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PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS

Cross-cutting Analyses

Procedures of Decision-Making and the Role of Law in International Organizations

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A. Introduction

There is no general body of procedural law for decision-making in international organizations. At the same time, many of the more than 230 existing international organizations (IOs) exercise public power through legislative and regulatory activities involving a myriad of decisions taken within these institutions every day. These decisions shape societal perceptions of a wide range of pressing humanitarian-, ecological, technical- and scientific issues and direct actions taken in these fields. From a rule of law perspective any exercise of public power outside a limiting framework of public law is reason for concern. According to the domestic rule of law traditions, public law is supposed to prescribe the form in which public power is exercised. It regulates the process of decision-making by establishing binding procedures, including procedural rights of participants and affected individuals. In case of unlawful exercise of power by public officials affected persons and entities have legal recourse to an independent court or tribunal. If formalized procedural constraints for the exercise of public authority are important at the national level they are all the more so at the international level since conflicts over substantive legal standards and disagreement over community values are usually more acute.

Despite the lack of a general body of administrative law guiding the work of international bureaucracies, there is of course some law to turn to. It is the law which forms the basis of the functioning of each individual international institution, such as the treaty constituting a particular IO, the rules of procedure of individual

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organs and internal rules such as financial- or staff regulations. Some of these rules may be set forth in the IO's founding treaty or constitution. However, constitutions are generally phrased in broad terms and notoriously unclear about the powers different bodies possess; rules of procedures usually only refer to individual organs and voting-procedures, rather then prescribing the entire process of decision-making which will often be scattered over a number of organs.[1] Financial and staff regulations as well as internal guidelines and rules of operational decision-making tend to be IO-specific and therefore appear to solely reflect particular institutional practices. There are of course a number of decisions and opinions of the ICJ and its predecessor on the scope of explicit and implied powers of IOs, but they are of a limited and rather ambiguous nature. Remarkably, Felice Morgenstern's classic conclusion regarding the state of legality in international organizations by and large still holds true today: "As a system of law all this does not amount to very much."[2]

The absence of a general body of procedural law for IOs would not be problematic if it could be assumed that international organization is an inherently beneficial undertaking. The question of legal limits and judicial control would then not become relevant in the first place. There is, however, a growing uneasiness about the way public power is exercised beyond the national realm. Scholars have noted a change of perception regarding international organizations.[3] The growing number and increased effectiveness of IOs has indeed brought new questions to the fore. Can the UN Security Council legislate in the field of nuclear non-proliferation and terrorism on behalf of the world community and arguably violate human rights and due-process standards by setting up lists of terror-suspects?[4] How complicitous is the international patent-protection regime in denying access to live-saving drugs for millions of H.I.V. victims in Africa? Who takes the responsibility for World Bank structural adjustment-programs with socially disastrous

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[1] HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 1 § 707 (1995).

[2] F. Morgenstern, *Legality in International Organizations*, 48 BRITISH YEARBOOK OF INTERNATIONAL LAW 241 (1976-77). The standard-reference in the field, Schermer's and Blokker's INTERNATIONAL INSTITUTIONAL LAW (note 1) likewise describes decision-making processes within various IOs without reference to a general procedural law.

[3] J. Klabbers, *The Changing Image of International Organizations*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 221-255 (V. Heiskanen ed., 2001); J.E. Alvarez, *International Organizations: Then and Now,* 100 THE AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 324-347 (2006); D. Kennedy, The *Move to Institutions*, 8 CARDOZO LAW REVIEW 841 *et seq*. (1987) (on early perceptions of IOs, in particular regarding the League of Nations).

[4] Feinäugle, in this issue; de Wet, *Holding International Institutions Accountable: the Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, in this issue.

repercussions for the affected populations and why are some persons granted a potentially life-saving international refugee-status by UNHCR and others not?

In more general terms, there is an increased interest in how decisions are taken in IOs, in whether they can be deemed legal, and in the question who actually bears responsibility for the distributional effects of such decisions towards which constituencies.[5] The aim of this paper is to more closely examine how decisions are taken in IOs and what role general international law plays in this regard. The paper is divided into four parts. In the subsequent part I attempt to explain why procedural controls of decision-making in IOs can be deemed necessary in the first place (B.). In the third part, I will briefly describe the role of various procedural principles in the domestic rule of law tradition (C.). In the fourth part, I will undertake an actor-oriented analysis of procedures of decision-making in IOs hereby drawing on the case studies presented in this project (D.). The main focus in this part will be put on the question of whether or not IOs in fact already rely on general procedural principles imported from the domestic rule of law tradition. The last part will discuss two strategies of international lawyers to construct general procedural constraints for the activities of IOs (E.).

B. IOs as Autonomous Actors and the Need for Enhanced Procedural Controls

Are enhanced procedural controls really needed in IOs? The underlying thesis of this paper is that IOs dipose of a high degree of autonomy in decision-making and that this fact had been concealed by the assumption that sovereign members always remain in full political control of the organization.

I. The Organizational Setting

Already the first half of the 19th century - IOs were modeled on the idea of the separation between political legislation on the one hand and technical administration by administrative bodies on the other hand. According to this concept, sovereign member states establish and direct the organization by designing and controlling its main organs. The foundation of an international organization is based on sovereign consent expressed by the adoption of an international instrument. The convention usually establishes a principal plenary organ, in which political decision-making in form of resolutions and standard-setting can take place. The political organs usually decide on the basis of the one

[5] On the changing role of public actors in times of globalization, *see* S. Leibfried & M. Zürn, *Von der nationalen zur postnationalen Konstellation, in* TRANSFORMATIONEN DES STAATES? 19-64 (S. Leibfried ed., 2006). On accountability *vis à vis* various constituencies, *see* N. Krisch, *The Pluralism of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 247-278 (2006).

state one vote principle hereby respecting the principle of sovereign equality. National representatives take responsibility for their participation in such organs under national criteria and are legitimized by national procedures, which remain outside the realm of general international law. The constitution generally also establishes an executive board or council as an executive supervisory organ usually consisting of a limited number of national representatives, representing the membership.[6]

Political organs (plenary and council) on the one hand and the secretariat on the other fulfill different functions. The plenary proceduralizes the "political" on the basis of the principle of sovereign consent, whereas the "technical" is based on the ideal of efficient administrative implementation and supposed to be handled by the secretariat and subordinated bodies.[7] To date most international institutions officially maintain an organizational hierarchy by delegating tasks to the secretariat or subordinated bodies and creating of mandates. According to the organizational blue-print political decisions are taken by member states in the plenary organs or a council or board, consisting of a smaller number of member states. Their promotion and implementation is then delegated to technical committees or the management of the organization. Plenary organs can also create new mandates in order to institutionalize certain policies by appointing special representatives, rapporteurs or ad hoc committees for specific tasks. Plenary organs are supposed to be responsible for rule making and for guiding the secretariat in the implementation of standards and strategic goals politically.

II. Conceptual Legacies and the Assumption of Sovereign Control

If responsibility was merely delegated, a control problem could - at least in theory - not occur. Sovereign member states theoretically could always direct the organization politically by taking respective decisions regarding mandated activities and delegated tasks in plenary (congress/assembly) or the council (board). From a historical perspective, the idea of controlling the work of IOs through general procedural standards or even through external judicial bodies would have conflicted with a number of general assumptions regarding the nature of international organization. First, external control would have meant that the decisions taken by sovereign member states in the plenary could be controlled by a higher form of political or legal institution. In the minds of 19th century international lawyers such an institution would have presupposed the foundation

[6] SCHERMERS & BLOKKER (note 1), at § 409.

[7] I. SEIDL-HOHENVELDERN & G. LOIBL, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN 124 (7th ed., 2000).

of a World-State with a World-Court, which in itself was considered a utopian and politically undesirable aspiration.[8] The creation of IOs in the 19th and twentieth century could only be brought about, if the overall institutional set-up did not convey the impression that its future operations would fundamentally conflict with the doctrine of national sovereignty. Second, international organizations were supposed to serve functions of the general welfare, which was in itself considered "a good thing."[9] They were conceptualized as entities rendering assistance and advice to member states in the fulfillment of certain administrative functions, rather then fulfilling such functions themselves. Decisions taken on the international level were generally regarded as having no effects on individuals outside the organization. Such effects were supposed to occur only through an act of national implementation, called transformation.

This assumption of sovereign control not only rendered midwife-services in the historical process of creating the first IOs, it remains a conceptual legacy of the law of international organization. It therefore does not come as a surprise that 20th century academic literature on IOs dealt primarily with the question of strengthening IO-performance and its legal personality *vis à vis* its sovereign and allegedly much more powerful member states. With their focus on high politics, questions of war and peace and hegemonic powers, authors considered autonomous decision-making of international bodies more of an unachieved or utopian goal than a problem.[10] Scholarly attempts in the interwar period to decouple the foundations of the international legal order from the sovereign will of states were aimed precisely at enhancing the legal autonomy of new international institutions like the League of Nations.[11]

IOs themselves also had no interest in portraying themselves as autonomous actors and instead ritually complained about the lack of commitment or disruptive power politics of individual member states, blocking important projects the IO could otherwise pursue.[12] The ambiguous or indeed paradoxical nature of international

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[8] For an influential German 19th century critique of "civitas maxima" conceptions in international law, *see* C. KALTENBORN VON STACHAU, KRITIK DES VÖLKERRECHTS 73 (1847).

[9] On this general assumption, *see* Klabbers (note 3), at 221-255.

[10] E.H. CARR, THE TWENTY YEARS' CRISIS 1919 – 1939. AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 186 (1940).

[11] J.V. BERNSTORFF, DER GLAUBE AN DAS UNIVERSALE RECHT. ZUR VÖLKERRECHTSTHEORIE HANS KELSENS UND SEINER SCHÜLER 59-61, 107-110 (2001).

[12] M.N. BARNETT & M. FINNEMORE, RULES FOR THE WORLD. INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 20-30 (2004).

organization, which is characterized by the need to create a new political actor, without openly infringing the sovereignty of its member states was concealed by the organizational hierarchy, according to which sovereign states seemingly remained in full political control of the organization.[13] As a consequence a number of developments and pathologies in the work of international bureaucracies remained theoretically invisible for a long time. Not only international legal scholarship but also predominant strands in International Relations (IR) theory seem to have underrated the degree of autonomy such actors can assume.[14] In particular, the need for specific legal controls of international bureaucracies was not perceived.

III. The Creation of Autonomous Actors Exercising Public Authority

As Inis Claude argued in his "Swords into Plowshares," the 19th century administrative unions already enjoyed a high degree of autonomy which did not sit comfortably with the prevailing assumptions of sovereign political control. The invention of the "secretariat" as a permanent genuinely international machinery of administration was the crucial step in the creation of autonomous political actors on the international level. The Bureau of the International Telegraphic Union became the prototype of a secretariat staffed by international civil servants tasked to carry out functions of research, correspondence and publication as well as the preparation of decisions for future conferences. This first phase of international organization was already marked by the emergence of a diverse group of new participants in the business of international affairs, including scientific experts, private interest groups and humanitarian organizations, which exerted considerable influence on decisions taken by the secretariat, without necessarily involving the political organs of the IO. This phenomenon destabilizes the conceptual hierarchy between decision-making in state dominated political organs and the seemingly technical implementation of such decisions by the secretariat.[15] Due to their unrivalled technical expertise in specific regulatory fields the bureaus of the first administrative unions quickly got involved not only in the implementation but also in the preparation and drafting of decisions to be adopted in plenary by member states.[16]

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[13] I.L. CLAUDE, SWORDS INTO PLOWSHARES. THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 39 (1956).

[14] On IO-autonomy in IR-theory, *see* Venzke, in this issue.

[15] CLAUDE (note 13), at 39-40.

[16] SEIDL-HOHENVELDERN & LOIBL (note 7), at 124.

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With the proliferation of IOs in the second half of the 20th century and the impact of their policies, which today can be felt at every corner of the world, the trend toward administrative autonomy and influence have become more visible. IOs also had an increasing impact on the structures of domestic administrative law in their member states.[17] The following observations regarding structures of decision-making in international organizations stand in contrast to the original assumption that IOs have a hierarchical internal structure based on law that allows for significant political and legal control of the work of the organization.

1. Mission-Creep

Firstly, many IOs have started to engage in activities beyond their original mandate, as set out in their constitution, operating in these fields on a doubtful legal basis. Many of the activities of international bureaucracies described in the case studies are not mentioned in the constitution of the respective IOs.[18] Can such actions still be considered legal? Two potentially limiting principles of the law of international organization are relevant in this context: The principle of domestic jurisdiction and the *ultra vires* doctrine. The principle of domestic jurisdiction had been enshrined in the League of Nations Covenant (art. 15, para 8) and was given expression in art. 2 para 7 of the UN Charter.[19] The original idea behind the domestic jurisdiction doctrine was that there were issues which were *per definitionem* within the exclusive realm of sovereign national discretion. This restrictive approach to international jurisdiction was confirmed in various judgments and opinions of the Permanent Court of International Justice.[20] Its applicability suffered from the fact that it was theoretically and politically impossible to come up with a concrete list of issues, which by their nature could not be regulated by international law.

On the issue of *ultra vires* doctrine, the ICJ opined in the *Certain Expenses* case that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the assumption is that such an action is not *ultra vires* the Organisation."[21] Given

[17] As a comprehensive analysis of this phenomenon C. TIETJE, INTERNATIONALISIERTES VERWALTUNGSHANDELN (2001).

[18] On the terror lists of the UN Security Council, *see* Feinäugle, in this issue.

[19] On Art. 2(7) UN-Charter, *see* J.A. Frowein, *Are There Limits to the Amendment Procedures in Treaties Constituting International Organizations, in* LIBER AMICORUM FOR I. SEIDL-HOHENVELDERN 201-218 (Gerhard Hafner *et. al.* eds., 1998).

[20] On the critique of this principle by interwar-scholarship, *see* V. BERNSTORFF (note 11), at 88-91.

[21] Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, ICJ-Reports 1962, at 168.

that the purposes of an IO are usually not phrased in narrow language and are open to interpretation, the liberal approach towards implied powers taken by the ICJ in this case did not help to make the *ultra vires* doctrine an effective and constraining legal principle. In fact, by deducing implied powers from the purposes of the IO, the ICJ reduced the scope of application of the *ultra vires* doctrine to an extent, which made it virtually meaningless. In the *Nuclear Weapons* advisory opinion[22] the ICJ took a more restrictive approach returning to a narrowly interpreted principle of attribution of powers as originally applied by the Permanent Court of Justice in its opinion on the *Jurisdiction of the European Commission of the Danube* case.[23] A more restrictive approach indeed seems necessary to turn these principles into meaningful limitations on the proliferation of new competencies in some IOs.

2. The Flight from the Plenary

Secondly, plenary organs have often ceased to function as an effective political control mechanism. Formal decision-making in plenary bodies is often considered unproductive, since controversial political debates "block" decision-making in these fora.[24] Political struggles between rich donors and the biggest contributors on the one hand and developing countries on the other hand often lead to a stalemate situation, since the poor have the votes and the rich have the money. In addition, delegation and mandating as classic instruments of plenary organs for steering an international organization inevitably entails a loss of control. Once a task has been delegated to an institutional structure it inevitably takes on a life of its own. This effect is concealed by the hierarchical structure involved in delegation or mandating. Usually the creation of a new mandate involves reporting obligations of the new mandate holder vis à vis its creator.[25] However, the degree of institutional autonomy established by an act of delegation or mandating will not be severely limited by such reporting obligations. Strong states oftentimes have an interest in autonomous decision-making in expert bodies because they have more influence in these informal processes through higher scientific and bureaucratic resources.

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[22] Legality of the Use by a State of Nuclear Weapons in Armed Conflict , Advisory Opinion of 8 July 1996, ICJ-Reports 1996, at 80-81.

[23] Jurisdiction of the European Commission of the Danube between Galatz and Braila, advisory opinion, 1926 Publ. PCIJ, Series B, No. 14, at 64. *See* J. KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 80 (2002). For a critique of the "revisionist" nuclear weapons advisory opinion, *see* N.D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 99-102 (2005).

[24] On this problem within the FAO, *see FAO: The Challenge of Renewal. An Independent External Review of the Food and Agriculture Organisation*, 2007, FAO-document on file with author.

[25] On delegation, *see* Venzke, in this issue.

IOs also increasingly engage in horizontal delegation to other IOs and private institutions, hereby incorporating and enforcing external decisions taken in other institutions without procedures in place to politically assess and control them. The WTO, for instance, relies upon and "hardens" decisions taken in the WHO/FAO Codex Alimentarius Commission by a dynamic reference in the SPS Agreement.[26] The effect of such forms of delegation to external technical expertise can be the disempowerment of other political bodies on the international and national level. Delegation to technical committees is often justified by higher scientific expertise of these bodies. However, most regulatory decisions involve normative assumptions and trigger redistributive outcomes that can not be reduced to seemingly objective scientific inquiries; each time someone wins and someone looses.[27] Another example is the intense co-operation between Interpol and the UN Security Council Counter Terrorism Committee.[28] By connecting the committee with a global data platform for police enforcement activities, the implementation of individualized sanctions becomes possible in practice. This increase in efficiency by dynamic incorporation of standards and decisions between IOs comes with a price. It separates the political organs of the organizations from the relevant decision-making procedures. Decision-making and responsibility fall apart.

3. The Reign of Expert Bodies and Decision-Making Affecting External Entities

While initially the framework of regulatory decisions was clearly delineated by national representatives taking political decisions being implemented later by technical bodies, in practice there is often an inversion of these roles. More and more regulatory decisions are framed and prepared by technical committees and only formally adopted by national representatives, who are left with a rubber-stamping role. Internal hierarchies are replaced by technical subordination. Moreover, even large states often neglect their supervisory-functions in executive boards or councils unless they take a particular interest in a specific project. Due to the complexity of technical, economic and social issues at hand, decisions regarding programs, projects and policies prepared by the secretariat or management of the organization are not always scrutinized in a thorough fashion by governmental supervisory bodies before being adopted lock stock and barrel as proposed by the secretariat. Secretariats often either have specific knowledge of the relevant issues or are in a position to incorporate such knowledge through the involvement of

[26] Pereira, in this issue.

[27] I have made this argument elsewhere. J.v. Bernstorff, *Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony*, 9 EUROPEAN LAW JOURNAL 511-526 (2003).

[28] Schöndorf-Haubold, in this issue.

external experts and consultants. Such knowledge puts secretariats and expert-committees in a position to shape the general (global) understanding of the issues at hand. Such understandings and interpretations of social phenomena and international standards are disseminated by autonomous promotional and capacity-building activities of the secretariat.[29] Given that expert committees are often composed of specialists from governmental departments that deal with a particular issue area, they often share a common worldview.[30] Barnett and Finnemore refer to the "social construction power" of IOs because they use their knowledge to help to create social reality.[31]

Furthermore, decision-making by technical committees and secretariats increasingly entails at least indirect effects on individuals and other entities outside the organizational setting. In the case studies presented in this research project a number of such decisions are dealt with in detail. The attribution of a certain status or right, such as the recognition of refugee status by UNHCR[32] or the recognition of a trade mark by WIPO[33] would fall under this category. In addition, decisions to put a specific case, person or site on a formalized list, such as the listing of endangered species under CITES[34], or a listing as a world cultural heritage sites by UNESCO[35] need mentioning in this context.[36] Listing-procedures frequently trigger legal or political consequences for the listed entity and indirectly also for third

[29] On this aspect in the FAO-context, *see* Friedrich, in this issue.

[30] So called "epistemic communities," consisting of scientists, representatives of specific professions and national experts, provide institutions with shared meanings on various issues ranging from technical standards to bioethical considerations, which serve as a basis for decision-making within the institution. These contributions help to reduce societal complexity for the actors within the organization and have a considerable impact on the development of global standards. Such activities take place in technical committees or through informal contacts with staff members of the secretariat of the organization. Once the epistemic community has succeeded to transform their world-view into a global standard within one institution it tries to convince other organizations to adhere to these standards in related areas. And once recognized globally, such standards can effectively be used at home to pressure national legislators to reform national regulations portrayed as being out of step with global standards. It goes without saying that such lobbying activities proliferate where commercial interests are affected by global decision-making. *See* P.M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INTERNATIONAL ORGANIZATION 1-35 (1992).

[31] BARNETT & FINNEMORE (note 12), at chapter 1 (2004).

[32] Smrkolj, in this issue.

[33] Kaiser, in this issue.

[34] Fuchs, in this issue.

[35] Zacharias, in this issue

[36] Feinäugle, in this issue.

parties, be they individuals, member-states or non-member states. As a result, questions regarding a fair hearing, access to justice and legal remedies have become more acute.

In summary, the conceptually cemented assumption regarding the nature of international organization according to which sovereign member states control and direct the organization politically through internal hierarchies seems to be contradicted by the inherent tendencies of autonomous decision-making in IOs and other global governance-institutions. The creation of such institutions should, however, not be portrayed as a one sided process, which inevitably leads to a loss of influence on the part of state actors. Oftentimes states only gain influence on other actors and regulatory issues through the creation of international institutions. State representatives themselves can increase their freedom of action *vis à vis* domestic constituencies by creating and using international institutions.[37] It is often in the interest of some member states that technical committees initiate new standards. At the same time states have created a new actor, which cannot be fully controlled even by the strongest member states, let alone by less powerful actors. In the following, I will describe how procedures are used to gain control of the exercise of public authority on the national level.

C. Controlling the Exercise of Public Authority through Procedures

Procedures are the magic formula of the enlightened political mind. They promise to transform the reign of arbitrary power into the legitimate exercise of public functions in the interest of the citizens.[38] They domesticate the political "machine" and bring progress, reason and truth or in the words of Francois Guizot, the French nineteenth-century historian and statesman: "Toutes les combinaisons de la machine politique doivent donc tendre, d'une part, à extraire de la société tout ce qu'elle possède de raison, de justice, de vérité, pour les appliquer a son gouvernement; de l'autre , à provoquer les progrès de la société dans la raison, la vérité, et à faire incessament passer ces progrès de la société dans son gouvernement".[39]

The insistence on "truth" as the end of political procedures reveals the archaic roots of the enlightened belief in proceduralization. Public procedures, applied originally in post medieval court proceedings had replaced archaic rituals with an outcome

[37] M. ZÜRN, REGIEREN JENSEITS DES NATIONALSTAATES. GLOBALISIERUNG UND DENATIONALISIERUNG ALS CHANCE 245 (1998).

[38] N. LUHMANN, LEGITIMATION DURCH VERFAHREN 11-26 (1969).

[39] M. Guizot, *Histoire des origines du gouvernement représentatif en Europe*, vol. 1, 78 (1851).

allegedly predetermined by supernatural forces. Societies invented procedures in order to decide under conditions of uncertainty in a manner that allowed a reduction of societal complexity.[40] Proceduralized decision-making had become the "truth-machine" of modern society.

According to Max Webers sociological account of national bureaucracies, administrative procedures fulfill two main functions: formalization and rationalization of the exercise of public power.[41] Both functions are closely related to the concept of "Rechtsstaat", coined 1948 by the German liberal lawyer Robert von Mohl[42]. Legal systems make use of administrative procedures in order to formalize processes of public decision making and enforcement.[43] The law prescribes in detail in which form public power shall be exercised. It regulates the process of decision-making by establishing binding procedures.[44] In fact, the concept of the rule of law in the Western tradition is based on the assumption that public power is exercised in and through administrative procedures on the basis of legislation. If the unlawfully exercises power, the individual has recourse to legal remedies in an independent tribunal. Procedures based on legal rules formalize public decision-making processes and facilitate their judicial review. To date a number of procedural principles have emerged in domestic legal systems, which aim to enhance the control of administrative power. An official assessment of the Swedish government of procedural principles recognized within all EU-states *inter alia* lists the following legal principles: the principle of legality and proportionality and impartiality, the right to a fair hearing, the right to have access to information, the obligation to give reasons for a particular decision in written form and the obligation to give instruction on a right to appeal.[45]

In terms of rationalization procedures enable civil servants to structure the process of decision making. The imposed structure allows the planning and co-ordination

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[40] LUHMANN (note 38), at 11-26.

[41] M. WEBER, WIRTSCHAFT UND GESELLSCHAFT 125-130 (2006).

[42] M. STOLLEIS, PUBLIC LAW IN GERMANY, 1800 - 1914, 229-235 (2001).

[43] For the national realm, *see* E. SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE. GRUNDLAGEN UND AUFGABEN DER VERWALTUNGSRECHTLICHEN SYSTEMBILDUNG 305-310 (1998).

[44] On the German and Italian domestic tradition, *see* G. Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative law*, 9 EUROPEAN PUBLIC LAW 563, 565-566 (2003).

[45] Zitiert bei E. Schmidt-Aßmann, *Verwaltungsverfahren und Verwaltungskultur*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 40, 43 (2007).

of the contributions to this process by the participants. The procedure also clarifies on a general basis who can become a participant in the decision-making process, and when and in which form his or her voice will be taken into account by those who will make the final decision. It permits the selecting of information which is relevant to the process by excluding other information as irrelevant or belated. It excludes alternatives, reduces complexity and thus facilitates the gradual convergence of perspectives among participants regarding the matter at hand. This process according to Niklas Luhmann enables the system to construct the outside world in a way that enables the participants to reach a decision.[46] Needless to say they hereby enormously impact the substance of the decisions taken at the end of the procedure.

The reign of expertise and new informal ways of decision-making, which include private actors, also confront domestic administrative law with new procedural arrangements, which cannot easily be integrated in the various administrative law traditions.[47] The control problem can not only be observed at the international level.[48] Due to the increasing linkages between domestic and international bureaucracies described in the case studies a clear separation between these levels of decision-making can no longer be upheld. The main difference is that on the national level courts can potentially exercise meaningful judicial control whereas decisions produced on the international level often escape such judicial controls.

D. Procedures of Decision-Making in IOs

In the following two types of decisions of IOs shall be differentiated: rule-making decisions and operational decisions[49].

I. Rule-Making Decisions

The political process of rule-making and standard setting consists of a number of decisions often scattered over various organs of the IO. Procedures vary from IO to IO. Two general stages of such processes can be identified: the initiative- and

[46] LUHMANN (note 38), at 11-26.

[47] On expertise in German administrative law, *see* A. Voßkuhle, *Sachverständige Beratung des Staates, in* III HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 45 *et seq.* (J. Isensee & P. Kirchhof eds., 2005).

[48] For Pereira there is no difference between the domestic and the international level regarding the legitimacy problems involved in administrative decision-making. *See* Pereira, in this issue.

[49] For a more complex analytical matrix of decision making in IOs, *see* R.W. COX & H.K. JACOBSON, THE ANATOMY OF INFLUENCE. DECISION MAKING IN INTERNATIONAL ORGANIZATION (1973).

drafting stage and the adoption-stage. According to the original concept of international organization, governments are the main initiators of decision making processes within the organization. In fact they have a right of initiative through the plenary organs or the council in most IOs.[50] The preparation of an initiative and the creation of a first draft are often coordinated between particular groups of states before being tabled in the political organs.[51] Governments are frequently lobbied by private interest groups to run rule-making initiatives on the international level. This holds true for humanitarian- and economic issues alike. They offer to provide interested governments with background research and a first draft of a new standard or multilateral agreement and to assist them in lobbying other delegations regarding specific initiatives. As the case study for the OECD-export credit arrangement in this research project shows, private interest groups in co-operation with national bureaucrats play a major role in drafting new standards in this field.[52]

Some IOs foresee a formal right of initiative of the secretariat of the organization, the most prominent example being the European Commission. Secretariats also usually involve external expertise into the drafting process of such initiatives. Often, and in particular in the EC-context, drafts produced by interested private institutions are made into an official initiative without substantive changes. Within the UN the Secretary General has the right to propose items for the agendas of the main organs.[53] Even in the absence of a formal right of initiative secretariats claim powers of initiative from the nature of delegated functions and instructions. In particular the international financial institutions as well as development agencies, such as UNDP and UNICEF seem to be driven by a series of program and project initiatives generated predominantly by the management of these organizations.[54] Furthermore, secretariats usually have no problem in finding governments that are

[50] SCHERMERS & BLOKKER (note 1), at § 711. On the complex relationship between the Council and the Assembly of the International Seabed Authority, *see* Wolfrum, in this issue.

[51] In organizations with a universal membership cross-regional political groupings such as the Organisation of Islamic States (OIC), the Non-Alignment Movement (NAM) and the European Union (EU) have a political filtering function regarding individual initiatives. In particular the European Union coordinates common EU-initiatives as well as EU-member states-initiatives within such institutions in a substantive fashion. Likewise over the last years an astonishing revival of the Non Aligned Movement (NAM) could be observed, leading to an improved coordination of NAM-countries in universal institutions. Often such groupings run their own initiatives, which will formally be tabled by one member country representing the grouping in plenary.

[52] Goldmann, in this issue.

[53] Security Council, Provisional Rule 6; General Assembly, Rule 13; ECOSOC, Rule 10.

[54] P. Dann, *Grundfragen eines Entwicklungsverwaltungsrechts, in* INTERNATIONALES VERWALTUNGSRECHT 21-25 (C. Möllers, A. Voßkuhle, C. Walter eds., 2007).

willing to table their initiatives, which usually benefit from the secretariat's high level of technical expertise.[55]

The adoption of decisions of a rule-making nature usually takes place in plenary organs in a formalized fashion governed by the respective organ's rules of procedure. Most organizations rely on the one state one vote principle. However, mechanisms of weighted voting are a well established exception to that rule. Voting under the unanimity-rule, originally upheld by the Permanent Court of International Justice in its *Treaty of Lausanne* advisory opinion (1925)[56], has been replaced by (qualified) majority-voting in many international organizations. For instance, the adoption of a new convention by the General Assembly does not require a unanimous vote. Given that the binding effect on individual member states in any event depends on subsequent ratification majority voting does not seem to contradict with the principle of sovereign consent. More problematic in this regard are non-binding instruments, which are frequently adopted in plenary organs allowing for majority voting. Such non-binding - standards are often taken as a basis for the secretariat and other committees within the organizations in order to engage in a wide range of implementation activities.[57] Their adoption against the will of a number of member states increases the above mentioned political autonomy of IOs *vis à vis* their member states. Majority voting is therefore sometimes modified by so called opting out procedures, according to which states can lodge an objection against the decision of the majority and thus avoid being bound by the act.[58] In many organizational settings decisions are not taken by voting but by consensus (acclamation).[59] This means in practice that debates are continued until no one present in the room further raises objections against a specific proposal and therefore a minimum-level of acceptance of the decision among all participants has been reached.

An increasing number of universal IOs allow for NGO participation in the process of negotiating and adopting new standards. The UN for instance, grants consultative status to international and national NGOs on the basis of Art. 71 of the

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[55] SCHERMERS & BLOKKER (note 1), at § 714.

[56] PCIJ, Series B, no. 12, at 29. On this problem, *see* C. Tomuschat, *Obligations Arising for States Without or Against their Will,* 241 RECUEIL DES COURS / ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 199-374 (1993); KLABBERS (note 23), at 228-229.

[57] CITES is a good example. *See* Fuchs, in this issue.

[58] On opting out, *see* M. Fitzmaurice, *Expression of Consent to be bound by a Treaty as developed in certain Environmental Agreements, in* ESSAYS ON THE LAW OF TREATIES, 59, 66 (J. Klabbers ed., 1997).

[59] SCHERMERS & BLOKKER (note 1), at § 771.

UN Charter. Such a status can provide NGOs with access to ECOSOC deliberations and other negotiations in various UN-fora. Each main organ and agency within the UN has its own internal rules of procedure regarding the rights of participation of affected NGOs.[60] Despite increased openness towards NGOs and public participation, governments still play a dominant role in general rule-making in IOs. Procedures tend to be formalized and based on the principle of sovereign equality.

II. Operational Decisions

By far the greatest number of IO- decisions, many of which with direct effects on external entities, are taken outside plenary organs. They are usually considered as operational decisions taken in order to implement rules adopted in plenary or in the framework of explicitly or implicitly delegated tasks and mandates. Most of the case studies of this issue deal with decisions taken in secretariats and subordinated intergovernmental bodies and expert-commissions or committees of IOs.

Two rationales behind the delegation of decision-making to such bodies can be discerned. The first rationale concerns the quest for objective and expertise-driven decisions. For some tasks government-representatives are considered lacking the necessary impartiality and expertise. For instance, the UNESCO world heritage committee consists of independent experts who are supposed to decide impartially on the granting of the desired world heritage status. Another example from the case studies is the FAO/WHO Codex Alimentarius Commission, consisting of governmental experts and private interest-groups tasked with regulating global food-safety standards. Governmental delegations to the Commission often include industry-representatives. However, despite its "technical" mandate, the Commission deals with highly politicized issues such as the assessment of GMO-products.[61] The findings of the Commission, even though being of a non-binding nature, determine whether or not specific food-products can be banned by national governments. The reason for this is that the decisions of the Commission can effectively be "hardened" and enforced by WTO-mechanisms.

The second reason for the delegation of decisions to smaller bodies is the attempt to increase the effectiveness of decision-making.[62] A smaller body is usually more likely to make decisions in a reasonable time frame. In terms of facilities and

[60] G. DAHM & R. WOLFRUM, VÖLKERRECHT 240 *et seq.* (2002).

[61] Pereira, in this issue.

[62] With a critique of the call for effective implementation and the corresponding mindset, *see* M. Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization,* 8 THEORETICAL INQUIRIES IN LAW 9 (2007).

translation deliberations in smaller sized bodies are less costly then those in the plenary organs. Executive boards, councils and governing bodies, composed of a smaller number of government representatives were established out of this functional necessity. Most of these boards officially function under the authority of the plenary, some however have their own independent executive powers.[63] A prime example is the UN Security Council, which has developed a system of subcommittees consisting of national diplomats from the permanent missions of the members of the Security Council in New York.[64] The division of labor between the council and the plenary regarding policy decisions depends on the constitution of the respective IO and is not always clear cut.[65]

Operational decisions can be regarded as complex processes of decision-making often involving the secretariat, the governing board, technical committees and external experts. In the case of the World Bank a decision to finance a country project is prepared by the civil servants and taken by the World Bank board of directors.[66] Similarly, UNICEF country programs are prepared by the management of the organization, adopted by the UNICEF executive board lock stock and barrel to be subsequently implemented through individual projects based on decisions taken by the staff members of the organization.[67]

Implementation of such projects on the ground frequently involves the use of external expertise provided by scientists and NGOs. The promotion of standards through secretariats might also involve activities of norm-concretization through manuals, guidelines and commentaries. Such autonomous acts of norm-concretization, however, involve an element of norm-creation.[68] On the international level this is particularly relevant because norm-concretization through the secretariat or a functional committee may have direct influence on how domestic legislators eventually regulate the issues at hand. This indirect form of

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[63] SCHERMERS & BLOKKER (note 1), at § 409-421.

[64] On the powers of the Security Council, *see* G. Nolte, *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS - ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 315-326 (Michael Byers ed., 2000).

[65] R. Wolfrum, in this issue.

[66] Dann, (note 54), at 21-25.

[67] On program-management in IOs, *see* D.T.G. Dijkzeul, *Programs and the Problems of Participation, in* RETHINKING INTERNATIONAL ORGANIZATIONS PATHOLOGY AND PROMISE 197-233 (D.T.G. Dijkzeul ed., 2003).

[68] H. KELSEN, REINE RECHTSLEHRE. EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK 98 (1934).

global rule making through model-legislation can have an enormous regulatory impact even though it is based on non-binding standards and autonomous promotional activities by often not more than a handful of international civil servants, experts and private interest-representatives. This is illustrated in the case studies in this issue on the Code of Conduct for Responsible Fisheries and on the OECD-activities in the field of taxation.[69]

In terms of the state of formalization and rationalization of operational decision-making the first observation is that subordinated technical committees and secretariats of IOs in general enjoy a high degree of discretion regarding the implementation of their mandate. However, there is an obvious need to fill the substantive legal void left by the constitution of the IO with internal organizational structures aiming at the rationalization of decision-making-processes. Such structures are usually adopted by the bodies themselves in order to allow for a certain degree of internal managerial control and efficiency. As the case studies presented in this research project prove, all international bureaucracies take recourse to internal guidelines, rules of procedures and regulations, which set out internal procedures of decision making. The level of formalization of such internal rules depends on the organization. Such rules are usually developed autonomously by the secretariat, management or the respective committees.

These internal rules intend to structure the process of decision–making and regulate which entities within and outside of the organization must be involved at which stage of the process. They may involve arrangements for incorporating external expertise from NGOs, scientists and other private interest groups through the secretariat and committees, either in the preparation phase (background studies for standard setting and programs) and/or in the implementation phase (project partners operating on the ground).[70] Both the World Bank and UNICEF for instance have a highly complex internal program cycle based on internal guidelines which governs internal decision making by sequencing meetings and the submission of documents for country programs. In terms of the types of procedures used in different substantive fields of governance striking similarities with national bureaucracies can be observed. For example programs and project-cycles are also being used in the field of the administration of subsidies in the national realm.[71] As can be seen in the case studies in this issue some IOs have even shaped procedures according to domestic legal principles replicating procedures of a fair hearing,

[69] Friedrich, in this issue.

[70] L. Dubin & R. Nogellou, *Public Participation in Global Administrative Organizations*, 3RD GLOBAL ADMINISTRATIVE LAW SEMINAR (June 15-16, 2007) (on file with author).

[71] Dann (note 54), at 21-25.

public access to information, the right to reasoned decisions and access to judicial relief on the international level.

1. Fair Hearing and Reasoned Decision-Making

In terms of the right to fair hearing, the UNHCR-case study in this issue demonstrates that the determination of a refugee-status has striking commonalities with the procedure of recognition of such a status under national immigration law.[72] The affected individual is generally heard by the UNHCR-staff before the decision is taken and there is an internal appeal-mechanism open to the respective individuals. Decisions in the appeal-procedure will then be taken by another UNHCR-staff member. The internal UNHCR-standards for determining refugee status "simulate" due-process procedures, which can be found in national administrative settings. The main difference is the lack of access of the affected individual to independent review by an administrative court or tribunal.

Another example for "simulated" due process are the revised guidelines of the UN-Security Council Counter Terrorism Committee regarding the listing of individual terror suspects falling under the Council's asset-freeze sanction regime. As described in the case study, the revised guidelines have introduced the duty to state the reasons why a particular person should be listed in more detail.[73] According to the guidelines states are now also supposed to inform the listed individual of the fact that he or she was listed. They also foresee the establishment of a focal point mandated to receive individual complaints and requests for instituting the de-listing procedure. In particular the Security-Council example shows, however, how far IOs still are from taking domestically established procedural legal principles seriously.

2. Public Participation and Access to Information

In line with domestic developments in administrative culture a number of IOs have adopted policies in order to enhance public participation and public access to information. The OECD for instance tries to enhance public participation by so called notice and comment-procedures and by open processes of consultation with NGOs on certain issue-areas.[74] However, the results of public participation-

[72] Smrkolj, in this issue. On the due process principle from a comparative perspective, *see* G.d. Cananea, *Equivalent Standards under Domestic Administrative Law: a Comparative Perspective* 116-125 (2007) (manuscript, on file with author).

[73] Feinäugle, in this issue.

[74] Goldmann, in this issue; Dubin & Nogellou (note 70).

processes are never binding for the bureaucracy. Final decisions are taken by governmental bodies or the secretariat of the IO.

The most progressive developments regarding these principles can be found in organizational settings in the field of environmental law. The Aarhus convention sets out specific rights of participation for the public and interested individuals.[75] In the Almaty-Guidelines of 2005[76] the member states of the UN-Economic Commission for Europe foresee the application of these principles not only at the state or EU-level, but also at the level of IOs. The Aarhus principles include the active dissemination of information on all environmental policy-making processes through the internet as well as access to relevant drafts and meetings within the respective IOs.[77] Remarkably, states are obliged to actually take into account comments and proposals of NGOs and other individuals participating in these fora.[78] As Jürgen Friedrich suggests in his case study on the rather untransparent FAO-policy making procedures in fisheries-issues, the extension of Aarhus principles to the international arena could function as an additional accountability mechanism, especially if access to information and public participation are secured by means of an institutionalized review. [79]

On this issue the ILA-report entitled on "Accountability of IOs" also recommends that IOs implement the "*principle of transparency*" and the *"principle of access to information*" by adopting all normative decisions in a public vote and opening meetings of non-plenary organs to the public.[80] According to the ILA-recommendations non-plenary organs should also grant an appropriate status to members and third states particularly affected by decisions of these organs.[81] Furthermore non-plenary organs should increase public access to information and provide information regarding their activities to all member states including the

[75] BGBl Jahrgang 2006, Teil II, Nr. 31, 15 December, 2006.

[76] United Nations Economic Commission for Europe, Report of the Second Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters held in Almaty, Kazakhstan, 25-27 May 2005, Decision II/4 entitled *Promoting the Application of the Principles of the Aarhus Convention in International Forums,* ECE/MP.PP/2005/2/Add.5, 20 June 2005.

[77] Almaty Guidelines (IV), UN-Dok. Nr. ECE/MP.PP/2005/2/Add.5

[78] Almaty Guidelines (V/ 37), UN-Dok. Nr. ECE/MP.PP/2005/2/Add.5

[79] Friedrich, in this issue.

[80] F. Berman, *et al.*, *ILA-Berlin Conference (2004) on Accountability of International Organizations*, 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 221, 229 (2004).

[81] *Id*. at 230.

texts of draft decisions under consideration.[82] It should not be overlooked in this context that many IOs or organs within them are still reluctant to grant open access to files and negotiations at an early stage of decision-making. The UN-Security Council[83] and the WTO are infamous examples for secret negotiations behind closed doors.[84]

3. Access to Independent Review

Some IOs have reacted to widespread criticism of their policies by introducing quasi-judicial complaint mechanisms on the international level. As referred to in the case studies in this issue, the World Bank inspection panel, Interpol's control commission and the OECD-guidelines on corporate social responsibility [85] for instance foresee the submission of individual complaints by external actors. Notably, such review mechanisms tend to confine the applicable standards to the ones the IO has given itself in the form of internal rules and guidelines.[86] As a result, such mechanisms add to the fragmentation of standards in the law of international institutional law. They do not explicitly allow for the application of general international law and usually do not provide for an appeal. Hence, the main difference compared to national bureaucracies rooted in the rule of law tradition remains the absence of general public law-structures, in which these types of procedures are embedded. The introduction of effective judicial control, however, could potentially help to remedy illegal effects on third parties and reorient the activities of the international institution in general international law. At the same time and somewhat paradoxically, effective judicial review itself is greatly facilitated by the existence of a general law of administrative procedures.[87]

Generally speaking operational decisions in IOs are of course not taken at random. They usually follow certain internal procedures of decision making based on particular rationalities. However, only in exceptional cases are such internal structures shaped according to general legal principles regulating the effects such decisions might have on third parties. Procedural rules usually aim at the internal rationalization of decision-making rather than trying to make decisions more

[82] *Id*. at 231.

[83] Feinäugle, in this issue.

[84] Dubin & Nogellou (note 70).

[85] Schöndorf-Haubold, in this issue.

[86] *Id*..

[87] Schmidt-Aßmann, *Verwaltungsverfahren und Verwaltungskultur*, NVwZ 40, 43 (2007).

transparent, let alone attempting to institute an external judicial or transparent political review.

E. Strategies to Bring General International Law Back In

International lawyers have reacted to the control-problem in different ways. A growing number of authors attempt to bring the constraining force of law to bear in decision-making of international bureaucracies. Two strategies should be mentioned in this context: First, the claim for internal constitutionalisation of IOs through the progressive development of existing principles of the law of international organizations or through comparative analysis of various domestic administrative law traditions.[88] Second, the demand that IOs adhere to human rights standards.

I. Internal Constitutionalisation

In its 2004 report on the accountability of international organizations the International Law Association recommended a number of general procedural principles for decision-making in IOs. The report's aim was to contribute to the "progressive development" of international law in that area and left open the question of the respective sources of the postulated procedural principles. Some clearly stemmed from national administrative law traditions.[89] A number of recommendations attempt to strengthen hierarchical mechanisms of political supervision. Under the "*principle of supervision*" parent organs should have a duty to exercise a degree of control over subsidiary organs which corresponds to the functional autonomy granted, including the right to overrule decision of subsidiary organs.[90] Questions related to *ultra-vires* and implied powers are subsumed under the "*principle of constitutionality*",[91] obliging the organs of the IO to carry out their functions in accordance with the rules of the organization. Constitutionalization in this context is understood as strengthening internal reformalization without addressing the question of conformity with substantive rules of international law.

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[88] On this approach G.D. CANANEA, EQUIVALENT STANDARDS UNDER DOMESTIC ADMINISTRATIVE LAW: A COMPARATIVE PERSPECTIVE 113-115 (2007) (manuscript, on file with author). On the evolution of administrative norms, *see* E. Benvenisti, *The Interplay between Actors as a Determination of the Evolution of Administrative law in International Institutions,* 68 LAW AND CONTEMPORARY PROBLEMS 319-340 (2005).

[89] For due process from a comparative perspective, *see* CANANEA (note 88).

[90] F. Berman, *et al.* (note 80), at 221, 237.

[91] *Id*. at 236.

The International Law Association was reluctant to set out recommendations for specific types of procedures, instead formulating a general "*principle of procedural regularity*"[92] according to which IOs should prevent abuse of discretionary powers, avoid errors of fact and law and ensure respect for due process and fair treatment. Another principle recommended which stems from national administrative traditions is the "*principle of objectivity and impartiality*"[93]. The principles recommended by ILA try to transfer procedural principles from various national rule of law-traditions to the global level. The report also takes up the classic claim of amending Art. 34 (1) of the ICJ-Statute in order to give IOs locus standi before the court.[94] Through such a mechanism of direct judicial action the recommended principles could then be confirmed by universal adjudication.

The procedural principles set forth in the report are an attempt to reconstitutionalize decision-making in international bureaucracies. Their aim is to strengthen internal hierarchies and to introduce elements of the rule of law – tradition for decision-making on the global level. Law is supposed to preside over efficiency or as Jan Klabbers has put it: "a constitutional approach would radically reject the proposition that the end justifies the means"[95]. A constitutional sensibility certainly must be welcomed and can be seen as a driving element behind this project. The question, however, is whether the strategy to re-entrench internal organizational hierarchies alone could solve the control problem in practice. After all, many national bureaucracies, particularly those from Western states, do not seem to have severe problems with the general loss of control over expert bodies and functional committees. They have contributed to this development in the past. Others often don't have the resources to contribute to more effective supervision. Many national actors therefore are likely to resist the proposed strategy of internal constitutionalization or will not be able to live up to the expectations raised by it.

II. Human Rights

A further strategy of imposing legal limits on IO decision-making to be dealt with in this context is the insistence on strict adherence of international bureaucracies to human rights standards. Such demands were triggered by the dramatic social consequences of particular economic policies of international financial and trade

[92] *Id*. at 239.

[93] *Id*. at 239.

[94] *Id*. at 291.

[95] J. Klabbers, *Constitutionalism Lite*, 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 31, 58 (2004); M. Koskenniemi (note 62).

institutions, by the death of thousands of Iraqi children as a result of the UN-Security Council's sanctions program, the disputed listing of terror suspects by its Anti-Terrorism Committee, UNHCR's involvement in forced repatriation of refugees and by many other human rights-sensitive issues administered and enforced by international bureaucracies. The argument that human rights should apply to IOs has been advanced from both a procedural and a substantive angle.[96] Criticism has been based on a number of rights, ranging from the right to a fair hearing (Art. 14 ICCPR) to the right to food and water (Art. 11 ICESCR).

Legally the question of whether or not IOs are bound by international human rights norms without having ratified the two principal human rights covenants or other human rights conventions is far from being clarified.[97] According to a frequently used argument in the UN-context, the promotion of human rights is one of the principle goals of the organization, as set out in the UN-Charter. Human rights violations committed by the organization itself therefore cannot be justified.[98] One could also argue that some human rights norms are part of international customary law and as such are binding also upon IOs.[99] If that is the case the question needs to be asked which norms have acquired the status of customary law and to what extent such necessarily vague customary norms can actually set limits to concrete activities of international bureaucracies. In the absence of compulsory judicial review on the global level these uncertainties are not likely to disappear in the near future. Decentralized judicial controls by national and regional courts can potentially have an impact on the development of universal standards in this area.[100]

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[96] F. Mégret & F. Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUMAN RIGHTS QUARTERLY 314-342 (2003).

[97] von Bogdandy, in this issue; de Wet, *Holding International Institutions Accountable: the Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, in this issue

[98] B. Fassbender, *Targeted Sanctions imposed by the UN-Security Council and Due Process Rights*, 3 INTERNATIONAL ORGANIZATIONS LAW REVIEW 437-485, 468-469 (2006). On this problem, *see* A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions,* 95 AJIL 851-872 (2001).

[99] Most commentators accept that IOs are in principle bound by international customary law, *see* J.E. Alvarez, *International Organizations: Then and Now*, 100 AJIL 324-347 (2006).

[100] *See* de Wet, *Holding International Institutions Accountable: the Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, in this issue; G. Cananea, *Return to the Due Process of Law: The European Union and the Fight Against Terrorism,* Comment on Court of First Instance judgment of December 16, 2006, Case T-228/02, Organisation de Modjahedins de l'Iran v Council, 32 E.L. Rev. 2007, 895-906 (on file with author). On the role of national courts *see* E. Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, 102 AJIL 241 (2008).

Despite - or perhaps precisely because of the vagueness of human rights entitlements the power of human rights-discourse to politically constrain international bureaucracies seems unmatched by any other strategy of re-legalization. The discursive scandalization of certain IO-policies by international NGOs based on human rights language has proven to have an effect on IOs. Social mobilization through media-driven campaigns has put a number of IOs on the defensive. As a reaction, many IOs have paid lip-service to human rights protection by officially declaring their commitment to these principles. "Human Rights Mainstreaming" has become a big issue in most IOs these days. Whether these initiatives are just a strategy of accommodation in the face of public resistance or the beginning of the acceptance of general legal constraints imposed by international law, remains to be seen. One thing seems clear: scandalization alone might divert public attention from problematic IO-routines which are less suitable for globalised media-coverage but nonetheless have a strong impact on the daily lives of individuals.[101]

F. Conclusion

Wolfgang Friedman at the height of the Cold War in his famous "The changing structure of international law" considered international co-operation through international organizations as the most important future project for international law. Organized co-operation was supposed to rescue mankind from "ruinous and destructive competition and exploitation of the resources of the earth short of war"[102]. Since then international law has indeed helped to bring about and stabilize many new organizational entities dealing with the most important economic, social and security-related issues of the planet. It seems, however, as if the role of international law remained confined to the creation of these new entities as powerful new actors without helping to embed them in procedural and substantive legal structures of a general nature. As a result, these actors have relied on flexible internal structures of decision-making, hereby increasing their individual autonomy in the process of developing and implementing global rules. They produce a myriad of political decisions every day, often taken in the absence of a binding legal basis. The resulting fragmentation of institutional practice not only impedes effective legal controls but also makes it more difficult for the public sphere to effectively address and contest political outcomes and redistributive effects of global governance.[103] In the meantime Friedman's dystopia, consisting of

[101] For a general critique of human rights discourse along these lines, *see* D. KENNEDY, THE DARK SIDES OF VIRTUE 3-35 (2004).

[102] W.G. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 94 (1964).

[103] Insisting on a space for politics, *see* J. Klabbers, *Two Concepts of International Organization*, 2 INTERNATIONAL ORGANIZATIONS LAW REVIEW 277, 292 (2005).

destructive competition, exploitation of resources short of war and an increasing global "apartheid" created by extreme poverty continues to unfold.