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Editorial

Dear Readers,

we are glad to present you the current issue, a special issue on the exercise of International Public Authority. It emerges from a fruitful collaboration with scholars who participated in workshops on this topic at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

Many thanks are due to Matthias Goldmann without whom this issue would not have been possible and who will in the following introduce you to this special issue's topic in a foreword.

We hope the thoroughly selected articles provide for yet another worthwhile read to our readership.

The Editors

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

Matthias Goldmann

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

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

The contributions of this special issue show the interplay of these two dimensions – the call for international regulation, which prompts new activities of international institutions taking hitherto unknown shapes, and the call for legitimacy, which has – or should have – induced certain international institutions to rethink their substantive and procedural standards. To engage with both aspects of the debate, the contributions to this special issue rely on the concept of “international public authority” (IPA). This concept serves as a focus for the identification of crucial acts of international institutions by which they seek to advance public interests on the international level, whether through traditional international law or new, often informal, governance instruments. It also claims that attention should be paid to the legal structures embedding such acts. Legal structures constitute the backbone of both the effectiveness and the legitimacy of such acts.² In these respects, the IPA approach resembles scholarly endeavors such as global administrative law³ or global constitutionalism.⁴

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

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

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

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

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

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

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

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

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

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