

**SPECIAL ISSUE:
PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS**

Cross-cutting Analyses

Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority

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A. Introduction

This article suggests a tentative model for the legal conceptualization of the great variety of instruments by which international institutions exercise public authority, brought to light by the thematic studies of this project. If one were to display this variety of instruments on a scale that ranges from binding international law to non-legal instruments, hardly any thinkable step on this scale would remain empty. Situated at the top end of the scale one would find binding instruments¹ such as international treaties,² periodic treaty amendments,³ decisions on individual cases with binding effect⁴ or decisions having the potential to become binding by way of

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¹ I use the term “binding” instrument as a heuristic category, defined as those instruments which can be ascribed to one of the traditional sources of international law stipulated in Article 38(1) of the Statute of the ICJ. On the difficulties related to the distinction between binding and non-binding norms, see Part E.

² World Bank loan or financing agreements, see Philipp Dann, *Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight*, 44 ARCHIV DES VÖLKERRECHTS 381 (2006).

³ Amendments to CITES Annexes, see Fuchs, in this issue; and to the WCO Harmonized Commodity Description and Coding System, see Feichtner, in this issue.

⁴ Listings of terror suspects by the UN Security Council Taliban and Al-Qaida Sanctions Committee, see Feinäugle, in this issue; Conferral of world heritage status by the UNESCO World Heritage Committee, see Zacharias, in this issue; Waivers for WTO members for implementing changes in the Harmonized System, see Feichtner, in this issue; decisions by the Enforcement Branch of the Compliance Committee

domestic recognition.⁵ While these instruments clearly have external legal effects, other instruments seem to be purely internal rules of procedure, although they have in fact considerable repercussions for national administrations.⁶ Next come various types of soft, i.e. non-binding legal instruments.⁷ Some of these instruments operate in the shadow of binding instruments.⁸ Others are kept in purely soft form, like product standards or codes of conduct,⁹ but also decisions concerning individuals.¹⁰ In the lower part of the scale one would find instruments containing non-binding rules that are foremost aimed at facilitating consultation,¹¹ or soft private law instruments.¹² At the bottom end one would discover non-legal instruments that are devoid of any deontic elements,¹³ but nevertheless have a high

for the Emission Trading System on, e.g., the reduction of emission rights due to past non-compliance, see Láncoš, in this issue.

⁵ International trademark registrations, see Kaiser, in this issue.

⁶ The "HS Procedure" for adapting WTO scales of concessions to changes in the WCO Harmonized Commodity Description and Coding System, see Feichtner, in this issue; the accounting rules for the administration of ETS allowances, see Láncoš, in this issue; and the Operational Guidelines of the World Heritage Committee, see Zacharias, in this issue.

⁷ The term "non-binding legal instrument", which I use in a strictly heuristic sense, is not an oxymoron. Rather, it is based on a relative concept of law which comprises both *binding law* and *non-binding law*, see, *infra*, Part B.I. On the problems related to a conceptual distinction between binding and non-binding law see, *infra*, Part E.

⁸ Refugee Status Determination by UNHCR, see Smrkolj, in this issue; ILO Declaration on Fundamental Principles and Rights at Work, see de Wet, *Governance Through Promotion and Persuasion*, in this issue; general and country-specific recommendations of the OSCE High Commissioner on National Minorities, see Farahat, in this issue.

⁹ Codex Alimentarius, see Pereira, in this issue; FAO Codes of Conduct for Responsible Fisheries, see Friedrich, in this issue; OECD Guidelines for Multinational Enterprises, see Schuler, in this issue.

¹⁰ Interpol notices, see Schöndorf-Haubold, in this issue.

¹¹ Proceedings before National Contact Points in case of complaints for violations of the OECD Guidelines for MNEs, see Schuler, in this issue; country visits and confidential follow-up reports by the OSCE High Commissioner on National Minorities, see Farahat, in this issue; as well as the HS Procedure, see (note 6).

¹² Decision letters concerning ICHEIC insurance claims, see Less, in this issue.

¹³ Only instruments with a significant prevalence of deontic vocabulary expressing commands, requests, and recommendations may be termed legal. As it is sometimes difficult to make a precise distinction between facts and norms at a theoretical level, my distinction between "legal" and "non-legal" instruments is rather heuristic than systematic. In most cases, though, it will not cause any practical difficulty. On the differences between facts, norms and normative facts, see ROBERT BRANDOM, MAKING IT EXPLICIT 623-6 (1994). For a critical assessment, see Jürgen Habermas, *From Kant to Hegel. On Robert Brandom's Pragmatic Philosophy of Language*, 8 EUROPEAN JOURNAL OF PHILOSOPHY (2000) 322.

legal or political impact on the affected policy area. Examples of this class of instruments include factual assessment reports,¹⁴ indicators,¹⁵ reports on implementation and compliance,¹⁶ and databases.¹⁷

The position of an instrument on this scale should not be taken as indication of its effectiveness. Rather, as the thematic studies reveal, each of the instruments surveyed in this project has its way of effectively contributing to the exercise of public authority¹⁸ in the policy area concerned. This is no coincidence as one criterion for the compilation of the instruments surveyed was that they have a perceptible impact on public policy. The driving interest behind this project is not so much the questions whether, why and to what extent international instruments are effective,¹⁹ nor why policymakers opt for a particular type of instrument in a particular situation,²⁰ but first and foremost to provide a legal account of effective international public authority, and to further develop the legal framework within which such authority is situated. The purpose of such a legal account is to foster both the effectiveness and the legitimacy of international public authority. Legal concepts serve as analytical tools, provide a medium for critique, and have the capacity of transposing imponderable discourses about legitimacy into more precise, sustainable, manageable and reliable concepts of legality.²¹ This is due to the law's capacity to rationalize disagreement on questions of justice through the

¹⁴ Risk assessment reports containing scientific information for risk management within the Codex Alimentarius Commission, *see* Pereira, in this issue; reports assessing eligibility for the Emission Trading System, *see* Láncoš, in this issue.

¹⁵ Armin von Bogdandy & Matthias Goldmann, *The Exercise of International Public Authority through National Policy Assessment. The OECD's PISA Policy as a Paradigm for a New International Standard Instrument*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW (forthcoming 2008).

¹⁶ Many examples are mentioned in the thematic studies. *See*, for example, the review mechanism in the Committee on Trade in Financial Services installed on the basis of China's Accession Protocol to the WTO, *see* Windsor, in this issue.

¹⁷ In the context of Interpol, *see* Schöndorf-Haubold, in this issue.

¹⁸ On the concept of public authority, *see* von Bogdandy, Dann & Goldmann, in this issue.

¹⁹ This is what distinguishes this project from research on compliance. *See* ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS (2008); COMMITMENT AND COMPLIANCE (Dinah Shelton ed., 2000); INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., 1997). For a critical viewpoint, *see* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

²⁰ *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421 (2000); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INTERNATIONAL ORGANIZATION 495 (1991).

²¹ On this agenda, *see* von Bogdandy, Dann & Goldmann, in this issue, part B.II.

use of formalistic arguments about rights and obligations.²² Certainly legal arguments are not free of contingency. Nevertheless, I consider the formalism of legal discourse as preferable to “pure” moral reasoning because it “enable[s] the legal profession to continue to carry out its legal job without having to transform itself into a legislative agency (“realise policy”) or a priesthood of right and wrong.”²³

It is submitted that this legal account of international public authority requires a legal conceptualization of the *instruments* by which public authority is exercised. This follows from our approach²⁴ for at least three reasons. Two reasons are rather practical. First, our approach focuses on the *exercise* of international public authority. Accordingly the authoritativeness of an international institution’s policies depends primarily on the kinds of instruments involved. Consequently an account of typical instruments would facilitate the identification of policies by which public authority is exercised. Second, the legal standards to be developed for ensuring the legitimacy of each exercise of international public authority, i.e. the concrete rules addressing competence, procedures, participation, transparency, accountability, judicial review, etc., cannot possibly be the same for all instruments. Obviously an international treaty that receives domestic ratification and has no immediate repercussions for individuals poses a legitimacy challenge that is different from that of a technical code adopted by a secretive round of government experts or an instrument affecting the financial interests of named individuals. The response of international institutional law to international public authority, therefore, needs to be specific to the type of instrument in question. The development of instrument-specific standards accentuates the administrative law bequest of our approach, as it entails a concretization and specification of constitutional principles. The third reason is epistemological and depends on the first two reasons. There is no direct access to reality, but only through the

²² This is the common denominator of otherwise very different legal theories within the communicative paradigm, see FRIEDRICH KRATOCHWIL, *RULES, NORMS, AND DECISIONS* 200 (1989); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 563 *et seq.* (2nd ed., 2005); JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* 272 *et seq.* (1992).

²³ Martti Koskeniemi, *Introduction*, in *SOURCES OF INTERNATIONAL LAW* xi, xiii (Martti Koskeniemi ed., 2001). This idea is also a driving factor for constitutionalist approaches, see Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 579, 610 (2006). Comprehensive on the role of the rule of law for channeling disagreement on questions of justice, see SAMANTHA BESSON, *THE MORALITY OF CONFLICT* 205 *et seq.* (2005).

²⁴ By “our approach,” I mean the concept set out in von Bogdandy, Dann & Goldmann, in this issue. It goes with out saying that not all aspects of this approach are shared by all participants in the project.

intermediation of concepts.²⁵ If there are good practical reasons for conceptualizing typical instruments in law, the concepts need to be *legal* ones. As each scholarly discipline has a specific interest in reality, it needs to define its own concepts for approaching reality. Thus, the aesthetics of the color blue are meaningless for the spectral analysis of a blue-colored pigment. Therefore, as instruments are to play a major role in the development of the law of international institutions, they need to be *legally* conceptualized.

This conceptualization of instruments should have the potential to cover diverse forms of public authority and include binding and non-binding legal as well as non-legal instruments. Presently the legal status of many of these instruments is all but clear.²⁶ The revealed plurality of instruments stands in marked contrast to the narrow limits of the classical doctrine of the sources of international law as stipulated in Article 38(1) of the ICJ Statute (hereinafter “sources doctrine”). Article 38 only provides for customary law, general principles of law, and treaties. Looking at the instruments under analysis in the thematic studies, only a few of them could be considered as “secondary”²⁷ treaty law,²⁸ and again fewer could be taken as representations of customary international law.²⁹ A large portion of the instruments of public authority, for which I will use the shorthand term “alternative instruments,” simply escapes the sources doctrine because of their lack of binding force (non-binding law), or of legal rules (non-law). The term “soft law,” though commonly used, assembles a very heterogeneous array of non-binding instruments.³⁰ Because it does not provide any meaningful conceptualization, the term “soft law” is not much more than a slightly more elegant way of saying “underconceptualized law.” Thus, a large part of the instruments by which international institutions exercise authority remains beyond the reach of meaningful legal concepts.

²⁵ “Gedanken ohne Inhalt sind leer, Anschauungen ohne Begriffe blind.” (Thoughts without content are empty, intuitions without concepts are blind): IMMANUEL KANT, *CRITIK DER REINEN VERNUNFT* 75 (2nd ed., 1787).

²⁶ For a detailed analysis, see Part B.

²⁷ The term “secondary” does not allude to HERBERT L.A. HART, *THE CONCEPT OF LAW* 79 (1961), but to the concept of secondary, or delegated, legislation as used in the context of EU law. See also JURIJ ASTON, *SEKUNDÄRGESETZGEBUNG INTERNATIONALER ORGANISATIONEN ZWISCHEN MITGLIEDSTAATLICHER SOUVERÄNITÄT UND GEMEINSCHAFTSDISZIPLIN* (2005).

²⁸ Changes to CITES appendixes, see Fuchs, in this issue; modifications of the Harmonized System, see Feichtner, in this issue.

²⁹ See de Wet (note 8).

³⁰ In this article, “soft law” is used in reference to the bindingness, and not to the degree of textual precision of an instrument.

The lack of a legal account of alternative instruments is all the more disconcerting as their legitimacy raises at least as many questions as that of binding international law.³¹ For example, alternative instruments might affect *democratic procedures* by facilitating two-level games in which national executives bypass their parliaments and other national stakeholders by agreeing on effective international instruments that do not require domestic ratification.³² Democratic decision-making might also be compromised by uncertainty about the competencies and procedures required for adopting alternative instruments. Who is authorized to adopt what kind of alternative instrument? While statutes of international organizations, professional associations, etc., usually stipulate whether an organ of the organization may adopt binding rules, alternative instruments are frequently adopted in the absence of a comparable statutory rule of competence and sophisticated rules of procedure ensuring participation, accountability, etc. Further, alternative instruments may affect *legal certainty* because they might modify the meaning of a binding rule without modifying the text of that rule.³³ Finally, alternative instruments might infringe *individual rights*. Interpol notices, for example, might have serious consequences for those named in them.³⁴ As a result one could say that alternative instruments face many of the well-known legitimacy problems of global governance.³⁵

This article attempts to sketch an approach that has the potential to cover a diverse range of instruments of international public authority and thereby to create some conceptual transparency for the “opacity” of instrumental pluralism in the postnational constellation.³⁶ This approach rests on the conviction that lawyers

³¹ This is the reason for Jan Klabbers’ philippic against soft law, see Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC JOURNAL OF INTERNATIONAL LAW 381 (1998). See also Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241, 243 (2004); Eyal Benvenisti, “Coalitions of the Willing” and the Evolution of Informal International Law, in COALITIONS OF THE WILLING: AVANTGARDE OR THREAT? 1 (Christian Callies, Georg Nolte & Peter-Tobias Stoll eds., 2006).

³² Kerstin Martens & Klaus D. Wolf, *Paradoxien der Neuen Staatsräson. Die Internationalisierung der Bildungspolitik in der EU und der OECD*, 13 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN 145 (2006); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICHIGAN LAW REVIEW 167 (1999-2000).

³³ Illustrative is the ECJ Case 322/88, *Grimaldi v. Fonds des Maladies Professionnelles*, 1989 E.C.R. 4407.

³⁴ Schöndorf-Haubold, in this issue.

³⁵ For many others, see Joseph H. H. Weiler, *The Geology of International Law - Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 547 (2004).

³⁶ JÜRGEN HABERMAS, *DIE POSTNATIONALE KONSTELLATION* (2003).

should not deplore relative normativity³⁷ but seek to get it under control. The envisaged account combines internal and external perspectives. It aims at building bridges between the instrumental plurality of global governance revealed by external, or material, perspectives, and the internal, or formal, viewpoint of law that follows the binary logic of the difference between legal and illegal.³⁸ This requires the formulation of multiple rules of identification for multiple types of instruments of public authority. Each of these rules of identification will identify one type of instrument, called standard instruments, of international institutions according to formal parameters. Standard instruments constitute the backbone of international institutional law: they enable the identification of instruments that are comparable to a degree that justifies the development and application of one identical legal regime that sets up rules regarding competence, procedure, judicial review, etc.

Part B provides the theoretical groundwork for the envisaged legal account. Reviewing various scholarly strategies that aim at coming to terms with alternative instruments, it argues that a successful account requires a relativist and internal viewpoint. On this basis, Part C introduces the concept of standard instruments, elaborates the parameters that serve as a toolbox for the definition of rules of identification, and suggests tentative rules of identification for a number of standard instruments that emerge from the project. Part D explores some elements of their respective legal regimes. Part E concludes with some observations, drawn from the present approach, on what it means in terms of legal theory to consider an instrument "binding."

B. Approaching Alternative Instruments: Theoretical Vantage Points

This section makes the case for a conceptualization based on a relative concept of international legal normativity and assuming an internal perspective. It claims that this standpoint is best suited for a legal account that aims at covering a wide specter of alternative instruments and at facilitating discourse about their legality. In making this point this section also reviews the ways in which different streams in international legal scholarship presently conceptualize alternative instruments. It thereby corroborates the initial assumption that alternative instruments are underconceptualized at present, and shows how the envisaged account relates to

³⁷ See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 413 (1983).

³⁸ On the difficulty to distinguish external from internal views, see Klaus Günther, *Legal Pluralism or Uniform Concept of Law?* 5 NO FOUNDATIONS. JOURNAL OF EXTREME LEGAL POSITIVISM 5 (2008). On the internal perspective of this project, see von Bogdandy, Dann & Goldmann, in this issue.

contemporary research. Because non-legal instruments rarely have been conceptualized in international law,³⁹ this section largely focuses on the literature on binding and non-binding legal instruments, without any claim to completeness.

I. Absolute vs. Relative Concepts of Law

One fundamental distinction in the debate about alternative instruments is that between absolute, or binary, and relative, or gradual, concepts of law.⁴⁰ Absolute positions make a categorical distinction between (binding) law and (non-binding) non-law. A rule is either part of (binding) law or it remains in the penumbra of politics or morals. Relative positions, however, assume that different grades of legal normativity are conceivable.⁴¹ In the case of international law, some relativists suggest a continuum ranging from non-law to *ius cogens*.⁴²

³⁹ Gauthier de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, 77 NORDIC JOURNAL OF INTERNATIONAL LAW 23 (2008). National law perspectives are similarly rare, see Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEORGETOWN LAW JOURNAL 257 (2000-2001); Christian Bumke, *Publikumsinformation. Erscheinungsformen, Funktionen und verfassungsrechtlicher Rahmen einer Handlungsform des Gewährleistungsstaates*, 37 DIE VERWALTUNG 3 (2004). Remarkably more research has been carried out on the Open Method of Coordination, which also comprises non-legal instruments, see David M. Trubek & Louise G. Trubek, *Hard and Soft law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, 11 EUROPEAN LAW JOURNAL 343 (2005); Christian Engel, *Integration durch Koordination und Benchmarking*, in EUROPÄISCHES VERWALTUNGSVERFAHRENSRECHT 408 (Hermann Hill & Rainer Pitschas eds., 2004). On research from other disciplines, see Dirk Lehmkuhl, *Governance by Rating and Ranking*, Paper presented at the 2005 Annual Meeting of the International Studies Association, on file with the author.

⁴⁰ On this distinction, see Dinah Shelton, *International Law and 'Relative Normativity'*, in INTERNATIONAL LAW 145, 167-8 (Malcolm Evans ed., 2003); Anne Peters & Isabella Pagotto, *Soft Law as a New Mode of Governance: A Legal Perspective*, New Modes of Governance Project, Paper No. 04/D11, 6 (2006).

⁴¹ For reasons of conceptual clarity, it should be added that absolute and relative positions can be combined both with uniform accounts of law, which assume that there is only one overarching international legal order, and with pluralist accounts, which embrace the view that there is a heterarchy of different legal orders. On uniform and pluralist accounts, see Günther (note 38), at 6. On the relationship between legal pluralism and the monism vs. dualism debate, see Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 397 (2008).

⁴² Pierre Eisemann, *Le Gentlemen's agreement comme source du droit international*, 106 JOURNAL DU DROIT INTERNATIONAL 326 (1979); Richard Baxter, *International Law in Her Infinite Variety*, 29 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 549, 563 (1980); Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 901, 913 (1999); Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 850, 866 (1989). Willem Riphagen proposes a circular, rather than a linear relationship, see Willem Riphagen, *From Soft Law to Ius Cogens and Back*, 17 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 81 (1987).

Contemporary accounts of international law that pursue an absolute concept of law claim that only the sources enumerated in Article 38(1) of the ICJ statute may give rise to *legal* obligations. All rights and obligations entail basically the same legal effects while non-binding instruments are considered mere “legal facts”⁴³ or “political” instruments.⁴⁴ The term “soft law” is therefore considered a misnomer.⁴⁵ Certainly, scholars entertaining an absolute concept of law do not simply pass over alternative instruments. Rather, the effects of non-binding instruments on the traditional sources of international law are acknowledged. Accordingly, non-binding instruments are seen as important evidence of the existence of *opinio iuris*; as rules of interpretation for the concretization of general clauses like “good faith” or indeterminate treaty provisions; as means for facilitating implementation of indeterminate treaty provisions; and as limitations to the scope of domestic jurisdiction.⁴⁶

Absolute concepts of law find their origin in positivist legal theories, which are primarily focused on the national level.⁴⁷ Two central arguments are presented in favor of an absolute concept of international law. The first is the idea of state sovereignty and of a predominantly horizontal international order. These principles dictate strict adherence to voluntarism and make anathema the idea that legal obligations might arise against or without the will of states.⁴⁸ The second is the

⁴³ Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EJIL (2008), issue 5, on file with the author.

⁴⁴ Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 787 (1986); Michael Bothe, *Legal and Non-legal Norms - A Meaningful Distinction in International Relations?*, 11 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 65, 95 (1980); WOLFGANG HEUSEL, “WEICHES” VÖLKERRECHT. EINE VERGLEICHENDE UNTERSUCHUNG TYPISCHER ERSCHEINUNGSFORMEN 47 (1991).

⁴⁵ Bothe (note 44), at 95.

⁴⁶ Daniel Thürer, *Soft Law*, in IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 452 (Rudolf Bernhardt ed., 2000); see also the statements in *A Hard Look at Soft Law*, in PROCEEDINGS OF THE 82ND ANNUAL MEETING 371 (American Society of International Law ed., 1988). The list could be continued. This account is shared by scholars arguing from very different theoretical standpoints, including traditional positivist as well as constructivist approaches. See KRATOCHWIL (note 22).

⁴⁷ Theorists like Austin, Kelsen, Hart, and Luhmann generally follow an absolute approach.

⁴⁸ See the strictly horizontal view of the international legal order in Weil (note 37), at 417-9. Further, the distinction between legal acts and legal facts is based on a voluntaristic concept of law, see d’Aspremont (note 43), at 4.

general positivist concern of ensuring a “pure” concept law that is uncontaminated by values, morals and political considerations.⁴⁹

The first argument presents more an empirical than a theoretical challenge.⁵⁰ On a theoretical level relative normativity can be reconciled with a strictly voluntaristic approach to international law if one considers that states might simply choose to create instruments of varying legal normativity.⁵¹ Empirically the contemporary state of the international order brings the sovereignty argument considerably under stress because it looks more and more vertical. International institutions exercise considerable public authority that is only remotely related to state consent.⁵² As the thematic studies of this project amply demonstrate, majority votes, bodies with limited composition and expert committees are now part of daily international affairs. Consensual acts might affect states that never consented to them.⁵³ But even if all these developments were seen as exceptions that prove the rule of a still largely horizontal international order characterized by state sovereignty, empirical proof would still militate against the exclusion of non-binding legal instruments from the concept of law. The thematic studies in this issue show that such instruments function as independent sources of public authority.⁵⁴ Some of them look like law and function like law. They govern public affairs in situations where practical reasons impede the adoption of law under the sources doctrine⁵⁵ or where an existing treaty framework proves insufficient.⁵⁶ Non-binding legal instruments, therefore, put limits to state sovereignty just as much as instruments falling under the sources doctrine because states chose them to do so. As a result, for empirical reasons, sovereignty and state consent cannot be invoked as arguments for limiting non-binding legal instruments to the role of mere auxiliaries to the traditional sources of international law and leaving them essentially before the doors of the

⁴⁹ Weil (note 37), at 421.

⁵⁰ Insofar I agree with Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296, 301 (1977).

⁵¹ Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 305, 325 (1993).

⁵² See Ingo Venzke, in this issue.

⁵³ This is particularly the case of financial regulations which are usually made by developed states.

⁵⁴ See Part A. For further examples of effective governance through alternative instruments, see JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 217 *et seq.* (2005). For the literature about compliance with alternative instruments, see (note 20).

⁵⁵ Ravi Afonso Pereira, in this issue; Gefion Schuler, in this issue.

⁵⁶ Jürgen Friedrich, in this issue.

concept of law.⁵⁷ Such an absolute concept of law is unconvincing if one sees the role of public international law in providing a comprehensive framework for the international order.⁵⁸ Consequently absolute concepts of law either need to be modified so as to take full account of alternative instruments or should be abandoned for the purposes of this article.

In recognition of this problem three intriguing strategies extend the *absolute* concept of law into the field of alternative instruments by proposing rules of recognition that reach farther than the sources doctrine and would cover a significant number of non-binding legal instruments. The first strategy, proposed by van Hoof, proceeds on the basis of H.L.A. Hart's concept of law and suggests five "points of recognition" for determining all relevant manifestations of consent or agreement that he considers to be rules of international law.⁵⁹ Those points of recognition allow to treat certain non-binding legal instruments and instruments falling under Article 38(1) of the ICJ Statute all the same. The second approach is Andrew Guzman's constructivist rational choice model of international law. Guzman observes that reputation has a far greater, and enforcement a far lesser role for state compliance with international rules than traditional theories of international law suggest. Consequently he defines international law comprehensively as "those promises and obligations that make it materially more likely that a state will behave in a manner consistent with those promises and obligations than would otherwise be the case." This definition clearly includes non-binding law.⁶⁰ The third strategy is proposed by both Brunnée and Klabbbers. They rely on Lon Fuller's eight criteria for the morality of law⁶¹ in order to draw the distinction between law and non-law.⁶² This is a promising way of accommodating any non-binding legal

⁵⁷ In addition, it is difficult to conceptualize the agreement or promise contained in such instruments in other normative orders like politics or morals, see JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 121 (1996).

⁵⁸ On this purpose of public law, see von Bogdandy, Dann & Goldmann, in this issue.

⁵⁹ GODEFRIDUS VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983). Those points of recognition comprise abstract statements (declarations etc. which indicate a state's conviction to be bound), travaux préparatoires, characteristics of the text of an instrument (e.g. language employed, name and preamble of a document), follow-up mechanisms and subsequent practice. *Id.* at 215-279.

⁶⁰ Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIFORNIA LAW REVIEW 1823, 1878 *et seq.* (2002).

⁶¹ According to LON FULLER, *THE MORALITY OF LAW* 33-91 (1964), legal norms (as opposed to moral norms) require generality; promulgation; limited retroactivity; clarity; absence of contradictions; not requiring the impossible; constancy through time; and congruence between official action and declared rule.

⁶² Jutta Brunnée, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 101 (Rüdiger Wolfrum &

instrument within an absolute concept of law because state consent does not play a role in Fuller's model. As Klabbers concedes, Fuller's criteria are not designed to determine the validity of laws, a factor that Fuller presupposes, but rather to ensure their legitimacy.⁶³ Klabbers suggests giving up the categorical distinction between validity and legitimacy that is so fundamental for modern legal positivist thinking.⁶⁴ This distinction also lies at the heart of the second argument listed above. While I fully share and endorse the positivist view that the strength of law lies in its enabling a formalized, rational discourse that produces relatively clear, timely, and enforceable decisions, I do not think that the concept suggested by Brunnée and Klabbers raises concerns in this respect. Most of Fuller's criteria are quite formal and can be applied easily and without too much contingency.

My reservations about absolute concepts of law, including those that react on contemporary instrumental diversity, lie elsewhere, on a more pragmatic level. If the objective of the envisaged conceptualization is to enable the law to provide a comprehensive framework for the international order and the exercise of public authority within this order, i.e. to ensure its effectiveness, legitimacy, and conformance with human rights norms,⁶⁵ absolute concepts of law do not seem to be very helpful. If the scope of the rule of recognition is extended in order to include non-binding legal instruments, instruments that are not equal are put on an equal footing. For example, nobody doubts that instruments outside the scope of the sources doctrine are not susceptible to giving rise to damages or claims before international courts. The envisaged conceptualization should mirror such differences. One-size-fits-all solutions run the risk of downplaying important differences and preclude the formation and application of adequate legal standards that are specific to each type of instrument. As valuable as the proposal by Brunnée and Klabbers is for other purposes,⁶⁶ it does not provide a basis for developing the envisaged conceptualization of instruments of public authority that would allow

Volker Röben eds., 2005); Jan Klabbers, *Constitutionalism and the Making of International Law. Fuller's Procedural Natural Law*, 5 NO FOUNDATIONS. JOURNAL OF EXTREME LEGAL POSITIVISM 84, 91 (2008).

⁶³ Klabbers (note 62), at 106. See also Jan Klabbers, *Reflections on Soft International Law in a Privatized World*, 16 FINNISH YEARBOOK OF INTERNATIONAL LAW 313, 322 (2005 (2008) (pleading for the use of purely formal criteria for the identification of legal rules).

⁶⁴ Klabbers (note 62), at 108.

⁶⁵ On these aims see von Bogdandy, Dann & Goldmann, in this issue.

⁶⁶ In fact, the concept suggested by Klabbers and Brunnée is of great value insofar as it approximates our concept of international public authority, see von Bogdandy, Dann & Goldmann, in this issue. The concept of international public authority seems to be more inclusive insofar as it also encompasses non-legal instruments, and less inclusive insofar as it approaches purely private self-regulation with more caution.

treating different instruments differently and like instruments alike. This objective seems to require a relative concept of law that includes additional categories besides “law” and “non-law” and allows determining not only *whether* an instrument is valid but also *how* it is valid.⁶⁷

Two important caveats should be added. First, discarding absolute concepts of law for the purposes of this project does not amount to assuming that such concepts are “wrong.” The choice between absolute and relative positions is a matter of definition and definitions cannot be right or wrong. They can only be more or less convenient for understanding reality.⁶⁸ Relative concepts might simply provide more convenient solutions measured by the aims of this article.⁶⁹ Second, the preceding argument only supports the view that a relative concept of law is necessary for *defining different categories of instruments* and describing their legal effects. It does not include the claim that *the legal regime* that will be applicable to each category of instruments necessarily needs to be based on a relative concept of law. Rather, each category of instrument resembles a self-contained regime that is subject to judgments that follow the binary code of legality versus illegality.⁷⁰ The maintenance of a binary structure does not cause relative theories to lose their *raison d’être*.⁷¹ Their *raison d’être* is to extend legal discourse to those instruments of public authority that have hitherto remained largely below the radar of legal discourse. Even if the legality of an alternative instrument is an on/off matter a relative understanding still allows a more precise assessment of the legal effects of the instrument and does not have to refer instruments that are constitutive of public authority to substantially different spheres like morality or politics. This is the main point of a public law approach.

⁶⁷ Similar Peters & Pagotto (note 40), at 9; Christian Tietje, *Recht ohne Rechtsquellen?*, 24 ZEITSCHRIFT FÜR RECHTSZOLOGIE 27 (2003).

⁶⁸ KARL POPPER, DIE BEIDEN GRUNDPROBLEME DER ERKENNTISTHEORIE 368 (2nd ed., Troels Eggers Hansen ed., 1994); HANS ALBERT, TRAKTAT ÜBER KRITISCHE VERNUNFT 35-44 (5th ed., 1991).

⁶⁹ My main point of disagreement with proponents of absolute concepts like d’Aspremont (note 43) therefore seems to be a different idea of the purpose of the concept of law, which I see not only as a means of coordination, but as constitutive of an international public order.

⁷⁰ On soft law as a self-contained regime, see Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EJIL 499 (1999). The concept of self-contained regime should be used *mutatis mutandi*, as it usually refers to regimes falling under the sources doctrine.

⁷¹ But see KLABBERS (note 57), at 157 *et seq.*

II. External vs. Internal Standpoints

The preceding section deals with the theoretical concept of law that this article should endorse. Legal theory assumes the external standpoint of an outside observer of legal operations.⁷² Ultimately, however, the present project, and this includes this article, does not aim at fostering legal theory. Its objective is the development of international institutional law so as to facilitate discourse about the validity and legality of instruments, which is an internal perspective. This section argues that the needs of internal standpoints require that we base the envisaged conceptualization on purely formal criteria.

At this point it must be noted that a large share of scholarly analysis of alternative instruments is written from a functionalist perspective and assumes an exclusively external standpoint. Thematically as well as personally this stream of legal research overlaps with other disciplines, in particular with social sciences.⁷³ Although the need for internal conceptualizations finds recognition in this research⁷⁴ it pursues different interests. For example, it describes the use of alternative instruments, their advantages and disadvantages, the reasons why states comply with them, the challenges they imply for democracy, etc. As a consequence of these research interests instruments are judged and classified not according to formal criteria only but also according to material criteria such as their actual effects, the peculiarities of the issue area concerned, the likelihood of states' compliance, etc.

Likewise, legal theory that endorses a relative concept of law maintains an external, observing perspective and frequently uses other than explicitly formal criteria for classifying instruments. For example, according to the theory proposed by Gunther Teubner and Andreas Fischer-Lescano, law, as opposed to other communicative systems, presupposes institutionalized processes of secondary norm-formation,⁷⁵ which is a material criterion referring to social reality. Other theories like the New Haven School and Transnational Legal Process even gloss over the difference between law and other normative discourses like politics and morals, proposing

⁷² For the distinction between external and internal approaches, see HART (note 27), at 88-90.

⁷³ Abbott & Snidal (note 20); HARD CHOICES, SOFT LAW (John J. Kirton & Michael J. Trebilcock eds., 2004); Lipson (note 20); Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581 (2005); SHELTON (note 19); Christine M. Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE 21, 30 (Dinah Shelton ed., 2000); Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICHIGAN JOURNAL OF INTERNATIONAL LAW 420, 431 (1990-1991).

⁷⁴ ALVAREZ (note 54), at 258.

⁷⁵ GUNTHER TEUBNER & ANDREAS FISCHER-LESCANO, REGIME-KOLLISIONEN 43 (2006).

neither formal nor material criteria for distinguishing different kinds of instruments.⁷⁶

What is the problem with the recourse to material criteria? Why do internal approaches need to be based on purely formal criteria? Internal perspectives, i.e. the perspectives of those who need to make decisions about the validity and legality of certain instruments, etc., require *ex ante* judgments. Only formal criteria allow such judgments. The operator with an internal perspective cannot wait until the instrument causes certain effects, is being complied with or not, before he or she makes a judgment about its legal quality that will allow him or her to determine the conditions for its validity and legality. The insider needs to be able to legally qualify an instrument in the moment he or she chooses to make use of it. The operator within a legal system may anticipate the legal quality of that instrument and apply the legal regime provided by international institutional law for instruments of this kind only by way of formal criteria. Formal criteria would enable the identification and classification of an instrument before its “normative ripples”⁷⁷ appear. For this reason the ensuing internal conceptualization hinges on the exclusive use of formal criteria.

C. From Sources to Standard Instruments

I. The Concept of Standard Instruments

This section proposes the concept of standard instruments as a category for the legal conceptualization of instruments of international public authority from an internal, doctrinal perspective. This concept is not entirely new or revolutionary, neither for domestic nor for international law. In addition, it harmonizes with the established sources doctrine.

A standard instrument is a combination of a rule of identification for authoritative instruments of a specific type and a specific legal regime that is applicable to all instruments coming under the rule of identification. The two elements of standard instruments need to be carefully distinguished. The *rule of identification* identifies specific instruments that belong to a certain category of authoritative acts to which

⁷⁶ Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, in 82 RECUEIL DES COURS 137, 162 *et seq.* (1953); Harold Hongju Koh, *Transnational Legal Process*, 75 NEBRASKA LAW REVIEW 181 (1996).

⁷⁷ Klabbers, *Reflections* (note 63), at 322.

the same legal regime applies.⁷⁸ It is based on a relative concept of law and assumes an internal perspective by reliance on formal criteria. The *legal regime* is the second element of standard instruments. It determines conditions for the validity and legality of the instruments that fall under the rule of identification (hereinafter: standardized instruments) that relate to issues such as competence, procedure, or review. From our public law perspective the legal regime is at the highest level guided by principles of public law that are of constitutional significance for the institution within whose penumbra the instruments have been created.⁷⁹

The proposal to think in standard instruments instead of sources has a long tradition in European legal orders. The definition of standard instruments played a crucial role in the development of an administrative law in some continental legal orders.⁸⁰ Developed as doctrinal concepts with the purpose of rendering administrative activity more effective and legitimate, they later were instrumental in the assertion of judicial review against administrative action. The law of the European Union comprises written and unwritten standard instruments that are crucial for the allocation of competence among its organs.⁸¹

In international law, the idea of standard forms is all but new. International lawyers have conceptualized certain types of international instruments, often alternative instruments, in a more or less abstract manner.⁸² For example, René Jean Dupuy suggested declaratory and programmatic law as instrumental categories in the penumbra of customary and treaty law.⁸³ Further examples include

⁷⁸ The rule of identification is constituted by formal criteria only and designed for an internal standpoint. I therefore refrain from using the term rule of recognition, which Hart uses for the analysis of the law from an external perspective.

⁷⁹ On the concept of a pluriverse of internal constitutional principles see von Bogdandy, *General Principles*, in this issue.

⁸⁰ On Germany and Italy, see von Bogdandy & Goldmann (note 15).

⁸¹ Jürgen Bast, *Legal Instruments*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 373 (Armin von Bogdandy & Jürgen Bast eds., 2006).

⁸² Comprehensively HENRY SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW, sec. 1196 *et seq.* (4th ed., 2003).

⁸³ René Jean Dupuy, *Declaratory Law and Programmatic Law: From Revolutionary Custom to "Soft Law"*, in DECLARATIONS ON PRINCIPLES 247 (Robert Akkerman, Peter van Krieken und Charles Pannenberg eds., 1977). Similarly, see Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEXAS INTERNATIONAL LAW JOURNAL 87 (1991). However, both authors include external and internal parameters in the proposed rules of identification.

conceptualizations of generally accepted standards⁸⁴ and codes of conduct.⁸⁵ A large amount of writing relates to resolutions of international organizations with a particular focus on those of the UN General Assembly.⁸⁶ The conceptualization suggested in the following builds on these proposals. It goes beyond them in two ways. First, in keeping with the adoption of an internal viewpoint, my conceptualization is based on a single set of purely formal parameters. Second, in keeping with the chosen relative concept of law, my conceptualization takes full account of the public authority exercised by such instruments and not only their significance for the classical sources of international law. The proposal is, thus, based on the hope that an approach that looks closer at the specific authority of an instrument will foster the normative project of advancing international institutional law in a fragmented legal order.

The concept of standard instruments is in harmony with general international law. Like self-contained regimes, standard instruments do not exist in isolation from general international law.⁸⁷ Thus, whenever their legal regime provides no specific rules, standard instruments are subject to general international law, including international institutional law, treaty law or customary law. Moreover, even international treaties could be conceptualized as a particular standard instrument. The main difference between thinking in terms of standard instruments and a refurbished theory of sources of law is that the notion of a standard instrument is not limited to legal instruments but equally encompasses non-legal instruments.

The realization of this proposal requires two moments of “doctrinal constructivism.”⁸⁸ First, the definition of rules of identification. Second, the

⁸⁴ Bernard Oxman, *The Duty to Respect Generally Accepted International Standards*, 24 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 109 (1991-1992). This concept of standards needs to be distinguished from the concept of standards proposed by EIBE RIEDEL, *THEORIE DER MENSCHENRECHTSSTANDARDS* (1986), who understands as standards normative rules of different legal quality emerging from an array of sources, ranging from practices of interpretation to principles in a Dworkinian sense.

⁸⁵ Hellen Keller, *Codes of Conduct and their Implementation: The Question of Legitimacy*, in *LEGITIMACY IN INTERNATIONAL LAW* 219 (Rüdiger Wolfrum & Volker Röben eds., 2008).

⁸⁶ Krzysztof Skubiszewski, *A New Source of the Law of Nations: Resolutions of International Organisations*, in *RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM* 508 (1968); Jochen Frowein, *The Internal and External Effects of Resolutions by International Organizations*, 49 *ZAÖRV* 778 (1989); BLAINE SLOAN, *UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD* (1991); on binding resolutions, see ASTON (note 27).

⁸⁷ Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, UN Document A/CN.4/L.682, 13 April 2006, 100.

⁸⁸ See von Bogdandy & Goldmann (note 15), at part IV.A.3.

definition of the applicable legal framework. The first moment will be the subject of the remaining part of this section while the second will be thematized in section D.

II. Defining Standard Instruments: Theoretical Basis

The following sections develop the parameters of which the rules of identification of standard instruments are composed. These parameters could thus be called the meta-rule of identification, or a toolbox for doctrinal construction, which establishes a common framework of reference. Each standard instrument will be defined as a specific constellation of these parameters. The parameters themselves rest on both empirical and normative considerations.

Regarding the empirical facet, I elaborated earlier in this article that this meta-rule of identification needs to be limited to strictly formal parameters as opposed to substantive ones. However, the conceptualization of instruments somehow needs to be linked to the world of the factual, as the concept of public authority on which this project is based also rests upon factual considerations, in particular on the empirical insight that there are instruments beyond the sources doctrine that put effective constraints on the will of their addressees. Therefore, a link has to be established between the pure formality of the parameters, which is owed to the needs of an internal perspective, and the world of the factual. In other words, the selection of formal parameters for inclusion into the meta-rule of identification must be made on the basis of generalized factual considerations, i.e. considerations about the abstract ability of each parameter to indicate the authoritativeness of an instrument. As in H.L.A. Hart's concept of law, in which the rule of recognition pertains to acceptance as a social fact, but buffers the realm of law against the factual due to its formal nature, in this internal conceptualization, it is the meta-rule of identification that provides the link between the factual and the normative and that autonomizes legal concepts from concepts stemming from other discourses. This link to the world of the factual is achieved by reference to theories surrounding compliance with hard and soft international instruments.

For this purpose I rely on a broad specter of compliance theories in order to extricate a set of parameters that have some significance for the authority of an instrument.⁸⁹ This cumulative application of different, and sometimes contradictory, theoretical strands could be shunned as eclectic and inconsequential.

⁸⁹ Although compliance is normally understood as the mere conformity of behavior with a rule irrespective of the impact of the rule on this result, while the impact of a rule on behavior is termed its effectiveness, most of the literature – theoretical and empirical – is about compliance as effectiveness can hardly be measured. On the difference between compliance and effectiveness, *see* Raustiala (note 73), at 610.

However, my aim is to identify the widest possible range of parameters for the identification of instruments of public authority. As each theory stems from a different theory about law and society, it would be insufficient to limit oneself to one theory and thereby construe the meta-rule of identification on a too narrow concept of society. To the contrary, it is more probable that each theory reveals a particular aspect of the truth. Furthermore, the requirement to achieve theoretical coherence should not be overstretched. The concrete rules of identification that are the ultimate aim of this article relate to legal doctrine, not to legal theory in the narrower sense. There is hardly a doctrinal concept in international law that rests on one single contradiction-free theoretical basis. The doctrine of the sources of international law is probably the best example in this respect, as neither positivist nor naturalist theories have thus far provided a conclusive explanation of all its features.

Admittedly, even this eclectic approach would require a detailed, critical assessment of each compliance theory. I limit myself to identifying four main factors that are deemed to have an impact on compliance by various theoretical strands because this article cannot provide the necessary, detailed assessment. The first factor is *enforcement*. Based on a rationalist model it encompasses all types of incentives or disincentives that make compliance more favorable for the addressees of a rule. Enforcement mechanisms can have harder or softer forms, ranging from military intervention⁹⁰ to the threat of reputational damage.⁹¹ The second factor is *management techniques* that the rationalist model of the managerial school considers decisive for compliance, such as sufficient and precise information concerning the content of rules and policies, monitoring, dispute settlement and capacity building.⁹² Third, quite different schools identify a number of reasons contributing to the *acceptance* of an instrument, such as the influence of its author or its symbolic validation, as factors fostering compliance.⁹³ Finally, a decidedly constructivist

⁹⁰ This is the position of positivist mainstream in an Austinian or Kelsenian tradition, but also that of non-constructivist rational choice accounts such as GOLDSMITH & POSNER (note 19).

⁹¹ This is the main argument in rationalist-constructivist accounts, see GUZMAN (note 19); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541 (2005); George Downs, David Rocke & Peter Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INTERNATIONAL ORGANIZATION 379 (1996).

⁹² ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY* (1995). On the different impacts of normative vs. hortatory, general vs. specific instruments, see Dinah Shelton, *Law, Non-Law and the Problem of "Soft Law"*, in COMMITMENT AND COMPLIANCE 1, 3 (Dinah Shelton ed., 2000); Peter Haas, *Choosing to Comply: Theorizing from International Relations and Comparative Politics*, in COMMITMENT AND COMPLIANCE 43, 52 *et seq.* (Dinah Shelton ed., 2000).

⁹³ This includes the New Haven School, see McDougal (note 76); and Transnational Legal Process, see Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE LAW JOURNAL 2599 (1997); THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

strand of the literature singles out elements of *persuasion*, such as justificatory discourse that shapes not only the instrument, but also the identity and interests of its authors.⁹⁴

Apart from providing the link to the factual, the carving out of the parameters needs to take into account certain normative considerations that follow from the overall thrust of this project to ensure the legitimacy of public authority. Thus, it plays a decisive role for the qualification of an instrument whether individuals are directly affected by it or whether the interface of another governance level has the potential for providing relief. Moreover, accounting must be made for the existence and length of a “transmission belt” of delegated authority.

III. Parameters for the Definition of Standard Instruments

The factors for compliance as well as the normative premises listed above will now be extrapolated to a set of formal parameters, the meta-rule of identification. This is a toolbox for the ensuing formulation of concrete rules of identification. Three main groups of parameters can be distinguished: genetic, textual, and follow-up related parameters. There is no “sacred” rule as to which parameters should be part of a concrete rule of identification.⁹⁵ The decision must be made according to practical considerations: those parameters that most adequately capture the specificity of the public authority exercised through a certain type of instrument should be chosen as defining parameters. Consequently not all of the following parameters will always be part of a specific rule of identification. Some parameters will be of relevance for a larger number of rules of identification than others.

1. Genetic Parameters

Genetic parameters refer to various circumstances in the process leading up to the adoption of a particular instrument.

a) Author

The legal personality of the institution adopting an instrument (e.g. states, international organizations, private associations) as well as the legal framework

⁹⁴ Jutta Brunnée & Stephen Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, 13 FINNISH YEARBOOK OF INTERNATIONAL LAW 273, 292 (2002 (2004)); Michael Barnett & Raymond Duvall, *Power in Global Governance*, in POWER IN GLOBAL GOVERNANCE 1 (Michael Barnett & Raymond Duvall eds., 2005).

⁹⁵ See JÜRGEN BAST, GRUNDBEGRIFFE DER HANDLUNGSFORMEN DER EU 20, 101 *et seq.* (2006).

and composition of the decision-making body within the institution have an impact on the legitimacy of an instrument. Authorship is a crucial category for input legitimacy and for effectiveness because an instrument's author's authority might induce compliance. In practical terms it might be decisive for the effectiveness of an instrument that it has received the blessing of the hegemon of the time. But such aspects cannot be formulated as a formal parameter. Only the abstract legal personality of the author is to be considered.

b) Procedure

A large part of the procedural parameters will usually not be decisive for the classification of an instrument. Rather, procedure is one of the primary fields to which the legal regime of a standard form is supposed to apply, because the adoption procedure is a crucial factor for ensuring the legitimacy and also the effectiveness of an instrument.⁹⁶ However, it might matter for the qualification of an instrument that it is part of a larger process leading to the adoption of another instrument or that it concludes the process. Presumably only few preparatory instruments will require specific conceptualization because the conceptualization of the concluding instrument will normally suffice. Only if the preparatory instrument frames the concluding instrument in a decisive way or if said instrument has specific significance for the legitimacy or effectiveness of the concluding instrument, do normative reasons require a legal conceptualization of the preparatory instrument.

c) Promulgation

The role of the promulgation of an instrument is acknowledged in a number of theories about compliance, in particular managerial theories of compliance. It seems evident that it matters for the authority of an instrument whether it is adopted by solemn declaration⁹⁷ or official publication, whether it is disclosed or not,⁹⁸ or copyrighted.⁹⁹ All these aspects are formal and can therefore be

⁹⁶ Note that in the law of the European Union, the applicable procedure largely depends on the competence, not on the instrument used, *id.* at 351.

⁹⁷ The OECD Guidelines for Multinational Enterprises, *see* Schuler, in this issue.

⁹⁸ The Export Credits Arrangement, which used to be confidential. Also, the Basel group developed confidential rules. Likewise, the Security Council's reasoning behind putting someone on or removing him from the list of terrorists remains secretive, *see* Feinäugle, in this issue.

⁹⁹ Official Commentary on the OECD Model Convention on Double Taxation, *see* Reimer, *Transnationales Steuerrecht*, in INTERNATIONALES VERWALTUNGSRECHT 181 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007).

determined *ex ante*. This justifies the elevation of aspects concerning the promulgation of an instrument to the rank of potential parameters.

2. Textual Parameters

Textual parameters refer to the text of the instrument. It is not necessary for an instrument to dispose of a written text, but most in fact do.

a) Designation

In EU law, due to consistent practice, the abstract designation given to an instrument, like “regulation” or “decision,” is a safe indicator for the type of standard instrument chosen.¹⁰⁰ But the terminological practice of international institutions seems to be too heterogeneous, both within and across institutions, to give much significance to the designation of an instrument. This will therefore regularly not be a meaningful parameter.

b) First Level Addressees

This parameter concerns the direct addressee of an instrument, i.e. the individual or group to which the instrument is explicitly addressed. It matters mostly from a normative perspective because this is the counterpoint to authorship for determining whether there has been a delegation of authority and how many links the chain of delegation has.¹⁰¹

c) Second Level Addressees

The term “second level addressee” refers to the person or group that, according to the instrument, is affected. Sometimes the first and second level addressees are identical, as in the case of an instrument addressed to states that only affects their situation.¹⁰² However, a number of activities by international institutions are addressed to states, while they explicitly concern individuals and affect them

¹⁰⁰ BAST (note 95), at 146; FLORIAN VON ALEMANN, DIE HANDLUNGSFORM DER INTERINSTITUTIONELLEN VEREINBARUNG 44 (2006).

¹⁰¹ In most of the thematic studies of this project, instruments are addressed to states. However, some instruments are addressed directly to individuals. See Less, in this issue; Kaiser, in this issue; Smrkolj, in this issue; Schuler, in this issue.

¹⁰² Smrkolj, in this issue; Kaiser, in this issue (on individuals). Láncoš, in this issue (on states).

indirectly,¹⁰³ for example by requiring states to impose obligations, grant rights, or change the legal situation of individuals.¹⁰⁴ This parameter is to be taken into account for the same reasons as the first level addressee. However, it may only be taken into account if the second level addressee is explicitly mentioned. Not every indirect, remote effect may count.

d) Deontic vs. Non-Deontic Instruments

Mostly for normative reasons a distinction between whether an instrument contains deontic language or not must be made. In the terminology used here this corresponds to the question whether the instrument may be considered as law.¹⁰⁵ While deontic language reduces the choice of action of the addressees irrespective of whether it defines goals or means, the dissemination of mere information, though it might have a normative impact, leaves the addressees with greater leeway. Thus, while instruments of "governance by information"¹⁰⁶ might very well be seen as exercising public authority, the authority is less focused than in cases of legal rules. Moreover, a distinction may be drawn based on whether an instrument contains more hortatory or obligatory language. However, this parameter is not particularly clear cut and should therefore be used with care.

e) General vs. Specific Instruments

It is easier to distinguish whether the instrument is addressed to specific individuals or whether it sets up a general rule. Normally international institutions set up general rules that have to be implemented at the domestic level. A notable exception is WIPO.¹⁰⁷ This division of work is about to change. Indeed, the recent awareness for the activities of international organizations is not least due to their increasing adoption of specific instruments concerning (but not necessarily directly addressing) individuals.¹⁰⁸ This puts individuals more in the focus of international

¹⁰³ On indirect legal effects, see PETER KRAUSE, RECHTSFORMEN DES VERWALTUNGSHANDELNS 25 (1974). This largely corresponds to the distinction between *acte juridique* and *fait juridique*, see d'Aspremont (note 43).

¹⁰⁴ Farahat, in this issue; Feinäugle, in this issue.

¹⁰⁵ *Supra*, note 13.

¹⁰⁶ See Matthias Goldmann, *The Accountability of Private vs. Public Governance "by Information". A Comparison of the Assessment Activities of the OECD and the IEA in the Field of Education*, 58 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 41 (2008).

¹⁰⁷ Kaiser, in this issue.

¹⁰⁸ The most prominent example are certainly the Security Council anti-terrorism lists, see Feinäugle, in this issue.

institutions because it removes the “armor” of national implementation and perhaps even national judicial review.

f) Superior vs. Subordinate Instruments

Another formal parameter relates to the position of an instrument within a cascade of norms ranging from abstract to concrete that affect the relevant issue area.. From the viewpoint of democratic legitimacy and individual rights it makes a significant difference that an instrument is backed by another instrument and merely concretizes it in respect of some details.

3. Parameters Concerning Follow-up

The third group concerns parameters that provide for incentives for compliance, or disincentives for non-compliance, and that play the predominant role in the enforcement approach to compliance.

a) Hard Enforcement: Sanctions, Damages or Direct Implementation

Hard enforcement mechanisms like sanctions, reprisals or damages may be used only in case of a violation of binding international law, i.e. acts under the sources doctrine as well as secondary acts endowed with the same legal effects.¹⁰⁹ In a rationalist interpretation hard enforcement gives these instruments particular bite. Therefore, it needs to be determined carefully that the instrument is supposed to trigger such sanctions. This is relatively easy if an instrument is subject to a special self-contained regime that qualifies the use of these sanctions. Otherwise, it must be determined in accordance with the rules of interpretation stipulated in Articles 31-33 of the Vienna Convention on the Law of Treaties. Besides sanctions, direct implementation is another form of hard enforcement. It takes place in the event that the institution adopting an act has the means to implement the decision directly, e.g. by withdrawing benefits or allocating a grant.

b) Proceedings Before International Courts or Other Fora

This is, strictly speaking, another element of hard enforcement. But due to its high significance from a legal perspective it deserves specific consideration. The determination that an instrument may serve as the basis of a claim before an international court or other forum for judicial dispute settlement is not significantly different from that concerning means of hard enforcement.

¹⁰⁹ ASTON (note 27).

An important sub-parameter relates to the question who might have recourse to judicial recourse. This might not only be decisive for the legitimacy of the instrument, particularly if individuals are directly affected.¹¹⁰ Also, incentive structures for judicial recourse might be significantly different if, for example, class actions are possible.¹¹¹ Furthermore, normative reasons compel a further distinction between independent judicial recourse and quasi-judicial, administrative complaint procedures.

c) Soft Enforcement: Monitoring, Reporting and Reputation

Monitoring and reporting mechanisms are a probate means of inducing compliance, both because they reduce managerial difficulties such as lack of transparency and information, and because they are a means of exerting pressure on non-compliant rule addressees. However, significantly different results in compliance are to be expected depending on whether the addressee, the international institution, or independent actors collect the data. Monitoring might be particularly effective if it is carried out in a horizontal direction¹¹² or if intermediate levels are involved.¹¹³ Also, the publicity of the data and reports multiplies their reputational repercussions. Furthermore, reporting obligations not involving specific negotiation and mediation elements are not always effective.¹¹⁴

Apart from international courts and tribunals there are other *fora* for dispute settlement that might impose soft sanctions.¹¹⁵ The proceedings before National Contact Points established under the OECD Guidelines for Multinational Enterprises are a fine example of such quasi-judicial settlements. The sanction consists in the issuance and publication of a statement by a National Contact Point. For enterprises with a reputation to lose this outlook might amount to a substantial threat. Again, who may trigger the procedure becomes a matter of great significance.

¹¹⁰ See, most notably, Feinäugle, in this issue; Smrkolj, in this issue.

¹¹¹ Anne van Aaken, *Making International Human Rights Protection More Effective: A Rational Choice Approach to the Effectiveness of Provisions of Ius Standi*, 23 CONFERENCES ON NEW POLITICAL ECONOMY 29 (2006).

¹¹² See Haas (note 92).

¹¹³ For example, the FAO Code of Conduct for Responsible Fisheries owes much of its effectiveness to monitoring and implementation by regional fisheries organizations, see Friedrich, in this issue.

¹¹⁴ For negative examples, see de Wet (note 8); for positive examples, see Farahat, in this issue.

¹¹⁵ See Aust (note 44) at 791.

The parameters thus defined should be sufficient for the definition of most standard instruments. Nevertheless, I do not claim that the list could not be continued. In particular, non-textual instruments like physical acts might require additional parameters that could be defined analogously.

IV. Identification of Some Preliminary Standard Instruments

Having established the parameters, this section proposes a preliminary set of standard instruments developed on the basis of the instruments analyzed in the thematic studies covered in this issue, and defines their rules of identification by means of the parameters. While the parameters have been developed deductively, the following part is more inductive, making the construction of rules of identification an overall dialectical exercise.

The thematic studies reveal that basically all governance mechanisms comprise a host of instruments all of which contribute in different ways to the exercise of public authority, be it that they are part of a cascade of instruments that step-by-step concretizes a broad statutory provision,¹¹⁶ establish the results of discussions,¹¹⁷ ensure uniform interpretation,¹¹⁸ foster the implementation of another instrument,¹¹⁹ or otherwise. Which of these instruments are to be framed as standard instruments? On the one hand, every instrument could qualify provided that a substantive argument were made that it reaches a minimum threshold of authority. On the other hand, a careful balance must be struck between the need to formalize international public authority and the practice requirement of leaving enough leeway for the spontaneous development of new modes of decision-making as well as substantive decisions. Without spontaneity as a resource of innovation and critique,¹²⁰ one would run the risk of suffocating progress and reform by too tight a formalist straightjacket. Likewise, over-simplifications will be normatively questionable while exaggerated specificity will be impractical.¹²¹

¹¹⁶ Friedrich, in this issue; Schöndorf-Haubold, in this issue.

¹¹⁷ Minutes or official reports of meetings and conferences, see Bogdandy & Goldmann (note 15).

¹¹⁸ Feichtner, in this issue.

¹¹⁹ See de Wet (note 8): Technically, the 1998 ILO Declaration on Fundamental Principles only corroborates preexisting conventional obligations, although it exceeds their significance; Schuler, in this issue.

¹²⁰ Gunther Teubner, *Neo-Spontanes Recht und duale Sozialverfassung in der Weltgesellschaft?*, in *ZUR AUTONOMIE DES INDIVIDUUMS* 437, 446 *et seq.* (Dieter Simon & Manfred Weiss eds., 2000).

¹²¹ Peters & Pagotto (note 40), at 7.

How to strike this balance? Creating hierarchies like the identification of a “central instrument” might serve heuristic purposes but are highly contingent and not always easy to achieve.¹²² A normatively sound way of making this choice is to focus on those instruments that are addressed to another legal subject whether they stand in a horizontal or a vertical relationship; these instruments are most likely to raise issues of self-determination and legitimacy. The following focuses mostly on these instruments. For reasons of clarity the standard instruments suggested in the following are grouped according to their second level addressee.

1. Instruments Concerning Individuals

a) International Administrative Decisions

A number of instruments retrieved in the thematic studies affect the legal situation of individuals, namely listings by the UN Taliban and Al Qaida Sanctions Committee, UNHCR Refugee Status Determination and International Trademark Registrations by WIPO.¹²³ All of these instruments contain an element of decision-making concerning individuals whose legal situations are indirectly affected. This also applies to the determination of refugee status: Although the UNHCR holds that this status follows directly from the Refugee Convention, the determination of this status by the competent international organization has an authoritative status that cannot, and is not, ignored at the domestic level. The Madrid System is slightly different in that it allows national authorities to opt out of a specific trademark registration. Although this mechanism affects individuals more directly than a decision imposing a duty to adopt an act affecting the individual, there is still an intermediate level of governance that filters the legal relationship between the international level and the individual. This justifies applying the same standards to it.

Applying the parameters in a systematic manner, the rule of identification for international administrative decisions could be defined as a deontic, not merely a hortatory act by, or delegated by, a public international institution, addressed to another level of governance, and having individuals as second level addressees, subject to hard enforcement. The strong – though indirect – legal repercussions of such instruments on individuals justify calling it an “administrative” decision, a term that illustrates well the main thrust of this kind of instrument.

¹²² Farahat, in this issue (referring to “central instruments”).

¹²³ See Feinäugle, in this issue; Smrkolj, in this issue; Kaiser, in this issue.

b) International Administrative Recommendations

Some decisions affecting individuals are merely hortatory in character. This is the case, for example, with the statements rendered by National Contact Points in case of a specific instance under the Procedural Guidance relating to the OECD Guidelines for Multinational Enterprises.¹²⁴ These statements are not subject to hard enforcement and therefore cannot be considered binding law. Nevertheless, they are rendered within an elaborate non-binding legal framework and use legal discourse to resolve a dispute. One could have doubts about the international character of these statements because they are rendered by national administrations. However, in doing so, the National Contact Points act purely on the basis of binding and non-binding international law. The system of National Contact Points, thus, features the peculiarity of a decentralized implementation in which regular meetings and information exchange provide for uniformity.

Applying the parameters it is possible to define international administrative recommendations as deontic, hortatory and specific instruments rendered by public institutions on the basis of international law, directly addressed to individuals and not subject to hard enforcement. The quasi-judicial process in which the statements of National Contact Points are produced is deliberately not included in this rule of identification. As this procedure appears crucial for the legitimacy and effectiveness of the instrument it should rather be subject to the legal regime of international administrative recommendations.

c) International Administrative Information Acts

Interpol Notices are a case in point for international acts of non-deontic content. Interpol Notices are not to be equated with requests for judicial assistance. Even though some states in practice treat them like requests they are mere announcements by Interpol that a member has issued, or will issue, a respective request for assistance. By issuing a Notice Interpol does not attribute rights or duties to an individual, like in the case of international administrative decisions, but merely forwards information. Nor does it impose any hard or soft obligation on its members to obey the corresponding request by the member entity.¹²⁵ There is no deontic element in the pure and simple dissemination of information. Nevertheless, as the issuance of a Notice has a grave factual impact on the individual concerned, human rights concerns militate for the definition of a

¹²⁴ Schuler, in this issue.

¹²⁵ Schöndorf-Haubold, in this issue.

standard instrument. By means of the parameters, international administrative information can be described as non-deontic instruments by international institutions addressed to public entities revealing information about specific individuals.

Having said that, a difference exists between the non-deontic dissemination of a Notice and the decision by Interpol underlying this dissemination. The latter is addressed to the applicant state and will be considered in the following section.¹²⁶

2. Instruments Concerning States

a) International Public Decisions

Decisions on requests for issuance of a Notice by Interpol are subject to examination by the Interpol General Secretariat to test their formal accuracy and necessity, including respect for human rights. Such decisions therefore entail a considerable margin of appreciation on the part of the international institution. They are addressed to a state or another public entity, even though its second level addressee might be an individual. In this sense this instrument resembles other state-directed decisions by international institutions, such as decisions of the UNESCO World Heritage Committee to include a monument or natural site in the list of world heritage or to award a grant to an enlisted site,¹²⁷ or decisions on eligibility for the Emission Trading System or on non-compliance by the Enforcement Branch of the Compliance Committee of the Kyoto regime.¹²⁸ Another example would be the approval of loans by the World Bank Executive Board.¹²⁹

All these decisions do not contain abstract rules but attribute rights and obligations to public entities,¹³⁰ mostly states. As they are implemented directly by the adopting international institution they are subject to hard enforcement and, therefore, can be considered binding. They are equivalent of international

¹²⁶ Certainly, these distinctions are difficult to draw. Similar problems can be observed in German police law, where it is controversial whether the issuance of a search request according to section 30 Federal Police Act (Bundespolizeigesetz of 19 October 1994, Bundesgesetzblatt (1994) I-2978), and the request of the individual affected to withdraw the pending search, are to be qualified as administrative decisions (Verwaltungsakte). See Michael Drewes, *Section 30, in BUNDESPOLIZEIGESETZ*, margin number 4 (Karl-Heinz Blümel et al. eds., 3rd ed. 2006).

¹²⁷ Zacharias, in this issue.

¹²⁸ Láncoš, in this issue.

¹²⁹ See Dann (note 2).

¹³⁰ Jochen von Bernstorff, in this issue (calling them “operational decisions”).

administrative decisions although both their first and second level addressees are states. Interestingly, it seems that in none of the mentioned cases a plenary body decides on the measure but only limited bodies or secretariats. This is an issue for the legal regime, not for the rule of identification of international public decisions, because this greatly affects the legitimacy of the instrument. By means of the parameters they could be defined as deontic, specific instruments by international institutions, addressed to other public entities as first and second level addressee and subject to direct implementation.

b) International Public Recommendations

A number of instruments that are directed to states or other public entities are not subject to hard enforcement. For example, the OSCE High Commissioner on National Minorities issues specific recommendations concerning the situation of minorities in an individual state.¹³¹ Similarly, the Committee on Freedom of Association of the ILO issues non-binding conclusions on alleged violations of the freedom of association,¹³² and the Committee to the Harmonized Commodity Description and Coding System (Harmonized System) within the World Customs Organization (WCO) issues recommendations in order to settle classification disputes among member states.¹³³ Within the OSCE there seems to be no consistent practice as to the public accessibility of such recommendations. The public accessibility of such recommendations is a form of soft enforcement that gives these instruments considerably more weight. But it seems to be too sensitive an issue to be included in the rule of identification of this standard instrument. Instead, it seems more advisable to develop legal principles pertaining to public accessibility.

International public recommendations can be defined as deontic, hortatory instruments concerning an individual case issued by international institutions and addressed to states or other public entities that are not necessarily subject to soft enforcement mechanisms.

c) International Secondary Law

A few international institutions have the power to adopt abstract rules that have the same legal effects for their members as international treaties. Among the thematic studies in this issue this is the case with amendments to the appendices of

¹³¹ Farahat, in this issue.

¹³² de Wet (note 8).

¹³³ Feichtner, in this issue.

CITES.¹³⁴ CITES amendments technically become constituent parts of the international treaty and are subject to the sanctions regime, which includes trade sanctions. Similarly, amendments to the Harmonized System within the WCO modify the underlying treaty. If no state party objects within six months the Harmonized System, an integral part of an international convention, is amended. Slightly different are waivers of obligations arising from agreements within the frame of the WTO, which change the content of treaty obligations only with respect to specific members.¹³⁵ Other instruments do not formally affect the obligations arising under an international treaty but create new ones. The COP/MOP of the Kyoto Protocol adopts accounting rules for the Emission Trading System that need to be implemented by member states and that are subject to enforcement measures by the compliance committee.¹³⁶

At an abstract level one could define such secondary law as deontic, general instruments by international institutions addressed to states or other public entities that are subject to hard enforcement. Admittedly, this definition might be too broad to account for the considerable differences between the many variants of international secondary law such as waivers, opting-out¹³⁷ or contracting-in¹³⁸ procedures.¹³⁹ These instruments seem to require more refined subcategories. But this would go beyond the scope of instruments covered by this project.

d) Internal Operational Rules

The legal quality of certain types of rules that are situated at a medium level of norm concretization seems to provide some difficulty in the thematic studies in this issue.¹⁴⁰ For example, the Operational Guidelines by the UNESCO World Heritage Committee are subordinate to the provisions of the Convention but need to be meticulously observed by states if they want to succeed with their applications. The Kyoto COP has adopted functionally similar principles, modalities, rules and guidelines. Another example is the Common Regulations under the Madrid

¹³⁴ Fuchs, in this issue.

¹³⁵ Feichtner, in this issue.

¹³⁶ Láncoš, in this issue.

¹³⁷ Decisions by the Council of the International Civil Aviation Organization.

¹³⁸ ILO Conventions, see de Wet (note 8).

¹³⁹ For a comprehensive analysis, see ASTON (note 27).

¹⁴⁰ See Fuchs, in this issue (“de facto lawmaking”); Smrkolj, in this issue (“internal soft law”); Zacharias, in this issue (“binding secondary law”).

Agreement and Madrid Protocol adopted by the assembly of member states.¹⁴¹ The Interpol General Assembly has adopted a variety of resolutions setting out operational procedures for the submission of requests for notices. Each of these resolutions is annexed to a comprehensive internal document called General Regulations.¹⁴² Similarly, the mandate of the UN Taliban and Al Qaida Sanctions Committee is specified in Committee guidelines, and Refugee Status Determination by UNHCR receives normative guidance from the Executive Committee's Conclusions on International Protection of Refugees.¹⁴³ The decisions and resolutions of the CITES COP specify the provisions of the convention by determining, among others, the criteria for the listing of specific animals, i.e. for the adoption of secondary law.¹⁴⁴ Another case of operational rules for the adoption of secondary law are the HS procedures adopted by the WTO General Council for the adaptation of WTO schedules of concessions to changes in the Harmonized System of the WCO, yet with the difference that they do not merely concretize previous commitments, but provide for their flexibilization and amendment by establishing a new procedural framework on a questionable legal basis.¹⁴⁵

Those rules thus concretize the provisions of an international treaty whenever specific decisions are being taken.¹⁴⁶ Formally they are only of internal significance for the respective international institutions and add nothing to the obligations arising under the treaty. Nevertheless, they have a crucial impact on the outcomes of the procedures and decisions for which they provide the set-out. Also, the establishment of such operational guidelines involves a considerable degree of discretion. As the international institution has the possibility of implementing them directly they are subject to hard enforcement. Therefore, this type of subordinate instrument should be conceptualized as a standard instrument. By reference to the parameters it could, thus, be defined as a deontic and not only a hortatory instrument dependent on superior standards that is authored by actors within international institutions and addressed to actors within international institutions who adopt instruments having individuals or states and other public entities as their first or second level addressees, subject to direct implementation.

¹⁴¹ Zacharias, in this issue; Láncoš, in this issue; Kaiser, in this issue.

¹⁴² Schöndorf-Haubold, in this issue.

¹⁴³ Feinäugle and Smrkolj, both in this issue.

¹⁴⁴ Fuchs, in this issue.

¹⁴⁵ Feichtner, in this issue.

¹⁴⁶ CITES is an exception. However, the secondary law that the resolutions prepare is specific with regard to the animal concerned.

e) International Public Standards

Another large group of instruments is constituted by multilateral agreements drafted within an international institution that are not subject to hard enforcement. Some of these instruments have received considerable public attention. The list includes the OECD Guidelines on Multinational Enterprises, the Codex Alimentarius, the ILO Declaration on Fundamental Principles and Rights at Work, and the FAO Code of Conduct for Responsible Fisheries.¹⁴⁷

These instruments, although their names vary, have a significant number of common parameters. They are deontic, specific instruments at a low level of concretization, authored by international institutions and addressed to states, private or other public entities, sometimes cumulatively. The public promulgation of these instruments should be taken as another defining element as it is key to their effectiveness. A further sub-division of this standard instrument could be considered for international public standards that are enforced by soft mechanisms going beyond monitoring and reporting.¹⁴⁸ Some international public standards are implemented by other international or regional organizations through reference in their hard law. The classical case is the relationship between the WTO SPS Agreement and the Codex Alimentarius.¹⁴⁹ Such linkages boost compliance with these standards considerably. It could also be framed as a formal criterion. The drafters of the international public standard are very well aware of this “hardening” of their instrument, so that an *ex ante* application of specific legal standards should be possible.

f) International Implementing Standards

Implementing instruments are usually subordinate to international secondary law or international public standards. A case in point is the rules concretizing the Code of Conduct for Responsible Fisheries such as International Plans of Action and Technical Guidelines for Responsible Fisheries that are developed by the FAO Secretariat.¹⁵⁰ Another example is the explanatory notes to the Harmonized System drafted by the HS Committee.¹⁵¹ Implementing standards could thus be defined as

¹⁴⁷ See Schuler, in this issue; Pereira, in this issue; de Wet (note 8); Friedrich, in this issue.

¹⁴⁸ The OECD Guidelines on Multinational Enterprises. See Schuler, in this issue.

¹⁴⁹ Pereira, in this issue.

¹⁵⁰ Friedrich, in this issue.

¹⁵¹ Feichtner, in this issue.

instruments of international institutions addressed to states and subordinate to treaty law, international secondary law or international public standards. Usually they are not enforced by hard means but only by reporting.

The classification of general recommendations issued by the OSCE High Commissioner on National Minorities is no clean slate. While previous general recommendations that advise states on minority related policies on specific issues indicated the international rights or standards on which they were based, this practice ceased in 2006.¹⁵² This instrument oscillates between the form of an implementing standard and an international public standard. Should the practice continue it might raise questions of competence.

g) Preparatory Expert Assessments

Most preparatory instruments remain below the radar of conceptualization as a standard instrument. Only some of them deserve closer consideration. The Codex Alimentarius Commission adopts standards on the basis of risk assessment reports prepared by the Joint FAO/WHO expert bodies. These reports summarize available scientific information about the risks to consumers' health related to a certain food standard including minority opinions and enduring uncertainties. Considering that these reports need to interpret scientific data and make choices between sometimes diverging opinions they are certainly not free from normativity. However, the reports as such do not contain deontic operators and refrain from risk assessment, which is the sole task of the Codex Alimentarius Commission. Nevertheless, the division of work between the Commission and the expert bodies in the standard-setting procedure justifies considering them as an independent standard instrument for the exercise of public authority and not only as a preparatory instrument that does not call for specific conceptualization. Accordingly, International Expert Assessments could be defined as non-deontic instruments of international institutions requested by a body of the same or another international institution as part of a law-making or standard-setting procedure that limits the discretion of the requesting institution or body.

A deontic variant of the same standard instrument can also be observed. The operational guidelines of the World Heritage Committee provide for the consultation of Advisory Bodies composed of independent expert organizations on every application for inclusion in the list of world heritage or for financial support. Granted, there is no division of work as in the case of the Codex Alimentarius Commission. Rather, the discretion of the World Heritage Committee is not limited,

¹⁵² Farahat, in this issue.

even though in practice it regularly follows the Advisory Bodies.¹⁵³ However, the practice of preparatory expert recommendations seems to have acquired customary status within the World Heritage Committee. Their conceptualization as a standard instrument is therefore justified because of their role as accessory instruments to the international public decisions rendered by the World Heritage Committee. Similar considerations apply to recommendations by Expert Review Teams within the framework of the Kyoto protocol.¹⁵⁴

h) National Policy Assessments

Finally, some policies rely on the gathering and dissemination of information. For example, the OECD PISA policy consists in large-scale empirical assessments of educational achievements of students in the participating states. The periodic and public nature of the assessment reports, coupled with country rankings, make this an effective instrument for influencing national educational policy. This policy is not subject to any predefined standards, as opposed to, e.g. the Transitional Review Mechanism by which the WTO Committee on Trade in Financial Services supervises China's implementation of GATS obligations, or compliance monitoring as carried out by the ILO. Some policies, however, like the OECD Environmental Policy Review, constitute intermediate forms that only partly monitor the implementation of predefined international standards. And even monitoring instruments may concretize, or even change, the meaning of the standards to which they refer. In addition, some of these instruments draw more or less specific recommendations from the material, while others do not. National Policy Assessments should, therefore, be broadly defined as predominantly non-deontic instruments by international institutions addressed to another entity that are subject to soft means of enforcement.¹⁵⁵

V. A Continuing Task

The preceding taxonomy of standard instruments is rather preliminary. Its relatively small empirical basis makes any claim to completeness impossible. Further standard instruments could be envisaged, in particular in relation to monitoring and reporting activities, while some of the proposed standard instruments could benefit from more fine-tuning. A particular challenge yet to be considered is that of purely private instruments that are not linked in any way to

¹⁵³ Zacharias, in this issue.

¹⁵⁴ Láncoš, in this issue.

¹⁵⁵ For an earlier definition, see von Bogdandy & Goldmann (note 15).

public entities or international institutions by any chain of delegation. In this respect, the only examples within the scope of the thematic studies in this issue are the instruments adopted by ICHEIC, in particular claim decision letters.¹⁵⁶ As a general rule, in case such instruments assume functions that can be qualified as equivalents to those of instruments of public authority, they should be measured by the same standards as instruments of public authority.¹⁵⁷ Whether this applies to ICHEIC claim decision letters is questionable. In spite of the undisputed socio-political significance of ICHEIC, at the end of the day, those instruments amount to means for the facilitation of private dispute settlement that are sufficiently explained and framed by the terms of private law.

It is to be expected that the elaboration of standard instruments is a continuous task. Once the legal requirements for specific standard instruments are being spelled out it is to be expected that some decision-makers will look into ways to strip them off by taking recourse to hitherto unknown and not yet legally framed instruments. The entirety of standard instruments will never correspond exactly to the full range of instruments of public authority. All that can be achieved is an approximation. There is thus the concrete prospect of an endless cat-and-mouse game. But this game is preferable to an uncontrolled plague of mice. And with the parameters as tools for the development of rules of identification it can be ensured that each new mouse will soon be followed by the cat.

D. Construing the Legal Regime of Standard Forms

I. Methodological Observations

Once standard instruments have been defined their legal regimes, i.e. the legal standards determining their validity and legality, need to be elaborated. This is still a very distant goal. Methodically the elaboration of a standardized legal regime for each standard instrument is a task that cannot, and should not, be carried out by scholarship alone. It requires multiple rounds of exchange between theory and practice, until a legal regime emerges. What scholarly discourse can achieve, however, is the abstraction of structural principles, i.e. significant regularities in the legal regimes of instruments of the same type.¹⁵⁸ The extrapolation of structural principles should be followed by a profound normative critique based on the overarching idea of ensuring legitimate and effective public authority. This would

¹⁵⁶ Less, in this issue.

¹⁵⁷ von Bogdandy, Dann & Goldmann, in this issue.

¹⁵⁸ On structural principles, see von Bogdandy, *General Principles*, in this issue.

be the main contribution of legal scholarship for initiating a communicative process in which domestic and international policy-makers, civil society, domestic and international judges elaborate the legal regime. Concerns about the role attributed to international law scholarship in this method might be mitigated by the fact that it is not unusual for concepts of international law, even for prominent ones like *mare liberum* or *ius cogens*, to be formulated in the first instance by scholars as a claim that later finds recognition in international legal practice. Nevertheless, each scholarly proposal needs to strike a careful balance between apology and utopia, and requires awareness of the risk that it might strengthen, rather than diminish, power imbalances.

Whether and how the elements of the legal regime thus elaborated acquire legal normativity is a difficult question. In particular, the legal regime needs to rank above the standardized instruments that it regulates. Within one international institution it is relatively easy to conceptualize higher ranking rules that could take the form of internal constitutional principles or customary legal commitments emerging from consistent institutional practice.¹⁵⁹ Elements of legal regimes that transcend institutional borders might only emerge in the long run. Customary law, international constitutional principles¹⁶⁰ or certain human rights¹⁶¹ might lend themselves as levers of normativity and hierarchical superiority to an emerging overarching international institutional law. These problems are familiar from the discourses about the constitutionalization of international law and global administrative law. It goes without saying that any definitive solutions cannot be proposed in the frame of this article.

II. Elements of Legal Regimes

An exhaustive consideration of structural similarities or dissimilarities in the legal regimes of the standardized instruments described above would be beyond the scope of this article, in particular because the other cross-cutting analyses of this project reveal these aspects extensively.¹⁶² Nevertheless, a few selected observations should be made as to how the above conceptualization might translate into specific legal regimes for each standard instrument that goes beyond general

¹⁵⁹ von Bogdandy, *General Principles*, in this issue; von Bogdandy & Goldmann (note 15).

¹⁶⁰ Stefan Kadelbach & Thomas Kleinlein, *International Law - A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles*, 50 GERMAN YEARBOOK OF INTERNATIONAL LAW 303 (2007).

¹⁶¹ von Bogdandy & Goldmann (note 15).

¹⁶² von Bernstorff, in this issue; von Bogdandy & Dann, in this issue; de Wet, *Holding International Institutions Accountable*, in this issue; Röben, in this issue.

principles of international institutional law. These observations will be based on comparisons of the different regimes.

1. *Rules of Conflict*

Normative conflicts between instruments belonging to categories are all but impossible. Two different dimensions of normative conflicts are conceivable. First, conflicts might emerge within one policy of the same international institution, e.g. among different bodies involved. In this case the taxonomy of instruments might provide for some hierarchy that serves as a default rule of conflict and excludes the application of, e.g., the principle of *lex posterior*.¹⁶³ Second, conflicts might emerge between instruments belonging to entirely different regimes, such as trade and human rights. This recalls the familiar discussion about the fragmentation of international law. Some instruments, like waivers of concessions under WTO law, are means for the proceduralization of such conflicts. However, most instruments do not contain such mechanisms. There might, therefore, be some need to develop principles for collision management in a fragmented normative environment. The principle of mutual recognition might be a candidate for this.¹⁶⁴

2. *Competence: The Principle of Adequate Concretization*

Competence is at present a doctrinal category that hardly constrains the activities of international institutions. This is due to the tension between the principles of attributed and implied powers.¹⁶⁵ The tendency of international institutions to increase their autonomy¹⁶⁶ makes the latter principle likely to prevail, and international institutions arrogate competencies not explicitly provided for in the founding instrument.¹⁶⁷ This development has serious repercussions for national power balances.¹⁶⁸ But, although greater clarity in relation to competencies is desirable, one should not cherish hopes that are likely to be disappointed. Even in developed multilevel legal orders, such as Germany or the European Union, formal

¹⁶³ See, however, Farahat, in this issue.

¹⁶⁴ Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 *LAW & CONTEMPORARY PROBLEMS* 263 (2005).

¹⁶⁵ Jan Klabbers, *The Changing Image of International Organizations*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 221 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

¹⁶⁶ von Bernstorff, in this issue; Venzke, in this issue.

¹⁶⁷ See the examples in Farahat, in this issue; Feichtner, in this issue; Windsor, in this issue.

¹⁶⁸ For the example of PISA, see von Bogdandy & Goldmann (note 15).

rules on the vertical division of competencies have not necessarily been an effective device for limiting “mission creep” at the “upper” level, and this is the case in spite of powerful courts with jurisdiction to enforce rules of competence.¹⁶⁹ Compensation might be afforded through an increase in the complexity of the procedural regimes. Thus, the WTO General Council adopted the HS procedures on a doubtful legal basis but at least pursuant to an inclusive process that mitigates concerns regarding legitimacy.¹⁷⁰ Further, internal constitutional principles could be elaborated that relate to the question which standard instruments a particular body of the institution might use. This might prevent issues like the questionable adoption of secondary law by the WTO Committee on Trade in Financial Services.¹⁷¹

One further observation can be made. Whenever international institutions dispose of relatively broadly formulated competencies in their statutes, these rules are further and further concretized through mandates, operational rules, etc. Remarkably, operational rules can be regularly observed in case of administrative instruments as well as international public decisions and recommendations, i.e. whenever an international instrument is adopted that concerns individuals, states or other entities as first or second level addressees.¹⁷² This resembles the essentiality principle (*Wesentlichkeitsgrundsatz*) in German constitutional law, according to which the essential features of a measure that affects fundamental rights need to be determined by acts of parliament. This principle is thought to limit the discretion of the administration in order to secure the impact of parliament on such decisions.¹⁷³ As of now, there is no equivalent principle in international institutional law that would require the plenary body that bears overall political responsibility for a certain policy to set out the essential features of that policy in a general manner instead of delegating this task to a subsidiary body, plenary or non-plenary, or to the secretariat. So far all that can be observed in this respect are certain structural similarities in international institutional practice: International

¹⁶⁹ Some exceptions confirm the rule. See ECJ, Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, 2000 E.C.R. I-8419; Bundesverfassungsgericht, Case 2 BvF 1/01 (*Altenpflegegesetz*), 106 BVerfGE 62.

¹⁷⁰ Feichtner, in this issue.

¹⁷¹ Windsor, in this issue.

¹⁷² See also von Bernstorff, in this issue.

¹⁷³ Helmuth Schulze-Fielitz, *Art. 20 (Rechtsstaat)*, in *GRUNDGESETZ-KOMMENTAR*, margin number 113 (Horst Dreier ed., 2nd ed., 2006).

operational rules are usually adopted by plenary organs¹⁷⁴ while non-plenary, expert bodies or secretariats often take the concrete decision on the basis of these operational rules.¹⁷⁵ Switching from a descriptive to a normative perspective, one could postulate a principle of adequate concretization by politically responsible bodies for reasons of individual rights protection and democratic legitimacy. The example of the UN Taliban and Al Qaida Sanctions Committee demonstrates the detrimental effects on individual rights of international administrative decisions based on insufficiently specific operational rules.¹⁷⁶ A lack of democratic legitimacy could be diagnosed for the operational rules of the World Heritage Committee, which are adopted by the Committee itself.¹⁷⁷ As with most international organizations the competencies of UNESCO are formulated in fairly broad terms. Non-plenary bodies and secretariats could be considered to lack the necessary competence to set out international operational rules that guide the adoption of administrative decisions, recommendations and information acts.

3. Procedure

Procedure is probably the issue that raises the most debate. A comparison of the current procedural regimes of some instruments belonging to the same type of standard instrument reveals interesting structural similarities.

In case of international public decisions and recommendations, decisions are usually not taken by plenary organs but instead by limited bodies like expert committees or secretariats.¹⁷⁸ It seems that the idea of state consent, fundamental as it is for international law, is unhinged by the idea that no state should be its own judge. It logically follows from the reduced role attributed to state consent that such instruments are often adopted by majority votes,¹⁷⁹ which smoothes decision-making in the bodies in charge. The same involvement of experts through specialized, non-plenary bodies can be observed in the case of preparatory expert assessments. In addition to the reason just mentioned, state consent might also be

¹⁷⁴ CITES recommendations; rules within the Emission Trading System of the Kyoto Protocol; the HS procedures of the WTO.

¹⁷⁵ The Enforcement Branch of the Kyoto Compliance Committee.

¹⁷⁶ Feinäugle, in this issue.

¹⁷⁷ The World Heritage Committee Operational Guidelines.

¹⁷⁸ Láncoš, in this issue; Zacharias, in this issue; Farahat, in this issue; Fuchs, in this issue; von Bernstorff, in this issue.

¹⁷⁹ Láncoš, in this issue; Zacharias, in this issue.

considered inappropriate in this case because it would destroy the aura of objectivity surrounding these instruments. While this reasoning would be questionable, it is normatively acceptable as preparatory expert reports are followed by political decisions of responsible committees.

Besides these specific instruments there are some general instruments that involve a high degree of expertise, namely international implementing standards within the FAO Fisheries regime and the OSCE regime on national minorities. Again, this seems to imply the belief that implementation is primarily a technical matter. This approach, although questionable, is consistent as long as the implementing standard explicitly refers to some superior standards that at least formally serve as the source of the obligations arising under the implementing standard. However, when this link to a superior standard is cut off, like in the case of general recommendations of the OSCE High Commissioner on National Minorities, this form of expert-driven standard-setting becomes questionable. In this case, it would be better to opt for an international public standard. Those instruments are usually adopted by high-level political bodies that seem to foster both the legitimacy and the effectiveness of the ensuing standards. This should apply *a fortiori* if issues like human rights or environmental matters are concerned where reciprocity is not a pertinent reason for states to comply.

Further elements of legal regimes could certainly be considered. However, the above list might suffice as a first impression of this instrument specific approach. Of course, at the moment the elements of legal regimes that were mentioned are not much more than proposals based on structural similarities or dissimilarities. For the time being it appears that the common ground among the legal regimes of instruments that fall into the same category, but belong to entirely different institutional frameworks, is limited. This is partly due to the fact that some legal regimes are not very consolidated, in particular if they relate to instruments produced by secretariats instead of plenary bodies.¹⁸⁰ Further, at this stage, international institutional law seems hardly developed enough to make a meaningful distinction between elements of legal regimes that are a precondition for the validity of the instrument and such elements that make the instrument illegal and voidable but not invalid.¹⁸¹ Nevertheless, the above observations might provide the starting point for normative claims that eventually become a legal rule. Admittedly, this goal is still a long way ahead.

¹⁸⁰ Farahat, in this issue; Less, in this issue.

¹⁸¹ BAST (note 95), at 329.

E. Inside Relative Normativity: The Elusive Quest for Bindingness

What are the larger doctrinal repercussions of this excursion into relative normativity? Four insights come to mind. First, alternative instruments do not only play a role at the margins of public authority. Second, the preceding section revealed several similarities in the legal regimes of instruments belonging to the same type, but also a few discrepancies. Legal conceptualization is therefore worth its price and helps understanding, but also criticizing, the exercise of authority by international institutions. Third, individuals are probably more affected by the activities of international institutions than is commonly believed. Even though international institutions often do not have direct access to individuals, but only through the interface of states and other entities, this intermediate level hardly has a negative effect on the efficiency of the instruments. The fourth and probably main insight is that the authority and legal regimes of instruments which classical doctrine considers binding, and those that it holds to be non-binding, do not vary that much. Internal operational rules are a case in point. Are these instruments “binding”? There seems to be no unequivocal answer to this. On the one hand, they are subject to one of the most effective enforcement mechanisms, which direct implementation by the international institution which has adopted them. On the other hand, they do not necessarily stand on a firm legal basis as they might be adopted by a body which has no competence for the adoption of binding rules. This raises the question whether the concept of bindingness, which has been hitherto used in a heuristic sense as previously defined,¹⁸² is theoretically tenable.

In classical accounts of international law the decisive criterion for determining the binding nature of an instrument is the “intent” of its drafter. This is not a formal criterion, a fact that makes it difficult to grasp in a practical sense. Besides, it is doubtful what the “intent” of the “parties” is – is it the intention of the persons involved in the negotiations, of the minister or heads of government who bear the political responsibility? But even if one were Hercules and knew exactly and in all details the mental state and intentions of the parties, the problem of drawing the line precisely would not be solved. What is the intent to be “bound” supposed to refer to? Is it the explicit or implicit assumption that an infringement of the act will entail damages or will give rise to a claim that can be enforced before a competent court?¹⁸³ The concept of intent, therefore, appears to be circular.¹⁸⁴

¹⁸² *Supra*, notes 1 and 7.

¹⁸³ In this sense, see Baxter (note 42), at 549; Hanspeter Neuhold, *The Inadequacy of Law-Making by International Treaties: “Soft Law” as an Alternative?*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 39, 48 *et seq.* (Rüdiger Wolfrum & Volker Röben eds., 2005); Roger Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 675 (2003). On the elusiveness of referrals to the intention to be bound, see KLABBERS (note 57), at 65 *et seq.*

But even if it were agreed that the possibility of triggering any form of hard enforcement or court proceedings was a conclusive, unequivocal sign of an instrument's binding nature, this concept would be out of sync with the sources doctrine. Some international treaties that might even have received ratification by the parliaments of their respective parties contain soft, indeterminate language so that no possible violation could ever be determined and that damages or court proceedings would never take place.¹⁸⁵ Reputational damage also is not a conclusive criterion because it might occur irrespective of whether the violated norm was "binding" or "non-binding." At most, violating binding obligations might entail higher reputational costs,¹⁸⁶ which only amounts to a gradual, not a categorical difference. Likewise, in a constructivist reading, non-binding norms may as well have an impact upon the preferences and identity of their authors and addressees. Therefore, any attempts to find a sort of "higher morality" in binding law beyond the mentioned sanctions or an increased reputational risk are speculative and on the edge of metaphysics.

With binding instruments adopted by international organizations the situation is not much better. Neither the designation of international instruments as "binding" nor the competencies of the adopting body are conclusive indicia of binding effect. Operational rules by bodies without the competence to make "binding" decisions might nevertheless be binding due to direct implementation. Middle-of-the-road concepts like "*de facto* bindingness" are helpless attempts to preserve a distinction of whose failure they are the best evidence. Jan Klabbers, therefore, takes the view that any international agreement could be considered binding.¹⁸⁷ In my view, the concept of an instruments binding nature, though it has an undeniable heuristic value, is theoretically elusive and is not a meaningful criterion for a theoretically sound distinction between different kinds of instruments expressing different kinds of commitments.

This journey to the heart of relative normativity, thus, brought us beyond the concept of bindingness. The same methodology could be extended to the realm of the traditional sources and be used for the reconceptualization of various sub-forms of these instruments that practice has developed. End-of-the-world scenarios in the face of relative normativity are exaggerated. A theoretically sound approach to

¹⁸⁴ For an impressive deconstruction of intent see KLABBERS (note 57), at 65 *et seq.*

¹⁸⁵ d'Aspremont (note 43), at 10 (accepting reference to these instruments as "soft law").

¹⁸⁶ Friedrich, in this issue.

¹⁸⁷ KLABBERS (note 57), at 164.

legal doctrine will always find pragmatic ways for the inclusion of new forms of public authority into the international legal order.