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THEORETICAL PRELIMINARIES**

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REGULATÓRIOS GLOBAIS – ALGUMAS  
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## THE QUEST FOR INTERNATIONAL RULE OF LAW AND THE RISE OF GLOBAL REGULATORY REGIMES – SOME THEORETICAL PRELIMINARIES

### A BUSCA PELO ESTADO DE DIREITO INTERNACIONAL E A ASCENSÃO DOS REGIMES REGULATÓRIOS GLOBAIS – ALGUMAS CONSIDERAÇÕES PRÉVIAS

MIODRAG JOVANOVIĆ<sup>1</sup>

University of Belgrade, Law Faculty  
Bulevar kralja Aleksandra 67  
11000 Belgrade, Serbia  
miodrag@ius.bg.ac.rs

**Abstract:** This paper addresses the rise of global regulatory regimes within a broader theoretical framework of the international rule of law. Section 1 focuses on the question of who should be ultimate beneficiaries of the international rule of law, and it challenges Waldron's claim that these should be individuals, rather than states. This section shows that, depending on the nature of a particular regime, states could also benefit from the global adherence to the rule of law. Section 2 explores what is required for a global regulatory regime to conform to the international rule of law value. Since central to this value has to be the very same idea that exists on the domestic level, that of "bounded government" which is restrained from acting outside its powers, a global regulatory regime has to meet a set of procedural and substantive requirements stemming from domestic administrative law, but adapted to peculiarities of the international level. Finally, Section 3 tries to show that the capacity of these regimes to excel the rule of law principles immanent to administrative matters is intricately connected to their putative "legality". It transpires, however, that jurisprudential effort of conceptualizing global administrative law largely depends on its prior task of settling much broader issues, such as the relation between the core and peripheral concept of international law and the theoretical sustainability of "graduated normativity" of international legal instruments.

**Abstract:** Este artigo aborda o surgimento de regimes regulatórios globais no contexto de uma estrutura teórica mais ampla do Estado de Direito Internacional. A Secção 1 centra-se na questão sobre quem devem ser os beneficiários finais do primado do Direito Internacional, e desafia a tese de Waldron de acordo com a qual estes devem ser indivíduos, ao invés de Estados. Esta secção mostra que, dependendo da natureza de um regime particular, os Estados também podem bene-

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1. Full Professor, Faculty of Law, University of Belgrade [miodrag@ius.bg.ac.rs](mailto:miodrag@ius.bg.ac.rs) First version of this paper was presented at the international conference "*Global Administrative Law and the Concept of Law*", which took place on 28 November 2014 at the Faculty of Law, University of Lisbon. I am indebted to the participants of the conference for their useful criticisms and comments. Special thanks go to Miguel Prata Roque who was the commentator to this paper.

ficiar da adesão global ao Estado de Direito. Na Secção 2 é explorado aquilo que é necessário para que um regime regulatório global possa estar em conformidade com a ideia de Estado de Direito Internacional. Como aquilo que é central para esta ideia tem de residir justamente na mesma ideia que existe no nível doméstico, a de “governo limitado” que está impedido de ir além dos seus poderes, um regime regulatório global tem de cumprir um conjunto de requisitos processuais e materiais decorrentes do Direito Administrativo nacional, embora adaptado às peculiaridades do plano internacional. Finalmente, na Secção 3 procura mostrar-se que a capacidade destes regimes para destacar os princípios do Estado de Direito imanescentes às matérias administrativas está intrinsecamente ligada à sua “legalidade” putativa. Verifica-se, no entanto, que o esforço jurisprudencial de conceptualizar o Direito Administrativo Global depende em grande medida da sua tarefa prévia de resolver questões muito mais amplas, tais como a relação entre o núcleo e conceito periférico do Direito Internacional e a sustentabilidade teórica da “normatividade gradual” dos instrumentos legais internacionais.

**Keywords:** global regulatory regimes, international rule of law, global administrative law, graduated normativity, jurisprudence

**Palavras-chave:** regimes regulatórios globais, Estado de Direito Internacional, Direito Administrativo Global, normatividade gradual, jurisprudência

**Summary:** 1. Introduction; 2. Who Should Benefit from the International Rule of Law?; 3. On Conceptualization of “Global Administrative Law”; 4. A Concluding Note

**Summary:** 1. Introdução; 2. Quem Deve Beneficiar do Estado de Direito Internacional?; 3. Conceptualização do “Direito Administrativo Global”; 4. Uma nota final

## 1. Introduction

Ian Brownlie opened his Hague Academy lecture on the occasion of the Fiftieth Anniversary of the United Nations by noticing that the “[t]he moral purpose of the United Nations was the promotion of the Rule of Law in international relations”, and, thus, concluded that his approach had necessarily to involve “a standing back and an evaluation of the institutions of international law”. This was so, because “the Rule of Law is much more than the application of the existing legal norms, but must involve an assessment of the quality of the legal norms”.<sup>2</sup> Such a perception of the goal of the United Nations has been more manifestly confirmed in recent years with the establishment of The Rule of Law Coordination and Resource Group, which was supported by the Rule of Law Unit,<sup>3</sup> as well as with the adoption of several General Assembly’s and Security Council’s resolutions dealing with this subject matter.<sup>4</sup> It appears, then, that regulating behavior of both state and non-state actors in the transnational realm needs to be scrutinized against the guiding value of the international rule of law. One of the rapidly growing areas of such a regulation is often denoted as falling under the “global administrative law”. This designation refers to various global regulatory regimes involving such diverse sectors as “[t]rade, finance, the environment, fishing, exploitation of marine resources, air and maritime navigation, agriculture, food, postal services, telecommunications, intellectual property, the use of space, nuclear energy, and energy sources”.<sup>5</sup>

I will begin by addressing the question of the beneficiary of the international rule of law value. In particular, I will challenge Jeremy Waldron’s claim that ultimate beneficiaries of the international rule of law should be individuals, rather than states. I will demonstrate that, depending on the nature of a particular international law regime, states could also benefit from the global adherence to the rule of law. This is, for instance, true in some cases of global regulatory regimes, which are tailored in such a way that they involve transnational administrative bodies which perform administrative functions but are not directly subject to control by national governments. In the next section of the paper I will examine what is required for such a global regulatory regime to conform to the international rule of law value. I will conclude by arguing that “legality” of these regulatory regimes is intricately connected to their capability of excelling the value of the international rule of law.

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2. IAN BROWNLIE, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, The Hague, 1998, p.1.

3. See, <http://www.unrol.org/>

4. General Assembly has adopted the following resolutions: A/RES/61/39, A/RES/62/70, A/RES/63/128. Security Council has convened several thematic debates on the rule of law (S/PRST/2003/15, S/PRST/2004/2, S/PRST/2004/32, S/PRST/2005/30, S/PRST/2006/28) and adopted resolutions stressing the relevance of the international rule of law in the context of children in armed conflict (SC Res 1612), women, peace and security (SC Res 1325, SC Res 1820), as well as the protection of civilians in armed conflicts (e.g., SC Res 1674).

5. SABINO CASSESE, Administrative Law without the State? The Challenge of Global Regulation, *International Law and Politics*, 37, 2005, p. 671.

## 2. Who Should Benefit From The International Rule Of Law?

Skeptics would instantly concede to the statement that the present-day “high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning”.<sup>6</sup> Potentials for disagreement enhance with the fact that an “internal” concept needs to be “externalized” in the international sphere. This is “the process by which a feature or characteristic that exists within the inside set is projected or attributed to circumstances or causes that are present in the outside space according to an internal–external dichotomous structure”.<sup>7</sup> When discussing the rule of law value in the international realm, Brownlie, for instance, cautiously observes that, while it is possible to subject this realm “to analysis in terms of the values of national legal and political systems”, one has to keep in mind that “legal concepts should not be translated too readily” from the domestic to the international level. The key reason lies in the fact that the relations between the states cannot be equated to the relations between legal subjects in the domestic field.<sup>8</sup>

This is exactly the starting point of Waldron’s analysis of how are we to conceive of the rule of law value in the international realm. He notices that it is tempting to make analogy between individuals in the domestic sphere and states in the international one. Since the rule of law as applied on individuals in domestic relations implies that in the absence of clear regulation individual freedom is increased, the analogy would lead to the conclusion that states’ international legal restraints have to be interpreted “in a rigorously textual spirit”. That is, “there would be no requirement to stretch or extend their meaning to constrain governmental freedom of action in areas that are unclear”.<sup>9</sup> According to Waldron, this reading is clearly fallacious, because unlike individual freedom, which is the intrinsic value of human’s individuality, “a state’s sovereignty is an artificial construct” and cannot as such be regarded “as a first principle of normative analysis”.<sup>10</sup>

This leads Waldron to dismantling the conventional analogy, according to which states at the international level should be the primary beneficiaries of the rule of law, just as are individuals at the national one. There is more to it. Namely, state is not just a subject of international law, but it is also its *agency*, its *official*, “so far as the administration and enforcement of international law is concerned”.<sup>11</sup> Accordingly, we have to employ a novel analogy (as presented below), according to which states and international institutions at the transnational level are

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6. SIMON CHESTERMAN, An International Rule of Law?, *The American Journal of Comparative Law*, 56, 2008, p. 332.

7. Take, for example, the concept of “sovereignty”, devised by Bodin for the domestic purposes, which was in the eighteenth century externalized by the Swiss author de Vattel. STÉPHANE BEAULAC, The Rule of Law in International Law, in *Relocating the Rule of Law*, Oxford and Portland, 2009, p. 204.

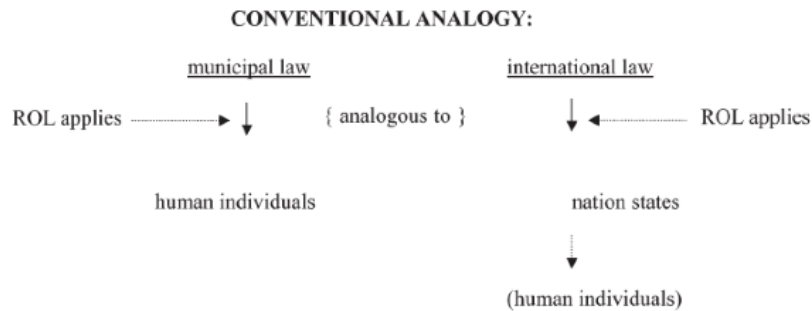
8. IAN BROWNLIE, *The Rule of Law*, p. 213.

9. JEREMY WALDRON, The Rule of International Law, *Harvard Journal of Law and Public Policy*, 30, 2006, p. 20.

10. *Ibid.*, p. 21.

11. JEREMY WALDRON, Are Sovereigns Entitled to the Benefit of the International Rule of Law?, *European Journal of International Law*, 22, 2011, p. 330.

comparable to state officials and administrative agencies at the domestic level. This, in turn, puts individuals at both national and international level in the position of the primary beneficiaries of the rule of law.<sup>12</sup>



3.



One need not enter complex debates on ontological and axiological issues regarding corporate entities,<sup>13</sup> in order to realize that Waldron too quickly dismisses some similarities between individuals and states. He reminds us of the social contract theory construction of the state of nature, which commonly serves as the starting point for our discussion on the justifiable limitations of state's restrictions of individual freedom, just to conclude that state "is not to be regarded in the light of an anarchic individual, dragged kicking and screaming under the umbrella of law for the first time by some sort of international social contract".<sup>14</sup> Interestingly enough, such sort of reasoning was not strange to the earliest proponent of the social contract theory, Thomas Hobbes. He argued that in the absence of some international legal order, which was under his theory hardly conceivable, states found themselves in the situation comparable to the state of nature, and, thus, "the same law [of nature, M.J.] that dictateth to men that have no civil government what they ought to do, and what to avoid in regard

12. *Ibid.*, p. 329.

13. See more in MIODRAG JOVANOVIĆ, *Collective Rights – A Legal Theory*, Cambridge, 2012, pp. 44-56.

14. JEREMY WALDRON, *The Rule of International Law*, p. 21.

of one another, dictateth the same to Commonwealths”.<sup>15</sup> What Waldron tends to neglect is that states existed as *independent* actors long before the international legal order vested them with sovereignty, which is the designation for a bundle of rights and responsibilities.<sup>16</sup> “Sovereignty”, in this respect, is the legal construction of state independence in the same way as “human rights” are the legal construction of individual freedom.<sup>17</sup> Consequently, just as we postulate the state of nature to ask under what conditions, if any, state might be justified in coercively restricting individual freedom, so we may, by way of analogy, ask under what conditions, if any, would be justifiable for the international order to restrict state independence.<sup>18</sup>

The progress of international law can be read precisely as the process of gradual imposition of constraints on state independence. The famous “Lotus principle”, according to which restrictions on state independence cannot be presumed because of the consensual nature of the international legal order,<sup>19</sup> is now regarded by some prominent scholars as utterly outdated.<sup>20</sup> The same is true of the “domain réservé” doctrine, which states that certain issues fall out of the material scope of jurisdiction of international law.<sup>21</sup> In words of Judge Cançado Trindade, the expansion of international law in the second half of the 20th century is evidenced, among other things, “by the concomitant erosion of the objection of the domestic jurisdiction or the reserved domain of States”. In the framework of

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15. THOMAS HOBBS, *Leviathan*, London, pp. 217-218. Electronic version available at [socserv.mcmaster.ca/econ/ugcm/3113/hobbes/Leviathan.pdf](http://socserv.mcmaster.ca/econ/ugcm/3113/hobbes/Leviathan.pdf)

16. International system of sovereign states is commonly taken to be the result of 1648 Westphalia peace treaties.

17. Waldron would here insist on the claim that individual freedom has intrinsic, while state independence can have only instrumental value. Nevertheless, our interpretation of international instruments that led to the system of sovereign states would have to be extensively stretched in order to support the claim that legal construction of sovereignty initially meant to protect primarily individuals and not the states.

18. Somewhat paradoxically, social contract argument and Kant’s ideal of self-legislation seem to work more successfully in the international, than in the domestic realm, since the main sources of international law are based on the explicit consent (treaty) or consensual behavior (custom) of states. This is not to say that the consent theory provides satisfactory explanation of the binding nature of the entire body of international law. Yet, “one cannot ignore the role of consent in international law ... it is preferable to consider consent as important not only with regard to specific rules specifically accepted (which is not the sum total of international law, of course) but in the light of the approach of states generally to the totality of rules, understandings, patterns of behaviour and structures underpinning and constituting the international system”. MALCOLM SHAW, *International Law*, 6th ed., Cambridge, 2008, p. 10.

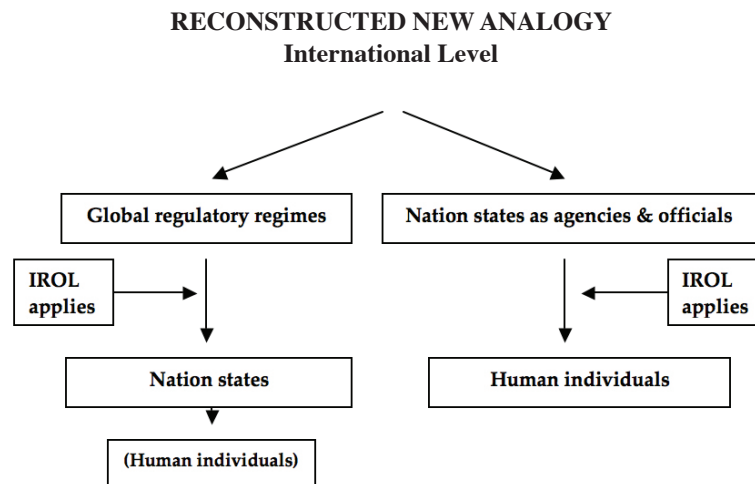
19. “Lotus”, Judgment n. 9º, 1927, in P.C.I.J., Series A, n.10º, p. 18.

20. In his separate Declaration to the ICJ’s Advisory Opinion in the Kosovo case, Judge Simma criticized “[t]he underlying rationale of the Court’s approach” as reflecting “an old, tired view of international law... famously expressed in the ‘Lotus’ Judgment.” International Court of Justice, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, n. 2010/25º, 22 July 2010, Declaration of Judge Bruno Simma, par. 2, available at <http://www.icj-cij.org/docket/files/141/15993.pdf>

21. Article 2º(7) of the UN Charter states as follows: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

multilateralism, states gradually realized that this objection “was self-defeating, and should be avoided, for the sake of the growth of International Law itself”.<sup>22</sup>

To this Waldron might object by resorting to his claim that states on international level are much more analogous to administrative agencies on domestic level, insofar as they normally perform the function of administering and enforcing international law. This, then, becomes the main reason for treating individuals as primary beneficiaries of the international rule of law. Things are, however, more complex than that. In some global regulatory regimes, the primary role is assigned to international organizations, as well as to informal intergovernmental regulatory networks and hybrid public-private or private transnational bodies. In some cases, they “enjoy too much de facto independence and discretion to be regarded as mere agents of states”.<sup>23</sup> Consequently, to the extent that they are subjects rather than agents and officials of these global regulatory regimes, states find themselves in the position of the primary beneficiaries of the international rule of law and individuals could be said only indirectly to benefit. And conversely, where states “work in tandem” with international organizations,<sup>24</sup> in the capacity of administrators of international law, individuals should be seen as the primary beneficiaries of the international rule of law. Hence, Waldron’s schematic presentation of who should benefit from the international rule of law (IROL) can be reconstructed in the following way:



22. Moreover, “the attribution to the organ concerned rather than to the interested State of the determination whether a matter was or not covered by the limitation of article 2<sup>o</sup>(7) of the Charter helped to draw attention to its artificiality as a safeguard for State sovereignty”. ANTÔNIO AUGUSTO CANÇADO TRINDADE, *International Law for Humankind – Towards a New Jus Gentium*, Leiden and Boston, 2010, pp. 172-173.

23. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, The Emergence of Global Administrative Law, *Law and Contemporary Problems*, 68, 2005, p. 26.

24. JEREMY WALDRON, Are Sovereigns Entitled, p. 331.

## 2. Global Regulatory Regimes And The International Rule Of Law

So far it has been indicated that we are living in the world of rapidly evolving regimes of global governance, which purport to regulate such vast areas of conduct of both state and non-state actors, ranging from sports to world trade, from food production to energy resources. Now it is necessary to explicate the reasons for depicting the phrase “global regulatory regimes” and not some other one that can be found in the growing literature on this subject matter. The term “regime” is here used to denote “principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area”.<sup>25</sup> I take “regime” to be preferable to the word “system”, which Sabino Cassese uses in the phrase “global regulatory systems”,<sup>26</sup> because the systemic nature of a regulatory regime, in the Hartian sense of the word, gives rise to the claim that we are dealing with a developed legal regime. However, the fact that these global regimes purport to regulate mutual relations of various actors is not in itself sufficient to argue that they are *legal* regimes. Hence, it would be premature to address them all as belonging to “global administrative law”, despite the fact “that much of global governance is administrative in form”,<sup>27</sup> insofar as it includes “rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties”.<sup>28</sup> As it will be demonstrated, “legality” of these regimes will ultimately depend on them being capable of conforming to the rule of law value. A final caveat should be given with respect to the choice of the word “global” instead of “international”. As noted by von Bogdandy, Dann and Goldmann, the term “global” in the “global governance” phrase “emphasizes the multilevel character of governance activities”.<sup>29</sup> This is evidenced by the definition of “global administrative bodies” provided in the seminal article of Kingsbury, Krisch and Stewart regarding the emergence of “global administrative law”. According to the authors, these bodies include: “formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public–private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance”.<sup>30</sup>

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25. STEPHEN D. KRASNER, Structural Causes and Regime Consequences: Regimes as Intervening Variables, *International Organization*, 36, 1982, p. 185.

26. He dismisses the alternative phrase “international regime” not because of the letter word, but because of the former which he associates with regulating “the relations between sovereign States as unitary actors”. SABINO CASSESE, *Administrative Law*, p. 670, n. 43.

27. GORDON ANTHONY et al., Values in Global Administrative Law: Introduction to the Collection, in *Values in Global Administrative Law*, Oxford and Portland, 2011, p. 1.

28. Rulemaking is “not in the form of treaties negotiated by states, but of standards and rules of general applicability adopted by subsidiary bodies”. Adjudication normally “includes informal decisions taken in overseeing and implementing international regulatory regimes”. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, *The Emergence*, p. 17.

29. ARMIN VON BOGDANDY / PHILIPP DANN / MATTHIAS GOLDMANN, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, in *The Exercise of Public Authority by International Institutions – Advancing International Institutional Law*, Heidelberg, 2010, p. 7.

30. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, *The Emergence*, p. 17.

Von Bogdandy, Dann and Goldmann's eventual dismissal of "global" for the traditional term "international" has more to do with the "governance" part of the "global governance" approach, insofar as "it does not enable the identification of those acts which are critical because they constitute a unilateral exercise of authority". The reason for this lies in the fact that "global governance flattens the difference between public and private phenomena, as well as between formal and informal ones".<sup>31</sup> My decision to stick to the term "global" stems primarily from the aforementioned "multilevel character" of transnational regulatory regimes.<sup>32</sup> In doing so, I do not oppose *en bloc* von Bogdandy, Dann and Goldmann's alternative "public law" approach, which focuses on the "exercise of international public authority".<sup>33</sup> What I challenge, however, is their attempt to draw a strict and clear demarcation line between public and private authority in the international realm, by relying on a specific public law source as the defining criterion for the establishment of the "international public authority". In authors' words, they are interested in institutions that "exercise authority attributed to them by political collectives on the basis of binding or nonbinding international acts."<sup>34</sup> There are at least three problems with the "public law" approach. First, if all the elements of the focal concept of "international public authority" are dependent on their "legal basis" – a specific public international law act – then it is question begging how nonbinding international acts are to count as producing same legal effects as legally binding ones. Second, the authors themselves are aware of the danger that their criterial approach might leave aside some global regulatory activities that "can be regarded as a functional equivalent to an activity on a public legal basis", inasmuch as such activity "directly affects public goods". Such is, for instance, the activity of the Internet Corporation for Assigned Names and Numbers (ICANN), which manages a global infrastructure by assigning Internet domain names.<sup>35</sup> This is by no means the only transnational body which assumes public (quasi)regulatory function. As rightly pointed out by Kadelbach, "[i]f the disposition over public goods is the criterion", then "also international

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31. ARMIN VON BOGDANDY / PHILIPP DANN / MATTHIAS GOLDMANN, *Developing the Publicness*, p. 10.

32. There are two additional reasons, which are of terminological nature and help avoiding confusion in the disciplinary field. First, the term "international" is used as an adjective to "administrative law" in order to denote regulations of internal matters of international organizations, such as legal relationships towards the organizations' personnel, budgetary affairs or internal dispute resolution. Second, the designation "international administrative law" (*Internationales Verwaltungsrecht*) has been used for quite some time in the German scholarship to denote rules pertaining to collision between jurisdictions and the applicability of the law of a certain country to a given case. MATTHIAS RUFFERT / SEBASTIAN STEINECKE (in co-operation with JANA MÜHLISCH), *The Global Administrative Law of Science*, Heidelberg, 2011, pp. 18-20.

33. They argue that "any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority if it determines individuals, private associations, enterprises, states, or other public institutions". ARMIN VON BOGDANDY / PHILIPP DANN / MATTHIAS GOLDMANN, *Developing the Publicness*, p. 5. The "determination" affects legal position of the given subject, either by legally obliging or by pressuring it to behave in a certain way. (*Ibid.*, p. 12)

34. "The «publicness» of an exercise of authority, as well as its international character, therefore depends on its *legal basis*." *Ibid.*, p. 13.

35. *Ibid.*, p. 15.

sports organizations such as IOC or FIFA are of interest”.<sup>36</sup> This leads us to the third problem of the strict public-private authority dichotomy. It transpires that international public authority can be exercised not only by formally structured international organizations with separate legal personality, but also by various “informal entities”, which qualify for the status of “institutions” only “in the sense of organizational sociology”.<sup>37</sup> Consequently, the criterial public law approach does not take us that far as promised when departing from the global governance perspective, which was criticized as flattening the differences between public and private and formal and informal phenomena.

For all the stated reasons, it seems more adequate to proceed from a broader and more diffuse concept of “global regulatory regimes”. To say this is not to abandon von Bogdandy, Dann and Goldmann’s initial premise that these global regulatory activities are worthy of our attention, insofar as “they require normative justification”.<sup>38</sup> Quite the contrary, I share this idea. However, whereas they choose to search for such a justification within a “public law framework”, which raises the problematic assumption that on the international level “there are superiors and entities or individuals who are their subjects”,<sup>39</sup> I propose to assess these activities in light of the international rule of law value that is said to guide the entire international legal order. What has been demonstrated so far is that the “externalization” of this value necessitates its adaptation to the peculiar features of the international arena. Not only states are primary subjects of international law, as indicated by Brownlie, but they are also often subjected to regulatory activities of various transnational, non-state actors. This, as I demonstrated, makes them at times the primary beneficiaries of the international rule of law.<sup>40</sup> Since these global regulatory activities are largely administrative in form, the common hunch in addressing the question of their normative justification is to borrow some set of administrative law principles inherent to the domestic rule of law value. As Harlow puts it, “[t]he rule of law ideal forms the central background theory against which the principles of administrative law operate, while at the same time acting as a governing principle”. Moreover, the rule of law value “gives rise to a further set of principles, which form the body of administrative law”.<sup>41</sup> This simplified pattern is impossible to replicate at the global level.

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36. STEFAN KADELBACH, From Public International Law to International Public Law: A Comment on the “Public Authority” of International Institutions and the “Publicness” of their Law, in *The Exercise of Public Authority by International Institutions*, Heidelberg, 2010, p. 44.

37. They are legitimate object of the study of the public law approach “if they enjoy determining capacities as defined above”. VON BOGDANDY / PHILIPP DANN / MATTHIAS GOLDMANN, *Developing the Publicness*, p. 16.

38. *Ibid.*, p. 16.

39. Kadelbach reminds us of the fact that the Roman private law institutions “have lent themselves to international law doctrine”, because only this way international actors could be perceived as equal. In that respect, “[t]he «publicness» of classical public international law resulted from nothing more than the fact that the actors were states, but did not presuppose any legal hierarchy between them”. STEFAN KADELBACH, *From Public International Law*, p. 44.

40. Most obviously, states benefit from the international rule of law guiding the use of force by international organizations. See, MIODRAG JOVANOVIĆ, Responsibility to Protect and the International Rule of Law, *Chinese Journal of International Law*, 14, 2015, pp. 757-776.

41. CAROL HARLOW, Global Administrative Law: The Quest for Principles and Values, *The European Journal of International Law*, 17, 2006, p. 190.

Notwithstanding the fact that administrative law is largely a Western construct, whose principles may not sit comfortably in many parts of the world,<sup>42</sup> there are various national administrative law traditions (e.g. French v. Common law) from which it is possible to draw different set of governing principles.<sup>43</sup> Even more importantly, the emerging “global administrative space” is multifaceted,<sup>44</sup> insofar as it consists “of separate regimes, which are connected into a network by piecemeal ties and cross-references”. This space “is not the result of a unitary design and ... does not embody a unitary structure”. Its characteristic features are the following: “it is cooperative and non-hierarchical; it has no center; it does not develop according to a plan, but spontaneously and incrementally; it creates a thick regulatory mass.”<sup>45</sup>

Kingsbury, Krisch and Stewart differentiate between five global regulatory regimes: 1) administration by formal international organizations (e.g. UN Security Council and its committees); 2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials (e.g. the Basel Committee on banking policy matters); 3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes (e.g. the exercise of extraterritorial regulatory jurisdiction); 4) administration by hybrid intergovernmental-private arrangements (e.g. Codex Alimentarius Commission on food safety standards); and 5) administration by private institutions with regulatory functions (e.g. International Standardization Organization on standards for various products).<sup>46</sup>

Whoever are the subjects of global regulatory regimes – be that states, individuals, corporations, NGOs, or other collectivities<sup>47</sup> – central to the international rule of law value has to be the very same idea that exists on the domestic level, that of “bounded government”, which is restrained from acting outside its powers.<sup>48</sup> At the domestic level, government is restrained by acts of public law, which also provide formal channels for the institutional control of administration. This is hardly the case with most global regulatory regimes.<sup>49</sup> The clearest situation

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42. This is the reason why Harlow eventually argues that on the international level “a universal set of administrative law principles ... is neither welcome, nor particularly desirable; diversity and pluralism are greatly to be preferred”. *Ibid.*, p. 207.

43. *Ibid.*, pp. 191-193.

44. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, *The Emergence*, p. 18, pp. 25 ff.

45. SABINO CASSESE, *Administrative Law*, p. 677.

46. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, *The Emergence*, pp. 20-23.

47. *Ibid.*, p. 23.

48. This is “a premise on which both the common law principle of *ultra vires* and the French principle of *excès de pouvoir* are based”. CAROL HARLOW, *Global Administrative Law*, p. 207.

49. This is the key reason why the topic of “global regulatory regimes” could hardly be filtered through some “global constitutionalism” matrix. As rightly pointed out by Krisch, postnational constitutionalism necessarily has “to connect with the foundational tradition” of the nation state. NICO KRISCH, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law*, Oxford, 2010, p. 53. However, “this strategy runs into obstacles. Most approaches to postnational constitutionalism are too thin to redeem the full promise of the domestic constitutionalist tradition and therefore cannot provide the continuity they seek”. An additional problem concerns the necessity to respond to the profound diversity of a global society. “[I]f the constitutionalist project seeks to redeem a minimum of its foundational aspirations, it needs to

is with the first aforementioned type of regulatory regimes. International organizations are vested with administrative functions by some binding international legal instrument. Take, for instance, the authority of the World Health Organization, which stems from the WHO's Constitution, which entered into force on 7 April 1948.

Article 21<sup>o</sup> of the Constitution lists five areas which the WHO has the power to regulate.<sup>50</sup> Contrast this with the Basel Committee which is composed of representatives of the central banks and supervisory authorities of the G-10 countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States) and Luxembourg. While the Basel standards were initially intended "only to apply to internationally active banks in the G-10, the 1988 Accord was quickly applied to all banks in the G-10, and over 100 other countries «voluntarily» adopted the accord".<sup>51</sup> When this range of its regulatory activities is coupled with the fact that the Basel Committee "is a «club» by design – small, homogeneous, and insular – designed to reach agreement quickly and act flexibly",<sup>52</sup> it becomes obvious why we are here in need of a more robust normative justification in terms of the rule of law.

Having in mind the variety of global regulatory regimes, most of which were not developed within formal international organizations, Kingsbury, Krisch and Stewart focus on the set of procedural and substantive principles, which can be said to emanate from the broader rule of law value,<sup>53</sup> and through which the existing global administrative practice might be assessed. As for the procedural principles, these are: *procedural participation and transparency* (e.g. an opportunity to be heard is stressed in the International Olympic Committee's World Anti-Doping Code); *reasoned decisions* (e.g. the global anti-doping regulatory regime requires a written, reasoned decision for measures against a particular athlete); *review* (e.g. the right of appeal to the Court of Arbitration for Sport from doping decisions). As for the substantive principles, they are particularly important when individual rights are placed at the forefront, and they amount to: *proportionality, means-ends rationality, avoidance of unnecessarily restrictive means, and legitimate expectations*.<sup>54</sup> Having in mind diversity of global regulatory regimes, these substantive principles would not always play an equally important role in the regime's operation.

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define (some) principled hierarchies, which in a divided society may well exacerbate tensions further." *Ibid.*, p. 67.

50. These are: a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; b) nomenclatures with respect to diseases, causes of death and public health practices; c) standards with respect to diagnostic procedures for international use; d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; e) advertising and labeling of biological, pharmaceutical and similar products moving in international commerce.

51. MICHAEL S. BARR / GEOFFREY P. MILLER, *Global Administrative Law: The View from Basel*, *The European Journal of International Law*, 17, 2006, p. 20.

52. *Ibid.*, p. 18.

53. These authors use a different path for the question of normative justification of global regulatory regimes.

54. In addition, they discuss to what extent exceptions in terms of immunities or lower standards for certain global regulatory areas, such as national security, could be justified. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, *The Emergence*, pp. 37-42.

### 3. On Conceptualization Of “Global Administrative Law”

It is upon jurisprudence, understood as the philosophical inquiry about the nature of law,<sup>55</sup> to determine whether a particular global regulatory regime could count as an instance of global administrative law. Since the theoretical disagreement whether to use adjective “global” or “international” is primarily of scholarly relevance, and there is a wide consensus on the “administrative” nature of transnational regulatory activities, the most pressing question to be answered is whether various employed instruments of regulation not falling under the standard sources of international law, as espoused by article 38<sup>o</sup>(1) of the ICJ Statute,<sup>56</sup> could be said to be *legal* instruments. Proceeding from the aforementioned “public law” approach, Goldmann stresses the same point when arguing that “legal account of international public authority requires a legal conceptualization of the instruments by which public authority is exercised.”<sup>57</sup> A number of these instruments belong to what scholars gathered around the Brussels’ “Global Law” program labeled as “UNOs”, that is, a class of “Unidentified Normative Objects – whose legal character is uncertain or challenged, but which produce or aim to produce regulation.”<sup>58</sup> All this, eventually, requires operating with a concept of (international) law against which we would be able to determine the legal nature of the given instruments.

In advancing the case for the concept of “soft law”, Peters and Pagotto dismiss “the binary view”, according to which normativity *qua* legal bindingness cannot be graduated. On the binary view, something is either law or non-law, and so the “soft law”, defined as “not legally binding in the ordinary sense, but ... not completely devoid of legal effects either”, is contradiction in terms.<sup>59</sup> However, as these two authors point out, “a ban on the term soft law will not prevent governments and other political actors from continuing to rely on unusual instruments and acts. Legal analysis should be informed by the empirical observation that acts which at least *prima facie* do not fit into the traditional categories of purely legal or purely political acts are being adopted in abundance”.

Since “legal scholarship must ... capture reality ... a special juridical term of art appears appropriate in order to describe a special phenomenon.”<sup>60</sup> Thus, the central problem consists in finding an appropriate way of approaching the in-

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55. Cf. ANDREI MARMOR, The Nature of Law, in *The Stanford Encyclopedia of Philosophy*, Winter 2011 Edition, at <http://plato.stanford.edu/archives/win2011/entries/lawphil-nature/>

56. This by no means implies that traditional sources of international law are not the subject matter of jurisprudential inquiry, but only that hardly anyone seriously challenges their legal nature. Nonetheless, one may come across quite different philosophical accounts of why treaties or customs count as instances of international law. See, generally, SAMANTHA BESSON, *Theorizing the Sources of International Law*, in *The Philosophy of International Law*, Oxford, 2010, pp. 163-185.

57. MATTHIAS GOLDMANN, Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority, in *The Exercise of Public Authority by International Institutions*, Heidelberg, 2010, p. 666.

58. BENOIT FRYDMAN, A Pragmatic Approach to Global Law, *Working Paper*, 2012, p. 3. At <http://ssrn.com/abstract=2312504>

59. ANNE PETERS / ISABELLA PAGOTTO, Soft Law as a New Mode of Governance: A Legal Perspective, *New Modes of Governance Project*, Paper n. 04<sup>o</sup>/D11, 2006, p. 4.

60. *Ibid.*, pp. 7-8.

vestigated phenomenon and conceptualizing it. Goldmann, who follows in the footsteps of Peters and Pagotto, notices that neither the “absolute” concept of law, based on “the binary view”, nor its alternative, “relative” concept, which he favors, can be qualified as “right or wrong”. They “can only be more or less convenient for understanding reality.”<sup>61</sup> In words of the prominent legal philosopher Robert Summers, “[i]f the analytical jurist is to provide the illumination and insight of which he is capable ... [h]e must go beyond analyzing concepts within our conceptual scheme as it is, and *devise improved ways of more adequately representing reality* (emphasis, M. J.)”.<sup>62</sup>

What scholars in the developing field of “global administrative law” normally do boils down exactly to attempts at “devising improved ways of more adequately representing” a newly created “reality” – that is, “raw data”<sup>63</sup> – of global regulatory activities.<sup>64</sup> In Capps’s words, “our view of the raw data alters our view of the role of the legal scientist.”<sup>65</sup> First, “raw data” of the investigated legal domain could be perceived as relatively stable and coherent. Yet, this might lead us into both directions – either to the idea that general legal concepts can be analytically extracted from participants’ viewpoints and ordinary language usage (Hart)<sup>66</sup>; or to the idea that the given social practice exhibits a coherent purposive orientation and, hence, has an essential, singular purpose (Weber).<sup>67</sup> The second possibility is that “the legal scientist has to impose order on the disparate raw data and thus take an active role in concept formation”.<sup>68</sup>

Now, what is the nature of “raw data” of global regulatory activity? It seems that no participant in the debate is willing to argue that we are dealing with a stable and coherent material. On the contrary, as the aforementioned Cassese’s finding demonstrates, we are faced with the disparate raw material, spontaneously

61. MATTHIAS GOLDMANN, *Inside Relative Normativity*, p. 676.

62. ROBERT S. SUMMERS, *The New Analytical Jurist*, *New York University Law Review*, 41, 1966, p. 871.

63. This is Finnis’s term. According to him, legal “raw data” “is constituted by human actions, practices, habits, dispositions, and by human discourse”. These “can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc. And these conceptions of point, value, significance, and importance will be reflected in the discourse of those same people, in the conceptual distinctions they draw and fail or refuse to draw”. JOHN FINNIS, *Natural Law and Natural Rights*, 2<sup>nd</sup> ed., Oxford, 2011, pp. 3-4.

64. Kingsbury, Krisch and Stewart, for instance, propose that “[i]t may be that a better account of the legal sources of existing normative practice in global administration could be grounded in a revived version of *ius gentium* that could encompass norms emerging among a wide variety of actors and in very diverse settings, rather than depending on a *ius inter gentes* built upon agreements among states”. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, *The Emergence*, p. 29.

65. PATRICK CAPPS, *Human Dignity and the Foundations of International Law*, Oxford and Portland, 2009, p. 47.

66. HERBERT HART, *The Concept of Law* (With an Introduction by Leslie Green), 3<sup>rd</sup> ed., Oxford, 2012.

67. MAX WEBER, *Economy and Society – An Outline of Interpretative Sociology*, I, Berkeley, 1978. However, it must be added that “Weber’s *general* concepts of normative practices, such as law or the state, arise through the identification of common features which all forms of the phenomena have”, because “there is no end which is common to all social practices of that type”. PATRICK CAPPS, *Human Dignity*, p. 92.

68. *Ibid.*, p. 48. Capps takes the Finnis’s standpoint of “practical reasonableness”.

developing, without a unitary structure or a center. This obviously calls for an active role of the theorist in the conceptualization of “global administrative law”. What does such an active role imply? For one, scholars involved in the study of a global administrative law “recognize that these are normative projects, and not simply a taxonomical exercise”.<sup>69</sup> That is, before taking a taxonomical step of determining whether a regulatory instrument could be classified as an instance of global administrative law, one has to provide a normative justification for the given global regulatory regime. This is what von Bogdandy, Dann and Goldmann also acknowledge in their “public law” approach when saying that the basis of a plausible legal analysis requires identifying “phenomena that need justification”.<sup>70</sup> How a theorist is supposed to assume active role and proceed with this normative project of justification without falling into the trap of taking some arbitrary standpoint? One way of doing it is to employ principles inherent in the investigated social practice. Since global regulatory regimes possess some important and typical features of administration, borrowing from justificatory principles inherent in domestic administrative law “seems a sensible thing to do”.<sup>71</sup> And this is what theorists commonly do when investigating the phenomenon of global regulation. Starting from a general idea of what the guiding value of international rule of law requires in the putative area of global administrative law<sup>72</sup> – and this is the ideal of “bounded governance” – they regularly move to a more concrete set of principles, such as the aforementioned principles of transparency, accessibility, accountability.<sup>73</sup>

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69. BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, *The Emergence*, p. 42.

70. As noticed, they focus on “the exercise of international public authority”. VON BOGDANDY / PHILIPP DANN / MATTHIAS GOLDMANN, *Developing the Publicness*, p. 5.

71. JAN KLABBERS, *Goldmann Variations*, in *The Exercise of Public Authority by International Institutions*, Heidelberg, 2010, p. 717.

72. At the most abstract level, this assessment proceeds from something akin Fuller’s “internal morality” standards of the rule of law, which require that legal norms have to satisfy requirements of generality; promulgation; limited retroactivity; clarity; absence of contradictions; not requiring the impossible; constancy through time; and congruence between official action and declared rule. LON FULLER, *The Morality of Law*, 2<sup>nd</sup> ed., New Haven, 1969. For an analysis in what ways Fuller’s theory might be helpful in rethinking general international law, see, JAN KLABBERS, *Constitutionalism and the Making of International Law: Fuller’s Procedural Natural Law, No Foundations – Journal of Extreme Legal Positivism*, 5, 2008, pp. 84-112.

73. There is a vast literature following this route. I will mention only couple of examples. For a general discussion, see, e.g., ELEANOR KINNEY, *The Emerging Field of International Administrative Law: Its Content and Potential*, *Administrative Law Review*, 54, 2002, pp. 428 ff. ANDREW D MITCHELL / JOHN FARNIK, *Global Administrative Law: Can It Bring Global Governance to Account?*, *Federal Law Review*, 37, 2009, pp. 237-262. For a discussion as applied in the area of global regulation of forestry, see, e.g., ERROL MEIDINGER, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, *The European Journal of International Law*, 17, 2006, pp. 80 ff. For a discussion of the global regulation of international trade through accountability lenses, see, e.g., SIDNEY A. SHAPIRO, *International Trade Agreements, Regulatory Protection, and Public Accountability*, *Administrative Law Review*, 54, 2002, pp. 435-458. For a discussion of legitimacy and accountability of Basel process, see, e.g., MICHAEL S. BARR / GEOFFREY P. MILLER, *Global Administrative Law*, pp. 24 ff. For an assessment of the World Anti-Doping Agency regime in light of these principles, see, e.g., LORENZO CASINI, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, *International Organizations Law Review*, 6, 2009, pp. 445-446.

Legal nature of a global regulatory regime, thus, appears to be intricately connected to the possibility of a prior normative justification in terms of the international rule of law value as applied in the administrative matters.<sup>74</sup> However, the theoretical project of conceptualization of global administrative law does not end here, because it ultimately depends on one's understanding of the concept of international law. This is so, on account that a particular international legal regime, such as putative global administrative law, has to share important features of a general legal regime it belongs to. The same applies to the relation between the concepts of international law and law in general. In a recent attempt to provide philosophical foundations of international law, Capps discriminates between different methodological steps in the process of the concept formation of law in general and international law. This project begins "at the level of our everyday practices, intuitions and language usage", where we find "paradigm cases of law", which are usually referred to as law (e.g. statutes), and "irregular cases of law", which are not normally considered law (e.g. some internal administrative circular of a ministry).<sup>75</sup> However, at the level of jurisprudential concept formation, the distinction should be made between the "concept of law" (or, the central case of law), which is an account of the constitutive features of law; "a peripheral case of law", which contains only some of the attributes of the concept of law; and "a false case of law", which lacks all the constitutive features (e.g. scientific laws).<sup>76</sup> Unlike Hart, who tends to draw the concept of law directly from paradigmatic cases of law, Capps argues that "[o]ur paradigm and irregular cases are defeasible examples of law and are not necessarily, in themselves, an example of either the concept of law or peripheral cases of law."<sup>77</sup> This conceptual relation, *mutatis mutandis*, extends to the relation between "paradigm cases of international law" (e.g. multilateral treaty), "irregular cases of international law" (e.g. General Assembly Resolution) and the "concept of international law",

74. This goes along the lines of Kingsbury's proposal "that in choosing to claim to be law ... a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law". Kingsbury acknowledges that the "publicness" requirement may sit uncomfortably with other elements of Hart's theory of law, which Kingsbury proposes to endorse in the conceptualization of "global administrative law". Thus, this requirement "seems much more consistent with Lon Fuller's view than Hart's". BENEDICT KINGSBURY, The Concept of "Law" in Global Administrative Law, *The European Journal of International Law*, 20, 2009, p. 30. For this reason, Ming-Sung Kuo charges Kingsbury for reading Hart through Fuller's lenses. MING-SUNG KUO, The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury, *The European Journal of International Law*, 20, 2010, p. 998. It is doubtful, however, whether Kingsbury should worry that much, because Hart's position on Fuller's theory is far more complex than the one commonly presented in the form of an open rivalry. Gardner has recently persuasively demonstrated that "Hart does not attack, and sometimes seems to support, Fuller's thesis that law by its nature exhibits some value in the rule-of-law dimensions of certainty, generality, and so on". JOHN GARDNER, Why Law Might Emerge: Hart's Problematic Fable, in *Reading HLA Hart's The Concept of Law*, Oxford and Portland, 2013, p. 93.

75. PATRICK CAPPs, *Human Dignity*, p. 35. In this respect, Capps follows Dworkin, who says that a legal philosopher proceeds from "a fairly uncontroversial preinterpretative identification of the domain of law, and with tentative paradigms to support his argument and embarrass competitors in the familiar way". RONALD DWORKIN, *Law's Empire*, Cambridge Mass. and London, 1986, p. 92.

76. PATRICK CAPPs, *Human Dignity*, pp. 35-36.

77. *Ibid.*, p. 36.

which is a type of law drawn from the general concept of law.<sup>78</sup>

Up until recently, “a wide spectrum of alternative instruments”<sup>79</sup> of global regulatory regimes would not even qualify for the status of “irregular cases of international law”. However, dramatic changes in the international arena have largely affected our understanding of international law. Shaw adequately summarizes these tendencies in the opening heading of his chapter on international law today, which is entitled – *The expanding legal scope of international concern*.<sup>80</sup> Therefore, depending how the central concept of international law is construed, some of the “alternative instruments” used for global regulatory activities may end up being qualified at least as “peripheral cases of international law”.<sup>81</sup>

In that respect, recent debates revolve around theoretical sustainability of the claim of “relative” or “graduated normativity” of law. For Peters and Pagotto this quality implies that “law can be harder or softer, and that there is a continuum between hard and soft”.<sup>82</sup> They argue, in more vivid terms, that no “compelling justification of the binarist assertion that «legality» is like virginity” hasn’t been offered to them. Put differently, “legality” does not exhaust in the concept of “validity”, and, hence, the key question “is not «whether» the norm is valid, but «how» it is valid”.<sup>83</sup> This perspective puts “legality” closer to concepts of “justice”, “legitimacy” and “effectiveness”. Hence, “[j]ust as a norm can be more or less «just» or «efficient», it can also be more or less «legal».”<sup>84</sup> The concept of (international) law cannot be, in any way, identified by a fixed set of necessary and sufficient conditions, such as material or formal parameters, the intention to be legally bound or the sanction potential.<sup>85</sup> Instead, the concept formation should be taken “in terms of clusters of predicates”. While none of the predicates is in itself necessary for the application of the concept, some are more salient than others, “so that individual items displaying them are more readily recognized as falling under the concept.” This enables us to differentiate between the “core” and “penumbral” concept of law.<sup>86</sup> Ultimately, we would be able to classify some of the global regulatory regimes as falling under the category of “global administrative law”, which is a “penumbral” (peripheral) case of international law. At the same time, we would not be forced to abandon crucial distinctions between law and politics, morality etc.,<sup>87</sup> as well as between legally binding and non-binding instruments.<sup>88</sup>

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78. *Ibid.*, pp. 36-37.

79. MATTHIAS GOLDMANN, *Inside Relative Normativity*, p. 670.

80. MALCOLM SHAW, *International Law*, p. 43.

81. Peters and Pagotto proceed from somewhat different terminology – in order to argue that “soft law is in the penumbra of law”. ANNE PETERS / ISABELLA PAGOTTO, *Soft Law*, p. 12.

82. ANNE PETERS / ISABELLA PAGOTTO, *Soft Law*, p. 8.

83. *Ibid.*, p. 9.

84. ANNE PETERS / ISABELLA PAGOTTO, *Soft Law*, p. 9.

85. *Ibid.*, pp. 10-12.

86. *Ibid.*, p. 12.

87. *Ibid.*, p. 10.

88. After a remarkable attempt at conceptualization of the so-called “standard instruments”, which would be used for categorization of various global regulatory instruments, Goldmann ends up by claiming that the concept of bindingness is “theoretically elusive”. MATTHIAS GOLDMANN, *Inside Relative Normativity*, p. 711. Klabbers criticizes this stance, by noting: “Shorthand it may be, but it is the sort of shorthand inextricably tied up with legal thought.”

#### 4. A Concluding Note

As the preceding pages demonstrate, a theoretical exposition of the rise of global regulatory regimes takes us at the very heart of the complex debate regarding the nature of (international) law. It starts from the perception that global regulatory activities are largely taken by international organizations and less formal non-state actors. Since these activities are administrative in nature, they have to be assessed against the rule of law value of “bounded governance”. Both states and individuals would benefit from the international rule of law guided activities of global regulatory regimes. At the same time, the capacity of these regimes to excel the rule of law principles immanent to the administrative matters is intricately connected to their normative “weight”<sup>89</sup> and putative “legality”.<sup>90</sup> Jurisprudence has the ultimate say on the possibility of the conceptualization of global administrative law. However, in order to do that, jurisprudence needs to grasp the theoretical sustainability of “graduated normativity” of law and the relation between the core and peripheral concept of international law. This task vindicates the renewed interest of legal philosophy for the subject matter of international law.

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And, then, in more figurative language: “In much the same way that one cannot think of Romeo without thinking of Juliet, or Tristan without Isolde, or Jack without Jill if you will, one cannot think of law without also thinking of it in terms of instruments being binding or non-binding.” JAN KLABBERS, *Goldmann Variations*, p. 723.

89. Kingsbury stresses that “understanding global administrative law as «law» involves not only questions of validity («is this a valid legal rule?»), but also assessments of weight («what weight should Public Entity X give to a norm set by Public Entity Y?»)”. BENEDICT KINGSBURY, *The Concept of “Law”*, p. 20. In this respect, a particularly important issue with potential implications for the international rule of law, concerns the treatment of global regulatory instruments by national courts. Kingsbury argues that “the weight given to a governance decision or administrative rule adopted by an external institution should depend, in part, on the degree to which that institution, in adopting that rule or decision, complied with criteria of «publicness».” BENEDICT KINGSBURY, *Global Administrative Law: Implications for National Courts*, in *Seeing the World Whole: Essays in Honor of Sir Kenneth Keith*, Wellington, 2008, p. 103.

90. “Legality” of certain global administrative rules can be, further, strengthened through the case law of relevant global adjudicative bodies. This, in turn, might be beneficial for the entrenchment of the rule of law value at the international level. This is a separate issue, which requires a detailed discussion that cannot be offered here. See, e.g., SABINO CASSESE et al., *Global Administrative Law: Cases, Materials, Issues* (2<sup>nd</sup> ed.), 2008, especially Chapter 5 on “Judicial Globalization”, available at <http://www.iilj.org/gal/documents/GALCasebook2008.pdf>