblance to the foundation of constitutional legality in the Member States: the parliaments represent the

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[101] *See* Armin von Bogdandy & Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, 39 COMMON MARKET LAW REVIEW 227 (2002).

[102] Karl Carstens, *Die kleine Revision des Vertrags über die Europäische Gemeinschaft für Kohle und Stahl*, 21 ZAÖRV 1, 14, 37 (1961).

[103] Joined Cases 90 and 91/63, Commission v. Belgium and Luxembourg, 1964 E.C.R. 1329, 1345.

[104] Case 68/86, United Kingdom v. Council, 1988 E.C.R. 855, para. 24.

sovereign, yet are strictly bound by their respective constitution and its legislative procedures.[105]

Only on the basis of this strict normativity does the *principle of positive legality* flourish. This principle implies that an enabling provision is a necessary proviso. Any act at the level of secondary Union law must possess a legal basis which can be traced back to the treaties. The legal basis can either be contained in the treaties themselves or in an act of secondary law, which in turn is based on the treaties.[106] Whereas negative legality is (only) concerned with delimiting an assumed public power, the requirement of an enabling norm is situated one step before and asks about the act's legal basis.

That the founding treaty of an international institution operates in this way as the standard for the law produced by that institution is a rather new phenomenon. A hierarchization of the sources of law is essentially alien to traditional international law (with the exception of *jus cogens*, in itself a new development).[107] In international institutions it is generally recognized that the founding treaty can be implicitly changed by a later deviating practice, and some understand the principle of implied powers in a way that international organizations can move into new areas of competence unless it is specifically denied by member states.[108] Furthermore the doctrine of ultra vires, an essential element of the principle of

[105] Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 RECHTSHISTORISCHES JOURNAL 176 *et seq.* (1990).

[106] The question whether State actions must also have a basis in the national constitutions in the same way is very controversial. *See* CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT 256 *et seq.* (2000).

[107] Kadelbach (note 68).

[108] Advisory Opinion 12 August 1922, PCIJ 1922, Series B, No. 2, 23-25, 39; Corfu Channel Case/Preliminary Objection (United Kingdom of Great Britain and Nothern Ireland v. Albania), ICJ Reports 1948, 15 *et seqq.*; Corfu Channel Case/Merits (United Kingdom of Great Britain and Nothern Ireland v. Albania), ICJ Reports 1949, 4 *et seqq.*, 25; M. Barnett & M. Finnemore, *The Power of Liberal International Organizations, in* POWER IN GLOBAL GOVERNANCE 161, 182 (M. Barnett & R. Duvall eds., 2006); DE VELASCO VALLEJO (note 78), at 138; Georg Nolte, *Lawmaking through the Security Council*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 237, 239 *et seq.* (Rüdiger Wolfrum & Volker Röben eds., 2005). For a critique *see* Andreas Zimmermann, *"Acting under Chapter VII (…)" – Resolution 1422 and Possible Limits of the Powers of the Security Council*, *in* VERHANDELN FÜR DEN FRIEDEN, LIBER AMICORUM TONO EITEL 253 (Jochen A. Frowein, Klaus Scharioth, Ingo Winkelmann & Rüdiger Wolfrum eds., 2003); Rüdiger Wolfrum, *Der Kampf gegen die Verbreitung von Massenvernichtungswaffen: Eine neue Rolle für den Sicherheitsrat*, *in* WELTINNENRECHT, LIBER AMICORUM JOST DELBRÜCK 865 (Klaus Dicke, Stephan Hobe, Karl-Ulrich Meyn, Anne Peters, Eibe Riedel, Hans-Joachim Schütz & Christian Tietje eds., 2005).

attributed competence, only applies according to the main understandings if the field of activity of an international institution is clearly overstepped.[109]

In light of a broad concept of public authority, this loose understanding hardly convinces;[110] *implied powers* should only be understood as a specific teleological interpretation of a positive competence, but not a further legal basis. There is an urgent need to formulate standard instruments by which international institutions exercise public authority and stricter requirements to uphold negative and positive legality; the International Law Association provides sensible proposals under its principle of constitutionality.[111]

There are also uncertainties with respect to which institutions have the competence to determine an infringement of the principle of attributed competence. Traditionally this competence lies with the acting institution. This is certainly unsatisfactory. The German Federal Constitutional Court has established the yardstick of the so-called "Integrationsprogramm" (integration program);[112] the potential of this doctrine needs to be proven.[113] One might consider differentiated requirements of a legal basis corresponding to various effects of decisions of international institutions: this corresponds with the overall approach of this research.[114]

II. The Relationship Between International Institutions and Private Subjects

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[109] On *ultra vires* acts and their disputed effects, *see* Rudolph Bernhardt, *International Organisations, Internal Law and Rules*, *in* II EPIL 1316-1317 (Rudolf Bernhardt ed., 1995); Eckart Klein, *Die Internationalen und Supranationalen Organisationen*, *in* VÖLKERRECHT 352-354 (Wolfgang Graf Vitzthum ed., 2004); IGNAZ SEIDL-HOHENVELDERN/GERHARD LOIBL, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIEßLICH DER SUPRANATIONALEN GEMEINSCHAFTEN 221 (2000); HERIBERT FRANZ KÖCK & PETER FISCHER, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN 561 (1997); Hersch Lauterpacht, *The Legal Effects of Illegal Acts of International Organizations*, CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 88 (1965); Ebere Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AJIL 239-256 (1983).

[110] On this point, *see* von Bernstorff in this issue.

[111] International Law Association (note 8), at 12 *et seqq*.

[112] *See* Bundesverfassungsgericht (BVerfG, Federal Constitutional Court), 2 BvE 2/07, paras. *42 et seq.* with further references.

[113] Mehrdad Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, 66 ZAÖRV 41 (2006).

[114] *See* Bogdandy, Dann & Goldmann, in this issue.

There is space only for a few lines on principles regarding the relationship between international institutions and private subjects, in particular individuals. The EU-Treaty puts the principle of freedom of the individual in Art. 6 para 1 right at the beginning. Although the importance of international human rights has steadily grown, there is little ground to consider the freedom of the individual as the foremost principle of international law.

Within the law of the European Union the principles of the rule of law and of the protection of private legal subjects are of increasing importance. The public authority of the European Union is bound by human rights, in particular by the European Convention of Human Rights, as interpreted by the European Court of Human Rights. Furthermore a seamless web of legal protection against public authority is required. Granted, the legal order of the European Union does not fully live up to these principles. Some acts are difficult, even impossible to challenge. Nevertheless, the difference between the European Union and international institutions is evident, given that what is the rule with respect to international institutions is a rare exception in European Union law.

However, it seems that this unsatisfactory situation is about to change. In particular the response to the UN sanctions list might have triggered the impetus to develop and uphold legal principles protecting the individual against acts of international institutions;[115] it can be built by coherently developing established doctrine.[116] These principles and the mechanisms of review need to be respectful of the specificities of international institutions, which is assured by their development in the process of internal constitutionalization. Accordingly, the doctrinal construction might vary from institution to institution. At the same time, the development of such principles protecting the individual against international institutions can draw on the EU experiences.[117]

On this note this article ends. Its aim was to discuss possible functions, impacts, bases and elements of general principles of international public authority. While the article remains rather skeptical about the prospects of a general doctrine of general principles similar to those in domestic legal orders, it sees and advocates the development of principles in the process of internal constitutionalization of the various international institutions. On this basis, a comparative doctrinal discourse

[115] Feinäugle, in this issue.

[116] ICJ Opinion, Effect of Awards of Compensation made by the United Nations Administrative Tribunal, ICJ Reports 1954, 57.

[117] August Reinisch, *Securing the Accountability of International Organizations*, *in* INTERNATIONAL ORGANIZATIONS 535, 538 *et seq.* (Jan Klabbers ed., 2005).

can distill legal arguments that are of general use when construing the authority of international institutions. Such arguments are useful irrespective of whether the principle amounts to a classic source of general principles. Accordingly, I see a future for general principles of international public authority, less as a source of law, but as condensed comparative legal arguments.