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GLOBAL ADMINISTRATIVE LAW
IN DOMESTIC COURTS.
HOLDING GLOBAL ADMINISTRATIVE
BODIES ACCOUNTABLE

Global Administrative Law in Domestic Courts

Holding Global Administrative Bodies accountable

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I. INTRODUCTION

Domestic courts are increasingly confronted with cases in which individuals challenge rules or decisions stemming from diverse transgovernmental regulatory bodies claiming that their fundamental rights are infringed. Numerous individuals that were targeted by the Sanctions Committee of the U.N. Security Council challenged this designation before European and national courts;¹ athletes contested suspensions based on doping misuse by international sport associations.² These cases require domestic courts to deal with a set of complex issues that require them to strike a balance between the respect for decisions made by functionally specialized international regimes and the demand deriving from their respective domestic legal to protect the fundamental rights of individuals.

Traditionally, domestic courts barely had to engage with such issues. The international sphere was static and state-centred; it had little to do with the regulation of human interaction within the territorial confines of the nation-states. Only limited points of reference existed between the domestic and the international legal order. Domestic courts mirrored and safeguarded the clear separation between national law, on the one, and international or transnational law, on the other hand, by relying on the well-established doctrinal constructions of dualism that allowed them to treat international and transnational law as largely irrelevant unless it was incorporated in the domestic legal order in which case they would treat it as national law.

The dramatic change of the international legal system in the past decades has rendered such an approach increasingly inadequate. As a result of the process of globalization and the accelerated differentiation of society into autonomous social systems that spring territorial confines, the capacity of the nation-state to regulate these “transnational communities” in fields such as security, environmental protection, banking and financial regulation, the regulation of the internet, and sports

¹ See for a good summary Vera Gowlland-Debbas, *Implementing Sanctions Resolutions in Domestic Law*, in Gowlland-Debbas/Tehindrazanarivelo (ed.), *National Implementation of United Nations Sanctions: A Comparative Study* (2004), 33, 55–65.

² See Alec Van Vaerenbergh, *Regulatory features and administrative law dimensions of the Olympic Movement's anti-doping regime*, IILJ Working Paper 11/2005, available at www.iilj.org/papers/documents/2005.11Vaerenbergh.pdf.

has been eroded and decision-making powers are increasingly exercised by “a dizzying variety of global regulatory regimes, including international organizations, transnational networks of national regulatory officials, and private or hybrid private-public regulatory bodies”³ that “define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves.”⁴ The rules and decisions adopted by these diverse legal regimes cannot simply be ignored by domestic courts because they are either directly applicable or are drafted in such a specific way that the act of transformation into the domestic legal order often remains purely formal, and does not leave any discretion to the domestic authorities to chill the results prescribed for the individual (or individual entities like companies) addressed.⁵

The problem with the emergence of various global administrative bodies (GABs) is that their rules, procedures and internal organization generally do not correspond with the procedural and substantive standards that have been developed for the exercise of power within liberal-democratic nation-states; rather they follow functional considerations in view of the regulation of global functional sub-systems that have intensified their own logic and rationality. As a result, GABs tend not to take sufficiently into account the effects of their rules and decisions to those that do not participate in the decision-making process. The global administrative space is characterized by a lack of accountability towards individuals. In particular, the rules and decisions adopted by GABs often do not observe the standard of fundamental rights protection that is required within the nation-state.

Global administrative law (GAL) explores the phenomenon of the increasing exercise of regulatory authority by a confusing array of various GABs from the angle of accountability; drawing from the experience of domestic administrative law, GAL seeks to find mechanisms to solve the accountability deficit in global governance.⁶ The central argument of this paper is that the current structure of the global administrative space (GAS) requires domestic courts to assume a central role in

³ Richard Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U.J Int’L & Pol. 695 (2005).

⁴ Andreas Fischer-Lescano/Gunther Teubner, *Regime-Collisions: The Vain search for Legal Unity in the Fragmentation of Global Law*, 25 Mich.J.Int’L L. 999, 1009 (2003-2004).

⁵ The lists conducted by the Sanctions Committee of the UN Security Council, for example, prescribe precisely the individuals whose assets should be frozen leaving no discretion to the addressees of the Security Council Resolution. The decisions of the International Association of Athletic Federations to suspend athletes because of the illicit use of drugs before sporting events also leave no discretion to the national federations.

⁶ Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EJIL 247, 248 (2006 No. 1).

this enterprise. Based on a solidarist conception of the international legal order that is centred around the normative goal of individual rights protection, I claim that domestic courts ought to play a central role in the protection of general principles of public law against rules and decision of GABs in the event that they substantially affect the interests of individuals. In the absence of courts or other equivalent institutions on the transnational level that are in the position to ensure the regard of general principles of public law, domestic courts need to step in to assure that these principles are observed in the GAS. Domestic courts are well-suited for this task as they have a longstanding institutional experience and expertise in the protection of individuals against regulatory authority.

A crucial question is how domestic courts ought to define this role when facing issues of high complexity and technicality involving GABs. On the one hand, there usually are functionally good reasons and necessities why these acts are enacted by GABs. The need for specialized regulation on the transnational level is, in fact, generally the reason why these bodies are created. In addition, the executive branch generally either participates in the decision-making process of these bodies or it approves them as domestic administration is increasingly incapable to deal with these issues itself. On the other hand, the institutional safeguards provided by GABs are many times not sufficient to meet the legal standards required by the rule of law and human rights in the domestic legal orders for decisions that affect individuals rights. There exists a serious accountability deficit in the GAS.⁷ How should domestic courts strike the balance between provisions of the domestic legal order and the GAS against this background? How much, if any, deference should they give to the decisions and rules adopted by these bodies? To which degree do their mandate, their procedure, their know-how, and their composition allow them to decide questions of the complexity and the technicality that usually arise in GAS?

I argue that domestic courts should review acts of GABs affecting individual rights in order to enhance the accountability of these bodies and to transfer general principles of public law to the

⁷ This appraisal is shared by See Kingsbury/Stewart/Krisch, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 16 (Summer/Autumn 2005).

GAS⁸. My approach is hence a bottom-up approach⁹. The threat of judicial review by domestic courts provides incentives for GABs to comply with a domestically required minimum standard resembling general principles of public law in order to avoid sanctions in the form of non-recognition of their decisions. In this way, domestic courts contribute to shaping the GAL: The mechanism of accountability will enable them to transfer the core of general principles of public law of their respective legal order to the GAS.

I will first expand the argument why domestic courts should hold GABs accountable (II.). In this regard, I will present the general framework of my approach (II.A.), deal with the concept of accountability and focus particularly on the correlation between the accountability gap and the lack of conformity with general principles of public law in the GAS (II.B.) and, finally, examine some of the arguments that are brought forward against the transfer of general principles of public law, in general, and, against the transfer by domestic courts, in particular (II.C.). In a second part, I will outline how domestic courts should hold GABs accountable (III.B.) on the basis of the analysis of two case-studies, the *Kadi* case before the European Court of First Instance (CFI) and the opinion of the Advocate General submitted to the European Court of Justice (ECJ) in this matter, on the one hand, and the *Krabbe* case before the District Court of Munich (LG Munich) and the *Meca-Medina* case before the ECJ, on the other hand (III.A.), in which the UN Security Council and the International Association of Athletic Federations (IAAF) accountability mechanisms towards GABs were established and, in part, enforced to protect the fundamental rights of individuals.

II. HOLDING GLOBAL ADMINISTRATIVE BODIES ACCOUNTABLE: THE CASE FOR THE TRANSFER OF GENERAL PRINCIPLES OF PUBLIC LAW TO THE GLOBAL ADMINISTRATIVE SPACE BY DOMESTIC COURTS

A. The General Framework

Normatively, my approach belongs to the realm of solidarism that is one of three different patterns of international ordering that *Kingsbury/Krisch/Stewart* identify: pluralism, solidarism and

⁸ With a similar approach, see David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 L. & CONTEMP. PROBS. 127 (Summer/Autumn 2005).

⁹ See for the implications of a bottom-up-approach in the GAS, Kingsbury/Stewart/Krisch, *supra* note 7, 53-57.

cosmopolitanism¹⁰. It hence corresponds with a normative conception of the role of GAL that is centred around the protection of individual rights¹¹. The increasing transfer of decision-making powers to GABs shall not result in a decline of the rights of individuals that these have gained within the nation-state. Therefore, domestic courts should protect basic rights of the individuals within their jurisdiction and hold GABs accountable for neglecting general principles of public law. The prospect of being held accountable gives incentives to these bodies to comply with the principles in the first place. A bottom-up-process unfolds.

The contributions of this bottom-up process to the GAS are greater than the protection of the rights of those who are affected by the rules and decisions of GABs; the active involvement of domestic courts driven by the normative impetus to ensure affected individuals the observance of general principles of public law in the GAS has the potential to integrate – on a basic level – the various legal regimes with different, often conflicting rationalities that are in need of common values. The combination of the institutional design of domestic courts and the normative force of individual right protection could fulfill important integrative functions in a global society that is increasingly fragmented into transnational communities with conflicting rationalities.¹²

While „aspirations to a normative unity of global law are ... doomed from the outset,“¹³ the goal must be to “effect a loose coupling of colliding units”¹⁴ of global legal regimes to achieve some basic form of normative compatibility. Instead of conceptualizing legal regimes as self-contained, common reference points should be created among the various legal regimes. General principles of public law are well-suited for this purpose as they are considered as fundamentally important, they relate to the control of exercise of regulatory authority and they potentially apply – to different

¹⁰ See their instructive summary of these patterns in Kingsbury/Stewart/Krisch, *see supra* note 7, at 42-51.

¹¹ *Id.* at 43.

¹² The protection of human rights has been a significant generator of common values in the international legal system. Institutional design, discourse structure and rationality of courts encourage balance and the settlement of conflicts in society.

¹³ Fischer-Lescano/Teubner, *supra* note 4, at 1004.

¹⁴ *Id.*

degrees – in any system of public law¹⁵. They encompass the principle of legality, the principle of rationality, the principle of proportionality, the rule of law and, human rights¹⁶.

In order to effectively fulfill an integrative function on the transnational level, domestic courts need to adjust their approach to the conditions of the GAS. An approach that is based on doctrinal constructions of dualism, hierarchy and legal unity is not viable in a situation where the rationalities of various legal regimes are drifting apart, while each of them claims the prevalence of their respective law in cases of conflict.¹⁷ The reason for the insufficiency of such means is well outlined by *Krisch*:

“In a situation of fundamental contestation over who should have the final say, any institutional order that responds primarily to one of the different constituencies is likely to lack legitimacy and will thus be unable to produce lasting and stable decisions. As long as the contestation persists, alternative institutional mechanisms will therefore be necessary.”¹⁸

As a consequence, domestic courts will have to develop a new instrumentarium and a new self-understanding in dealing with cases involving the rules and decisions of transnational regulatory regimes. The GAS with its mix of public, public-private and private bodies also requires a new conception on how to deal with law generated by private legal regimes that does not originate from the nation-state. A promising approach is proposed by *Fischer-Lescano/Teubner* who argue that the center-periphery divide could take the place of hierarchy of legal norms: “While courts occupy the center of law, the periphery of the diverse autonomous legal regimes is populated by political, economical, religious etc. organizational or spontaneous, collective or individual subjects of law,

¹⁵ See Benedict Kingsbury, *International Law as Inter-Public Law*, available at <http://www.law.nyu.edu/kingsburyb/fall06/globalization/papers/KingsburyNewJusGentiumandInter-Public11.pdf>, at p. 33.

¹⁶ *Dyzenhaus* follows a similar approach that relies on a broad understanding of the rule of law, see *supra* note 9. However, the conception of the rule of law seems to be more of a western concept than the conception of general principles of public law that conceptually leaves more room for particularities of other world regions, and it does not necessarily include human rights. See *supra* note 8.

¹⁷ *Fischer-Lescano/Teubner* rightly state that “[n]either doctrinal formulas of legal unity, nor the theoretical idea of norm hierarchy, nor the institutionalization of jurisdictional hierarchy provide an adequate means to avoid such conflicts.” See *supra* note 4, at 1003.

¹⁸ See *Krisch*, *supra* note 6, at 264.

which, at the very border of law, establish themselves in close contact to autonomous social sectors.¹⁹ However, the center-periphery divide should not be understood as an absolute border to institutional competency. Courts should also play a role in the periphery, albeit to a substantially lesser degree than in the center, if fundamental legal principles are concerned. They should intervene if private regulatory regimes such as doping regime affects the rights of individuals in a way that substantially disregards general principles of public law. In contrast, if only the organizational structure or the decision-making process of such regimes is concerned, courts should refuse to assume jurisdiction over such issues on the periphery of law.

The importance of the effective protection of individual rights does not give domestic courts a mandate to contest GAL without restraint. It would incapacitate GABs if all domestic courts plainly applied often diverging provisions of their domestic legal order. They would render moot a way of decision-making that has proven to be efficient and functional. Moreover, their composition, their know-how and their decision-making process make them principally an inadequate choice for the distribution of decision-making powers. Therefore, domestic courts should be principally constrained to accept the claim of prevalence of GAL in cases in which the decision-making power has been conferred to GABs. They are required to act cautiously and responsively when confronted with GAL.

Accordingly, in order to avoid that GABs are confronted with a diversity of requirements of different domestic course that create impossible situation for them, the mandate of domestic courts to set aside GAL is limited. *Kingsbury/Krisch/Stewart* stress the need that the implementation of a bottom-up-approach “require(s) some way to order the diversity of techniques that are bound to develop when different countries establish their own procedures and thus seek to influence global administrative bodies in diverging ways”²⁰. In my view, it is essential that the conditions under which domestic courts may set aside decisions and rules of GABs leave enough discretion for regional and domestic particularities on the one hand, but that they are also clear and precise enough in order not to submit them to arbitrariness of domestic courts, on the other hand. If confronted with acts of GABs

¹⁹ Fischer-Lescano/Teubner, *supra* note 4, at 1012-1013.

²⁰ Kingsbury/Stewart/Krisch, *see supra* note 7, at 56.

claiming prevalence vis-à-vis individuals, domestic courts should generally only set aside GAL under the following conditions.

Firstly, individuals should be substantially affected. Not any remote impact on individuals is sufficient. It has to be a qualified effect such as required by the German “subjektives Recht” or the French “intérêt à agir”. What kind of qualified effect is required in concrete can be determined by the respective domestic legal order. Secondly, the institutional safeguards provided by GABs or the substance of the decisions or rules adopted by them contradict general principles of public law. Thirdly, as the standard of general principles of public law varies in different domestic legal orders it would not be appropriate for domestic courts to plainly apply the domestic standard. They may only intervene if a minimum standard of general principles of public law as prescribed in the domestic realm is not met.

Admittedly, these criteria are not as clear and precise that it is impossible to imagine that GABs could be confronted with demands that they are incapable to implement or even demands from different domestic courts that are simply incompatible with each other. My approach certainly does not resemble a Kelsenian conception of law to which unresolved conflicts of laws appear to be incompatible with the concept of law. It rather reflects a governance approach that sets out a framework on the basis of which domestic courts will step-by-step contribute to make GABs more accountable and thus shape the GAS in accordance with general principles of public law. Conflicts of laws actually foster this process. On the one hand, demands from domestic courts to comply with these principles will initiate a political process on the level of the GAB. On the other hand, in cases where the demands of domestic courts are overdrawn so that GABs simply cannot comply with them, a political process could be initiated on the domestic level. The government could attempt to persuade the Court to modify its decision so that compliance with the GAB is possible. Those underlying policies can be expected to have a mitigating effect on domestic courts.²¹

²¹ Possibly, domestic courts could also compete for shaping the GAS by persuasion. They should therefore draft their judgments in a way that persuades other courts and GABs. Well-founded domestic court decisions that take into consideration the particularities of the GAS certainly have better prospects to be taken on by GABs than do have purely nationally-oriented judgments.

B. The Implications of the Concept of Accountability

The evolutionary emergence of GABs out of functional considerations and necessities in a globalizing world, characterized by a very high degree of interdependence has, widely unnoticed over the course of time, resulted in the attribution of considerable regulatory powers to them. This development impacts the issue of accountability in two particular ways. Firstly, individuals increasingly come into the reach of transnational regulatory regimes²². The general formal requirement of domestic implementation does not substantially impair this effect on individuals any longer because the acts and decisions taken by GABs are usually so precise and specialised that they do not leave meaningful discretion to the domestic implementer. Secondly, GABs are not accountable to the individuals who are affected by their decisions. Even though GABs are generally highly accountable to their respective constituencies – international organizations such as the United Nations or the WTO are accountable to the nation-states that form their members, private regulatory standard-setting bodies such as the International Standard Organizations (ISO) are accountable to their member organizations and to the market that needs to accept its standards –,²³ this accountability does not translate into accountability towards those that are affected by their decisions: individuals. They are accountable in the wrong way because they are, in part, accountable to the wrong constituency.²⁴ In my view, this has the following reason: Generally speaking, not governments or domestic standard-setting institutions but courts are institutionally designed in a way to hold GABs accountable for disregarding the interests of individuals affected by their rules and decisions. International tribunals, however, are widely missing in the GAS. The accountability gap in the GAS thus calls for a larger involvement of domestic courts.

The basic idea of the concept of accountability is that the prospect for the accountant of having to provide an accounting on the basis of which the accountee may, upon a negative evaluation, impose sanctions provides ex ante incentives for the accountant to give appropriate consideration to the

²² See Kingsbury/Stewart/Krisch, *supra* note 7, at 23-24.

²³ Keohane assumes that international organizations are in general highly accountable to their respective Member States. See, for example, Robert Keohane, *Accountability in World Politics*, 29 Scandinavian Political Studies 80 (2006 No.2). See also Krisch, *supra* note 6, at 250.

²⁴ Krisch, *supra* note 6, at 250.

interests of the accountee in his decision-making process²⁵. On this basis, *Stewart* distinguishes two different basic types of accountability relations. While “[t]he first basic type of accountability relation is exemplified by fiscal, electoral, hierarchical and supervisory mechanisms”²⁶, the second type of situation resembles the structure of right and duty. It “involves conduct by B that harms A in ways that the law prohibits. A, the account holder, institutes an action in a court or other tribunal against B, the accountee, for an accounting to determine whether A’s legal rights have been infringed and, if so, obtain an appropriate remedy”²⁷. The first type of accountability relation resembles in most cases the relationship between international organizations and their member states. The second type relates commonly to the relation between executive bodies and individuals in which courts are interconnected. Courts have the means to nullify acts and decisions of the executive. However, these means do not exist in the relation between GABs and domestic courts because the jurisdiction of the latter is limited to their own legal order. Nevertheless, there is a legally workable way to establish an accountability relation anyways. Domestic courts could deny acts and decisions of GABs recognition in their respective domestic legal order on the basis that they do not comply with general principles of public law. As a consequence, GABs would consider more closely the claims of domestic court prior to the enactment of acts or decisions, namely the observance of general principles of public law whenever individuals may be affected in order to avoid the sanction of non-recognition.²⁸

There are two underlying ideas of the concept of accountability that support this approach. The first, more basic and general dimension suggests that the control of power by those who are affected by its exercise will assure that their interests are taken into account. Accountability thus stresses that the exercise of power is conditional. General principles of public law are closely related to this idea because their purpose is to set conditions for the exercise of power by the government²⁹.

²⁵ See Richard Stewart, *Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance*, available at: <http://www.law.nyu.edu/kingsburyb/fall06/globalization>, p. 13.

²⁶ Stewart, *supra* note 25, at 12. “In each, the relation is created by a grant, delegation or transfer of authority or resources from one actor or set of actors (account holders) to another actor or actors (accountees), where the accountees are to act in the interest of the grantors or third persons”.

²⁷ *Id.*

²⁸ See also Stewart, *supra* note 3, at 753-756.

²⁹ The concept of accountability represents both a means and a reason for the establishment of general principles of public law in the GAS. It is a means in the sense that holding GABs to account for disregard of general principles of

These principles are established in the GAS in a deficient manner even though their legitimacy-generating quality could contribute to alleviate the existing legitimacy problem in the GAS. The reason for this shortcoming is explained, in my view, by the lack of accountability towards individuals.³⁰

There is a second – often overlooked underlying – idea of the concept of accountability that emphasizes the case for accountability of GABs towards individuals. It is the idea of “flipping of the coins” of those upon whom power is imposed over those who impose power³¹. In this respect, accountability represents a means that is in particular at the disposal of the weaker. It enables them to flip the coins when the conditions for subordination are not met. It is as such closely linked to the idea of the social contract. From the perspective of the individual, it does not make a difference whether it is exposed to power exercised by a national government or by a GAB. In both cases, it needs to have an effective means for control of that power. It needs to be able to hold both of them to account for the infringement of fundamental rights. Alongside popular elections, courts belong among the most important institutions by which the individual may flip the coins with regard to the government and hold it accountable for non-fulfilment of the condition of the rule of law.

In the virtual absence of direct or political accountability in the GAS, there remain only indirect or legal means of accountability available to individuals³². Individuals can only hold GABs to account through an institutional actor that is willing to take their interests into account. The individual needs an institutional chain through which it can exercise accountability. On the national

public law will prompt them to establish the prevalence of these principles in their respective sphere. It is also a reason in itself because both, the general principles of public law but also the concept of accountability, embody the idea of control of government to legitimise its exercise of power.

³⁰ In liberal democracies, the establishment of general principles of public law went hand in hand with the empowerment of the people. The social contract in the tradition of *Locke*, still a powerful philosophical account in the theoretical foundation of the nation-state establishes an accountability relation between the people and their government: The people approve the exercise of state power only under the condition that they are better off than in the state of nature. This is only the case when the government respects general principles of public law in the exercise of its powers. Once the government fails to do so the people will hold it accountable and terminate the social contract. However, a comparable link between individuals and GABs is missing on the international level. Member states or other members of GABs are interconnected into the relationship between the latter and the former and impair thereby the establishment of an accountability relation.

³¹ A term used by *Jeremy Waldron* in the Special Workshop Session of 11/17/2006 on Accountability in Global Governance within the framework of the “Globalization and Its Discontents Colloquium: Public and Private in Global Governance”.

³² Legal accountability is indirect because it needs to be enforced by institutions. Sharing this point of view, *see* John Ferejohn, *Accountability In a Global Context*, available at <http://www.law.nyu.edu/kingsburyb/fall06/globalization>, at 6.

level, courts are in particular designed to provide this chain in the case of infringement of general principles of public law. *Stewart's* second type of accountability relation includes precisely this feature³³. Courts are in a certain sense the agent of the individual. They provide the forum on the basis of which the account holder may hold the government to account for not observing general principles of public law. In the global arena, however, courts are rare. Even where international courts or tribunals exist do their procedures usually not allow for individuals to hold international bodies to account.

In contrast, individuals rely on various private bodies or the representative of the nation-state on the international level, the executive branch, as institutional chain for indirect or legal accountability. In the absence of international courts and tribunals, an accountability relation exists only between the Global Administrative Body – (National Government/Private Body) – Individual. In contrast, on the domestic level, the accountability relation persists between the Government – (Court) – Individual. It is this substitution of the court for the government as a forum for redress in the global sphere that explains, in my view, the insufficient establishment of general principles of public law in the GAS. It is the reason why the high degree of accountability of GABs to their respective member states does not translate into accountability towards the citizens of the member states.

The executive branch and private or public-private bodies such as the IAAF or domestic standard-setting agencies pursue particular institutional interests and fulfill certain functions that are distinct from the functions of courts. While the former may generally respect general principles of public law, they are institutionally not designed to guarantee the compliance with these principles. Their task is to find effective and functional solutions for particular policy problems. It explains why they transfer decision-making powers to the global sphere. At times, it is more functional because it enables solution for border transcending policy problems. It is the task of courts to control the executive branch and to provide protection to individuals. The absence of courts explains directly the lack of general principles of public law. It is the result of the lack of systemic

³³ “A, the account holder, institutes an action in a court or other tribunal against B, the accountee, for an accounting to determine whether A’s legal rights have been infringed and, if so, obtain an appropriate remedy”. See Stewart, *supra* note 25.

incentives that the concept of accountability requests. Therefore, so long as institutionally well-equipped courts, tribunals or arbitration panels are missing in the GAS, domestic judges need to fill the gap of the accountability deficit with regard to individuals and modify possible the incentive structure to the extent possible.

C. The Limitations to Domestic Court Involvement

The case in favour of the transfer of general principles of public law to the GAS and in favour of a higher involvement of domestic courts to perform this transfer does not entail, however, that these principles should be transferred to their fullest extent to the GAS and that domestic courts should review rules and decisions of GABs without limitations. In fact, there are strong arguments against the transfer of general principles of public law in general (a.) and the transfer by domestic courts in particular (b.). My claim is that even though these arguments are, in part, powerful they do not alter my case. They merely require limitations as to the strictness and rigidity by which general principles of public law are applied in the GAS and to the degree of involvement of domestic courts.

1. Arguments against the Transfer of General Principles of Public Law to the Global Administrative Space

While many authors have expressed criticism against the ‘wilful blindness’ by which the establishment of Western-style principles to the international level is propagated as a blessing, I will particularly deal with the arguments brought forward by *Carol Harlow* who particularly examined the issue whether the principle of legality and due process principles, the rule of law and human rights provide suitable foundations for the GAS.³⁴ Her paper ends on a sceptical note raising two major objections against the transfer of these principles – that all form part of the general principles of public law propagated in this paper – to the GAS:

³⁴ See Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 E.J.I.L. 187 (2006 No. 1).

“First, administrative law is primarily a Western construct, protective of Western interests. It may impact unfavourably on developing economies. Secondly, the evolution of GAL in adjudicative forums is leading to an undesirable ‘juridification of the political process’. ... [D]iversity and pluralism are preferable”³⁵.

The negative impact the transfer of general principles of public law might have on developing countries is based on the following considerations. First, *Harlow* warns to consider general principles of public law as universal principles. She argues that these principles are the product of the evolution of Western administrative law. Secondly, she claims that these principles are no neutral ideas whose establishment in the GAS will automatically benefit Third World countries. “[T]he network of legal rules and practices that governs a given global commodity chain inevitably reflects the structure of authority and power in that chain”³⁶. It follows that since general principles of public law are the product of the evolution of Western administrative law, their establishment in the GAS will also serve the interests of Western nations and, in reverse, overlook the interests and distinctive cultural traditions of developing countries.³⁷ Consequently, *Harlow* raises the question whether it is against this background legitimate to impose these principles on the developing world.

Harlow makes powerful arguments that are hard to ignore³⁸ but they do not invalidate the core of my claim³⁹. First of all, I deny that the establishment of general principles of public law necessarily serves the interests of powerful Western governments. In fact, I explain the lack of general principles of public law in the GAS by the domination of (governmental) executive bodies and Western-based multi-national enterprises and the absence of institutions such as domestic courts that control their

³⁵ *Id.*

³⁶ Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and EU Law* (2002), at 11.

³⁷ *Kingsbury/Krisch/Stewart* concede that the very conceptualisation of the phenomenon of the influx of transnational regulatory bodies as GAL might entail this consequence: “[C]asting global governance in administrative terms might lead to its stabilization and legitimation in ways that privilege current powerholders and reinforce the dominance of Northern and Western concepts of law and sound governance. See *Kingsbury/Stewart/Krisch*, *supra* note 7, at 27.

³⁸ Indeed, Third World countries often lack domestic courts that defend the interests of individuals and even if not, only wealthy people might be able to afford hiring a well-trained lawyer and going to court.

³⁹ By stating this I do not imply that the establishment of general principles of public law in their respective legal order is the main concern for developing countries rather than poverty and a lack of resources. Nevertheless, their establishment can be of advantage for developing countries.

activities. Establishing accountability mechanisms based on judicial review by domestic courts should have a civilizing effect on Western dominated GABs. While the claim to transfer these principles to the GAS originates from Western societies it might actually run against the interests of the western participants of GABs. Secondly, the observation that the powerful western nations determine the rules of the game in the global arena is a consequence of the general problem of the North-South-divide. It neither follows from the inequalities in the world that all principles originating from Western legal tradition automatically disadvantage developing countries nor does it provide a solution to this problem to abstain from resorting to Western legal principles. Moreover, my approach leaves a high degree of flexibility for the regard of legal traditions of developing countries. On the one hand, the idea of general principles of public law potentially applies in any system of public law. On the other hand, my idea is not to develop a global standard of general principles of public law. I also do not suggest that domestic courts define the meaning of administrative law principles in the GAS. I rather view their task in providing a bottom-line, a protection of the core of domestic standards. In doing so, they would contribute to the elaboration of these standards on the global level without precluding the result. Therefore, my approach leaves a lot of flexibility for local particularities reflecting the principle of subsidiarity. Finally, the establishment of general principles of public law in the GAS might potentially yield positive effects on developing countries and their citizens in the sense that they will be implemented in these countries as a result of a top-down process because their existence in the GAS unfolds a “legitimacy generating” effect.⁴⁰

The other objection *Harlow* raises is that “the evolution of global administrative law in adjudicative forums is leading to an undesirable ‘juridification of the political process’.”⁴¹ Against the background of the Dispute Settlement Procedure within the WTO system, *Weiler* argues that it is not

⁴⁰ *Miller* argues that some legal instruments adopted by GABs actually had a “legitimacy generating” effect in developing countries. While the latter “typically suffer from a weak state apparatus and their populations have little reason to place faith in the rule of law, [t]he prestige of a foreign model may lend rational authority to a process of reform” (p. 857). As “good” law adopted by “good” countries the establishment of general principles of public law in the GAS might – by persuasion and not by coercion – serve as an example for governments of Third World Countries which get exposed to the working of these mechanisms on the global level. See Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 *American Journal of Comparative Law* 839 (2003).

⁴¹ See *Harlow*, *supra* note 34, at 187.

possible to get “the rule of law without the rule of lawyers”⁴². He expounds in detail how the increasing influence of legal institutions develops a legal culture and a formalized legal discourse that will increasingly replace diplomacy and political compromises⁴³. Even though an increasing involvement of domestic courts will probably not have the same impact on the legalization of the GAS, the introduction of the Appellate Body had on the WTO⁴⁴, it will likely spur this development.

However, the loss that occurs through increasing penetration of legal culture into the sphere of diplomacy and political compromises should – at least within the GAS – not be overrated. In fact, decisions are often taken by groups of specialized experts that tend to overlook general political or legal implications of their decisions. There is a need for domestic courts to provide a controlling balance⁴⁵. Moreover, domestic courts shall only set aside acts of GABs that fall below the threshold of a minimum standard of protection prescribed by their respective legal order. It remains hence enough room for political compromises above this threshold and political dynamics could even force domestic courts to adjust their minimum standard.

2. Arguments against the Transfer of General Principles of Public Law by Domestic Courts

The claim for an active involvement of domestic courts in the GAS faces many serious conceptual problems. First, there is one considerable aspect within the issue of diversity. If every domestic court reviews decisions of GABs by reference to its domestic standard of general principles of public law, this could lead to a diversity of court decisions that threatens to undermine an uniform interpretation of GAL. Secondly, domestic courts tend not to pay sufficient attention to the particularities of the GAS. Instead they favour solutions and mechanisms of their own domestic legal order which is not a workable approach for a global regime. Moreover, their procedure, their know-how, their composition render them rather inapt for deciding questions of the complexity and the expertise that is usually

⁴² Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, available at [www.jeanmonnetprogram.org/papers No. 00/0090](http://www.jeanmonnetprogram.org/papers/No.00/0090) (Part III), p. 7.

⁴³ *Id.* at 7-10.

⁴⁴ The involvement of domestic courts would not be institutionalised and would therefore be far more sporadic. Only if the global administrative bodies responded by adjusting and legalizing their procedure a similar effect could unfold.

⁴⁵ The involvement of domestic courts might sometimes even have the opposite effect and provide incentives for political compromises on how to establish general principles of public law to the GAS.

required in GAS. It could thus be argued that there are good reasons for considering the international arena as the proper domain of the executive branch. One might add that the predominance of the executive in questions of foreign policy should not be undermined by an empowerment of domestic courts – especially since courts are by far not the only actors that could generate general principles of public law for the GAS.⁴⁶ Finally, the image of powerful domestic courts that have the authority to set aside law generally stems from western societies and is not common in Third World Countries.⁴⁷ Against this background, it could be argued that the involvement of (western) domestic courts only strengthens the position of western members of GABs and provides them with an additional means to set aside unfavorable decisions of GABs.

While these aspects form all valid objections, they are mostly incorporated in my approach. The uniform interpretation of GAL is not overly threatened because domestic court may not claim the superiority of the standard of general principles of public law applied by them for the GAS. The role of domestic courts should rather be viewed as making a contribution on how certain principles should be complied with in the GAS. Through their legal reasoning, they will have to convince other courts that this is the correct interpretation⁴⁸. Moreover, diversity of domestic court decisions is also to a certain degree desirable as it reflects the diversity of the different backgrounds of the actors in the GAS. Therefore, my approach is, on the one hand, flexible and reflects the principles of subsidiarity in order to leave room for local particularities. On the other hand, it also sets limits to flexibility as domestic court challenges to GAL need to fall in the ambit of general principles of public law.

I do fully agree that domestic courts would overstrain their capacities if they assumed the role of a policy-maker with respect to decisions of GAL. My claim is, however, that they should confine themselves to their original tasks: They should guarantee individuals the compliance with general

⁴⁶ This point is stressed by Harlow, *see supra* note 34, at 193.

⁴⁷ However, courts are increasingly gaining significance in the domestic polity of Third World Countries. *See* Gloppen/Gargarella/Skaar, *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (2004). However, a serious concern is the lack of impartiality and the existence of corruption among courts in Third World countries that seriously affects the role that I have envisioned for domestic courts.

⁴⁸ *Ann-Marie Slaughter* describes this phenomenon as “the rise of persuasive authority”. *See* Ann-Marie Slaughter, *A New World Order*, (2004), at 75.

principles of public law in cases they are affected by acts of GABs. In this field, domestic courts have superior expertise.

III. HOW TO HOLD GLOBAL ADMINISTRATIVE BODIES ACCOUNTABLE: THE ELABORATION OF GUIDING PRINCIPLES ON THE BASIS OF DOMESTIC COURT DECISIONS

I will first analyse two decisions of domestic courts⁴⁹ respectively in two different areas of GAL in which GABs were either held accountable for the lack of observance of general principles of public law or an accountability mechanism was established for future cases (III.A.). On this basis, I will present content and confines of the principle of the transfer of general principles of public law to the GAS (III.B.).

A. An Analysis of National Court Decisions dealing with Global Administrative Law

I will analyse two court decisions respectively in the area of administration by private institutions with regulatory functions in the field of sports, *Katrin Krabbe v. IAAF* case before the LG Munich⁵⁰ and the *Meca-Medina and Majcen v. Commission* before the ECJ,⁵¹ and two decisions in the area of administration by formal international organizations in the field of international security relating to the *Kadi* case before the CFI⁵² and the Advocate General^{53, 54}.

⁴⁹ One is, in fact, an opinion of the Advocate General of the European Court of Justice (ECJ) on how the ECJ should decide a case.

⁵⁰ LG Munich, available at SpuRt 1995, 161.

⁵¹ See European Court of Justice, David Meca Medina – Igor Majeen, 18 July 2006, case 519/04, in Rec., 2006, pp. I-6991, available at (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:224:0008:0008:EN:PDF>).

⁵² See Cases T-49/04 Hassan v. Council of the Eur. Union, 07/12/2006; T-253/02 Ayadi v. Council of the Eur. Union, 07/12/2006; T-315/01 Kadi v. Council of the Eur. Union and Commission, 09/21/2005; T-306/01 Yusuf v. Council of the Eur. Union and Commission, 09/21/2005. In a structural sense, the CFI can be regarded as a domestic court when it is confronted with Security Council resolutions.

⁵³ See Opinion of Advocate General delivered on January 16, 2008, Case C-402/05 P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, at <http://curia.europa.eu/juris/cgi-bin/gettext.pl?where=&lang=en&num=79919883C19050402&doc=T&ouvert=T&seance=CONCL>.

⁵⁴ *Kingsbury/Krisch/Stewart* distinguish five main types of globalized administrative regulation: “(1) administration by formal international organizations; (2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (4) administration by hybrid intergovernmental–private arrangements; and (5) administration by private institutions with regulatory functions”. See *Kingsbury/Krisch/Stewart*, supra note 7, at 20.

1. Katrin Krabbe v. IAAF and Meca-Medina and Majcen v. Commission

a. Legal Context and Proceedings

In both cases, *Katrin Krabbe v. IAAF* and *Meca-Medina and Majcen v. Commission*, successful athletes were suspended because of doping for several years by international sporting federations that operate under the aegis of the International Olympic Committee (IOC). An urine sample of Katrin Krabbe, the 1991 female world champion over 100 and 200 meters sprint, that was taken in July 1992 revealed traces of Chlenbuterol. Long distance swimmers David Meca-Medina and Igor Majcen were tested positive for Nandrolone after they had finished first and second during the World Cup in Salvador de Bahia, Brazil, in 1999. In the *Krabbe* case, the controversy arose because although Chlenbuterol has a performance-enhancing effect, it had not been listed on the doping list at the time of intake. In the *Meca-Medina* case, Nandrolone was only defined as doping if it exceeds a limit of 2 nanogrammes (ng) per millilitre (ml) of urine to take account of the possibility of endogenous production of Nandrolone. Both, Meca-Medina (9.7 ng/ml) and Majcen (3.9 ng/ml), well exceeded this amount, the controversy arose, however, because there was disagreement in the scientific community whether a larger amount of Nandrolone than 2 ng/ml could be produced endogenously, for example through the consumption of boar meat.

In the *Krabbe* case, Katrin Krabbe was suspended for one year by the German Athletic Federation (DLV).⁵⁵ The legal basis was not doping, though, but anti-sportive conduct. The Council of the IAAF, confirmed by the Arbitration Panel, extended the suspension to two additional years. Katrin Krabbe was not heard prior to the decision. She sued before the District Court of Munich (LG Munich). In the *Meca-Medina* case, both swimmers were originally suspended for four years by the international swimmer federation FINA. The penalty was reduced to two years' suspension by the Cour of Arbitration for Sport (CAS) after FINA and the applicants had agreed by an arbitration agreement to refer the case anew to CAS in view of new scientific experiments. The applicants sought review by the Commission of the European Communities of certain regulations adopted by the IOC

⁵⁵ One and a half years ago, Katrin Krabbe had already been alleged having manipulated a doping test, the imposed suspension was nevertheless annulled because it could not be excluded that somebody else had manipulated the test.

and implemented by FINA and certain practices relating to doping control based on alleged infringement of the athletes' freedom to provide services under Article 49 EC and breach of the antitrust prohibitions under Article 81 and 82 EC Union institutions. The central issue of the case was whether the anti-doping rules are sufficiently related to economic activity which is a precondition for the application of Articles 49, 81 and 82 EC.

b. Holding of the Courts

The LG Munich held Katrin Krabbe's suspension illegal and granted damages.⁵⁶ The LG Munich established its local jurisdiction in this case involving the IAAF on the basis of a doctrinally pioneering but nevertheless sound and appropriate interpretation § 21 of the German Civil Procedure Code because of the economically and regulatory close connection of the IAAF to the German DLV. However, the Court did not elaborate the question of whether and to which degree it is appropriate to exercise jurisdiction over a private international body such as the IAAF⁵⁷. On the substance, the LG Munich plainly applied the German basic law to the decision of the Council of the IAAF. It held the extension of the suspension of Katrin Krabbe by the IAAF, not the one-year suspension of the DLV, unconstitutional on the basis of a lack of competence – according to the rules of the IAAF only the National Athletic Federations are competent to declare a suspension –, a denial to the constitutional rights to a fair hearing and a disproportionate – a suspension of three years overall in the light (not of doping but) of anti-sportive conduct – interference with the constitutional right to freedom of occupation⁵⁸.

In the *Meca-Medina* case, the Commission stated that the anti-doping rules did not fall in the scope of European Community law because they were not directly related to an economic activity, the Court of First Instance (CFI) affirmed holding that the prohibition of doping is based on purely

⁵⁶ The Court of Appeals of Munich (OLG Munich) basically affirmed. OLG Munich, available at SpuRt 1996, 133.

⁵⁷ It only touched this question slightly under the angle of private International Law (The IAAF had its domicile in London, England, at the time) making it easy to itself in merely stating that the IAAF is a group of privates of different nationalities that took the relevant decision in Stuttgart, Germany, where the decision of the Council was taken during the World Athletic Championship in Stuttgart.

⁵⁸ The disproportionality was based on the length of the suspension of three years overall in the face of (only) anti-sportive conduct.

sporting considerations and therefore has nothing to do with any economic consideration.⁵⁹ The fact that the IOC might possibly, when adopting the anti-doping rules, have had in mind the concern of safeguarding the economic potential of the Olympic Games was not sufficient in the opinion of the CFI to alter the purely sporting nature of those rules.⁶⁰

The ECJ set aside the judgment of the CFI deciding that the anti-doping rules fall into the scope of EU law but nevertheless dismissed the appellant's actions as Articles 49, 81, 82 EC were not infringed by these rules. The Court held that "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by [Articles 49, 81 and 82 EC]."⁶¹ A crucial reason for the ECJ to engage in the review of these rules was "the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable ... [that] are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events."⁶² As a consequence, the restrictions imposed by the anti-doping rules "must be limited to what is necessary to ensure the proper conduct of competitive sport."⁶³ The Court subsequently engaged in a limited review of the decision of the CAS and the scientific evidence presented and ultimately concluded that "the restrictions which that threshold [2 ng/ml] imposes on professional sportsmen [do not] go beyond what is necessary in order to ensure that sporting events take place and function properly"⁶⁴ because "[i]t is common ground that Nandrolone is an anabolic substance."⁶⁵

c. Analysis

The decisions of the LG Munich and the ECJ have to be appraised in the context of the extensive autonomy of International Sports Federations, their dual character between private legal nature and

⁵⁹ See European Court of Justice, *supra* note 51, para. 44.

⁶⁰ *Id.* at para. 57.

⁶¹ *Id.* at para. 27.

⁶² *Id.* at para. 47.

⁶³ *Id.*

⁶⁴ *Id.* at para. 54.

⁶⁵ *Id.* at para. 51.

public-like regulatory powers, the far-reaching impact of its decisions vis-à-vis the athletes and the high social importance of the fight against doping in sports⁶⁶. While the establishment of the World Anti-Doping Agency (WADA) has improved the institutional design of the Olympic Movement headed by the IOC in the fight against doping, there still remain shortcomings in the compliance with general principles of public law that could only be alleviated. The autonomy from judicial review in many countries and the lack of well-equipped tribunals in the organizational structure of sport federations has resulted in a predominance of concerns for the economic prosperity of sports that might be affected due to doping scandals over the concerns for the life and professional future of accused athletes. The desire for the cleanliness of the sport often seems to impair the willingness to engage in a comprehensive, detailed and scrupulous investigation of the alleged conduct. In particular, the *in dubio pro reo* presumption in favor of the accused athlete is often reversed when performance-enhancing substances are discovered. The cases of Katrin Krabbe and Meca-Medina are only one out of several examples.

Against this background, it should be the role of domestic courts to establish accountability mechanism towards these sport regimes whose internal rationality is focused on the cleanliness and economic prosperity of sports. They should protect the affected athletes in the case of disregard of general principles of public law and, as a result, create common reference points and increase the compatibility between the two conflicting regimes. Chances are that setting aside the decision of sports bodies in the domestic legal order will spur a process of reflection within these bodies. According to *Van Vaerenbergh* domestic court decisions challenging rules or decisions of bodies assembled within the Olympic Movement was given a lot of authority⁶⁷. As a result, “the International private sport anti-doping regime has gradually overcome many original deficiencies in accountability

⁶⁶ The fight against doping in International sports is institutionally primarily embedded in the Olympic Movement headed by the International Olympic Committee (IOC) that encompasses the International Federations such as the IAAF as well as the National Governing Bodies such as the DLV. In 1999, the IOC set up the World Anti-Doping Agency (WADA) as a special anti-doping enforcement body that conducted the World Anti-Doping Code (WADC). Instructively on the global administrative law dimension of the Olympic Movement, see Van Vaerenbergh, *supra* note 2.

⁶⁷ *Id.* at 21.

and responsiveness” as a reaction to “constant pressure from ... national judges”⁶⁸. It follows that even though the WADC prescribes, in an attempt of the Olympic Movement to insulate itself from domestic court jurisdiction, that cases relating to ‘international events’ or international-level athletes’ can only be appealed to the CAS in Lausanne⁶⁹, domestic courts should not be deterred from exercising jurisdiction in cases where general principles of public law are compromised.

Therefore, the LG Munich and the ECJ chose the right approach to declare that the rules of their respective legal order are applicable to the rules and decisions of IAAF and FINA. While many other domestic courts have hesitated to review decisions of International Sports Federations that affected individuals⁷⁰, I claim that this is appropriate considering the significant regulatory powers of the different bodies represented in the Olympic Movement, the substantial impact of their decisions on individuals and the insufficient mechanisms on their behalf to ensure the observance of general principles of public law. Both, the LG Munich and the ECJ, were apparently motivated by a tendency of these regimes to disregard general principles of public law such as the *in dubio pro reo* presumption, the right to a fair hearing, the principle of proportionality and the freedom of occupation,⁷¹ on the one hand, and the devastating effects that a suspension has on the life of the athletes, on the other hand. In contrast, the decision of the CFI that the applicable anti-doping rules were not related to any economic activity keeps the respective sports regimes and the European legal order alienated. There is no attempt to reconcile the contrasting rationalities, thus threatening the regimes to further drift apart from each other.

The normative claim that domestic courts shall review acts and decisions of GABs that affect individuals and that seem to disregard the domestic standard of general principles of public law does

⁶⁸ *Id.* at 38.

⁶⁹ „The only relevant bases on which awards can be set aside, are if the arbitral tribunal was composed irregularly (art. V.1.d NY Cvt; art. 190 2a) LDIP), if the equality of the parties or their right to be heard in a contradictory procedure was not respected (art. 190d) LDIP: “procedural public policy”) or if enforcement would be contrary to public policy (art. V.II NY Convention; art. 190e) LDIP).“ *Id.* at 18.

⁷⁰ See examples of primarily Swiss courts in Van Vaerenbergh, *id.* at 71.

⁷¹ A right to freedom of occupation is not recognized in every domestic legal order. It is even more controversial whether suspension from professional sport because of doping abused falls within the ambit of such a right. See for a short discussion Van Vaerenbergh, *id.* at 13. According to my approach, this dispute is not essential. Each domestic court decides on the basis of his respective legal order whether a certain rights forms part of general principles of public law. In the German legal order, such a broad understanding of freedom of occupation is well established.

not imply that they may assume their jurisdiction independently of domestic provisions. It merely suggests that they should engage in judicial review under the condition that an interpretation of domestic jurisdictional provisions that observes the domestically common and accepted standards of interpretation is possible. In the present cases, the provisions of the German ZPO and the notion of economic activity in European Community law could be reasonably interpreted to assume jurisdiction. It was therefore appropriate for the LG Munich and the ECJ to perform judicial review.

Both court also have found the right balance of when it is actually appropriate to set aside a decision of a GAB. Considering that IAAF and FINA are international bodies that encompasses national athletic federations of more than 200 different countries and that there are functional reasons relating to the particular organization of the world of sport, including the anti-doping regime, the threshold of the disregard of the core of general principles of public law needs to be exceeded before a domestic court of the home country of one national athletic federations may set aside decisions of these GAB.

In the *Krabbe* case, the disregard of the right to a fair hearing and the rule of law, requirement of previous codification of the prohibited conduct for substantial punishment were disregarded in their core. Notwithstanding its performance-enhancing effect, Chlenbuterol was not listed on the doping list at the time of consumption. In this light, the one-year-suspension of Krabbe founded on anti-sportive conduct by the DLV already appears to be strict as it had huge impact on Krabbe's athletic career. However, it was the two-year extension of the suspension imposed by the Council of the IAAF and the refusal to provide Krabbe with a hearing in this proceeding that caused the LG Munich to set this decision aside. The fact that the LG Munich refused to review the one-year suspension ordered by the DLV shows willingness to defer to the expertise and shared understanding of sport governing bodies as long as they observe general principles of public law to some extent.

In contrast, in *Meca-Medina*, both athletes had undisputedly violated the existing anti-doping provisions. After new scientific evidence had been provided showing that it could not entirely be excluded that an amount of 2 ng/ml and higher of Nandrolone could be produced

endogenously, both athletes were granted a new arbitration proceeding in which the penalty was reduced from a 4-year to a 2-year suspension. The only issue was that a strict application of *in dubio pro reo* similar to domestic criminal law standards in view of the disagreement in the scientific community regarding the production of Nandrolone could have resulted in acquittal. However, given the specific background of anti-doping issue and the expertise that the respective international athletic associations have developed in this regard, domestic courts should leave them some discretion so long as their decisions do not fall below a minimum threshold of respect for general principles of public law. The decision of CAS did not fall below such a threshold.⁷²

2. The *Kadi* and *Yusuf* cases before European Courts

a. Legal Context and Proceedings

On 15 October 1999, the Security Council adopted Resolution 1267 to counteract the support of Al-Qaeda by the reigning Taliban regime on Afghan territory. Paragraph 4 (b) of the Resolution provided that all the States must “freeze funds and other financial resources ... controlled directly or indirectly by the Taliban ... as designated by the Committee (the so-called Sanctions Committee) established by paragraph 6 of the Resolution”. On 19 December 2000, Security Council Resolution 1333⁷³ extended this provision “to funds and other financial assets of Usama bin Laden and *individuals ... associated with him* as designated by the (Sanctions Committee).”⁷⁴ The Sanctions Committee established a process for the listing of persons alleged of financing international terrorist

⁷² However, both, the decision of the LG Munich and the ECJ, are also characterized by a certain lack of responsiveness towards the specific regulatory background of IAAF and FINA. Both courts merely considered whether and to which degree they could apply the German basic-law and the EC European Community law to the decisions of IAAF and FINA without taking into account the specific context of their decision. They simply applied the full standard of their respective domestic law provisions where responsive reasoning vis-à-vis the institutional framework and international setting of this body would have been required.

⁷³ More precisely its paragraph 8 c.

⁷⁴ There is another distinct anti-terrorism regime that was created under Security Council Resolution 1373. It generally requires states to freeze the assets of terrorists and their conspirators (not limited to Al-Qaida and Afghanistan). However, the committee created by Resolution 1373 is not a sanctioning body and does not manage a list of targeted entities and individuals that states are required to sanction.

activities on the basis of submissions by member states. The process does not provide a right for the persons concerned to be heard. The reasons for the listing are not disclosed⁷⁵.

On 27 May 2002, the Council of the European Union essentially transformed the content of the Security Council resolution in the form of Regulation No. 881/2002⁷⁶. A right to be heard in the context of the adoption and implementation of this regulation was not provided. The lists of the Sanctions Committee and Annex I to Regulation No. 881/2002 were amended several times by subsequent Security Council Resolutions and European Union Regulations. Several individuals (Hassan, Kadi, Yusuf, Ayadi) listed by the Sanctions Committee and by corresponding EC regulations brought legal action under Article 230 para. 4 EC before the CFI challenging Regulation No. 881/2002 in its amended version. Their assets had been frozen by member state authorities implementing the regulation. These authorities had not provided them with a hearing prior to such action. They argued that Regulation No. 881/2002 violated several fundamental rights, in particular the right to property, the right to be heard and the right to effective judicial review. It is noteworthy in this context, that following the filing of litigation challenging the failure to afford a hearing prior to listing, the Security Council adopted a procedure that enables a UN member state to afford diplomatic protection to a listed individual who is a citizen or resident of that state by seeking to persuade the Committee to remove the individual's name from the list as unwarranted.⁷⁷ A shortcoming of the de-listing procedure is, however, that all member of the Sanction Committee need to approve, while it suffices for the listing that no member objects.

b. The Holding of the Court of First Instance and the Opinion of the Advocate General

The CFI rejected the challenges of the plaintiffs. It held that Article 103 of the UN Charter commands that from the standpoint of international law resolutions of the Security Council prevail

⁷⁵ See Mielle Bulterman, *Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities*, 756 *Leiden Journal of International Law* (2006).

⁷⁶ Its Article 2 provides that "all funds and economic resources belonging to ... a natural or legal person ... designated by the Sanctions Committee and listed in Annex I shall be frozen".

⁷⁷ In addition, the Security Council exempted from the freeze assets needed to meet a listed individual's basic needs.

over every other international treaty including the EC Treaty. Even though the European Union is not a member of the United Nations, it is nevertheless bound by the resolutions in the same way like its member states. As Regulation No. 881/2002 constitutes the implementation at community level of the obligation placed on the member states as members of the United Nations, the community institutions had no autonomous discretion. Consequently, the CFI decided that it had no authority to exercise judicial review – even indirectly – over Security Council resolutions as embodied in the Regulation for conformance with European standards of protection of fundamental rights. However, the Court imposed, as a matter of European law based on European fundamental rights, a legal obligation on EU member states to provide a listed citizen or resident individual the legally enforceable right to present a request to the member state for review of their case and diplomatic protection before the Sanctions Committee. Moreover, the Court decided that it is empowered to review the lawfulness of the EC regulation implementing the asset freeze – and thereby indirectly the Security Council Resolution – for compliance with the norms of *jus cogens*. However, it found in *jus cogens* no mandatory rule of public international law that requires a prior hearing for the persons concerned in circumstances as those of this case, considering the importance of combating international terrorism and the fact that any hardship to a listed individual had been alleviated by the basic needs provision.

The case is currently pending before the European Court of Justice (ECJ) for review; Advocate General Poiares Maduro has submitted his opinion on how the ECJ should decide the case on January 16, 2008.⁷⁸ The Advocate General proposes to adopt a fundamentally different approach: He recommends to overrule the decision of the CFI and to annul Community Regulation 881/2002 in so far as it concerns the appellant notwithstanding the fact that it implements Security Council Resolutions. Rather than concluding that “once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order,”⁷⁹ the Advocate General is of the opinion that “[t]he relationship between international law and the Community legal order is governed by the Community

⁷⁸ See Advocate General, *supra* note 53.

⁷⁹ *Id.* at para. 24.

legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”⁸⁰ In his view, the Community legal order does not accord resolutions of the U.N. Security Council “supra-constitutional status.”⁸¹ Consequently, the Advocate General proposes that the ECJ should annul Community regulations implementing Security Council Resolution if the “Community’s fundamental values are in balance.”⁸² He rebuts concerns brought forward by the respondents, the Council and the Commission, that the ECJ would exceed the limits of judicial activity with the argument that “rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions.”⁸³ Regarding the facts at hand, the Advocate General argues that the fundamental rights of the appellant were infringed. “[T]he indefinite freezing of someone’s assets constitutes a far-reaching interference with the peaceful enjoyment of property ... [underscoring] the need for procedural safeguards which require the authorities to justify such measures and demonstrate their proportionality.”⁸⁴ Such procedural were largely absent, in particular the right to be heard was disregarded as “the Community institutions have not afforded any opportunity to the appellant to make known his views on whether the sanctions against him are justified.”⁸⁵ The de-listing procedure established “offers no consolation in that regard”⁸⁶ as it neither provides for an “obligation on the Sanctions Committee actually to take the views of the petitioner into account” nor for “even minimal access to the information on which the decision was based to include the petitioner in the list.”⁸⁷

c. Analysis

Based on a hierarchical conception of the international legal system, the CFI refused to review the legality of the EU regulation implementing the Security Council resolution with respect to European fundamental rights because – according to Article 103 of the UN Charter – Chapter VII

⁸⁰ *Id.*

⁸¹ *Id.* at para. 25.

⁸² *Id.* at para. at 44.

⁸³ *Id.* at para. 45

⁸⁴ *Id.* at para. 47

⁸⁵ *Id.* at para. 51

⁸⁶ *Id.* at para. 51

⁸⁷ *Id.*

measures of the UN Security Council prevail over all other treaty law. Nevertheless, the Court established other –albeit less effective – accountability mechanism. In obliging Member States to provide diplomatic protection to nationals listed by the Sanctions Committee, the CFI actually implemented a means of holding the Sanctions Committee of the UN Security Council accountable. On the one hand, it created a legally enforceable right of petition for individuals listed by the Sanctions Committee vis-à-vis their nation-state. On the other hand, the way the Security Council is held accountable remains on the level of intergovernmental consultations. While the access to the agent that represents the interests of the affected individual is legally enforceable, the means by which this agent performs its support remains on the level of politics. Moreover, it is doubtful whether the representatives of the nation-states in the Sanctions Committee have the institutional incentives to provide support for the enlisted individual as they were part of the listing procedure. This accountability mechanism is hence not sufficient because the executive branch pursues different institutional interests than domestic courts, and it is not a legalized and transparent procedure⁸⁸.

Complementing the right to diplomatic protection, the CFI established a legal accountability relation with the Security Council by exercising judicial review with regard to jus cogens. In favour of this approach could speak that jus cogens is, in contrast to European fundamental rights, a globally established category of peremptory norms to which even the Security Council is bound and on the basis of which it might be more legitimate to strike down Security Council resolutions. As a global standard, its application as the basis for the establishment of accountability relations could also prevent the fragmentation of public international law that might be the consequence of the application of regional norms. In addition, a hierarchy of norms with jus cogens law at the top, followed by the UN Charter that prevail over other treaty law could generate some form of order and unity in a

⁸⁸ This is illustrated by the case of *Sayadi and Vinck* (Decision of the Tribunal de première instance de Bruxelles, *Sayadi & Vinck v. l'Etat Belge*, 18 February 2005. Sayadi and Vinck were listed by the Sanctions Committee on 22 October 2002. After two and a half years of fruitless criminal investigations, the Brussels Court of First Instance ordered the Belgian state to ask the Sanctions Committee to de-list Sayadi and Vinck. However, the intervention of the Belgian obviously authorities failed. They are still on the list to this date. The public does not know why. See Bulterman, *supra* note 75, at 756-757.

fragmented international legal system.⁸⁹ Furthermore, the lack of a competent Court on the level of the United Nations that could judicially review acts adopted by the Security Council and its Sanctions Committee makes a case for the European Court to step in the vacuum⁹⁰.

I argue that the accountability mechanisms established by the CFI are insufficient and that the approach to jurisdictional conflicts as outlined in the *Kadi* decision is flawed. In contrast, I embrace the approach laid out by Advocate General Maduro in his opinion on January 16, 2008.

The main flaw in the reasoning of the CFI is that the the Court attempts to generate unity and order in the fragmented international legal system by employing the doctrinal constructions of hierarchy and legal unity. The Court has good intentions but employs the wrong means because it does not want to accept the social reality of an increasingly fragmented global society, and as a consequence, of a fragmented international legal systems. The CFI accepts the primacy of jus cogens and of the Charter of the United Nations – in descending order – as the paramount principles of public international law to avoid jurisdictional conflicts of different legal regimes that both claim the primacy of their respective legal provisions because the latter is irreconcilable with the conception of legal unity as developed in the context of the nation-state. However, the application of the wrong means could potentially backfire and accelerate the alienation of the different legal regimes with each other. As I have previously outlined, the fragmentation of the international legal system into various autonomous, highly specialized legal regimes is the result of the differentiation of the global society into sub-systems and transnational communities with increasingly conflicting rationalities.⁹¹ However, accepting the primacy of the Security Council Resolutions, even though they are perceived to infringe fundamental values on which the European legal order is based upon – acquiescence rather than engagement – accelerate the alienation of the European Union from the UN regime. Hierarchy

⁸⁹ Moreover, the problem of uniform application of jus cogens that is raised by the interpretation of this category of norms by a regional court rather than by the International Court of Justice is not as severe as it might seem: In fact, domestic courts frequently engage in the interpretation of public international law in the framework of domestic litigation.

⁹⁰ For a discussion about the International Court of Justice's lack of capacity to review Security Council action by reference to the U.N. Charter or other rules of international law, see Jose E. Alvarez, *Judging the Security Council*, 90 A.J.I.L. 1 (1996); B. Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 E.J.I.L. 517 (1999).

⁹¹ The rationality of the trade regime of the WTO often starkly contrasts the rationalities of human rights or environmental regimes; the conflict between the anti-terrorism regime established by the UN Security Council with the human rights values of the European legal order are another example of such conflicting rationalities.

contributes to the separation of these different legal regimes. The approach of the CFI does not create mutual points of references between the legal order, it does not create linkages on the basis of which the legal orders could interact with each other and attempt to reconcile the conflicting rationalities to make them compatible with each other.

It appears that the CFI was to some extent aware of the implications that arise from such an approach and thus established a linkage between the European legal order and the UN regime by empowering itself to indirectly review Security Council Resolutions at the standard of *jus cogens*. However, *jus cogens* represents the least common denominator as a point of reference between the two different legal regimes because the scope of *jus cogens* is very limited, it leaves a very high margin of discretion to the Security Council; most fundamental rights recognized in liberal democracies do not fall in the ambit of *jus cogens*. As a consequence, it does not provide an effective means to ensure the observance of general principles of public law. Hence, it represents an insufficient benchmark for the balance of the conflicting rationalities of the legal regimes.

In addition, it is problematic for a regional court to review a resolution of the Security Council according to *jus cogens* law. The CFI makes a claim that it has no authority to uphold. It neither has the jurisdiction nor the legitimacy to strike down resolutions of the UN Security Council. While technically, the CFI only reviews the legality of the Community regulation in fulfillment of an obligation imposed by the Security Council, the identical content of the regulation with the resolution effectively indicates that the Security Council resolution, in fact, ought to be void by the universal standard of *jus cogens*. The line between direct and indirect review of the resolution is purely formalistic.⁹²

In contrast, it would have been legitimate for the CFI to hold that the Security Council resolution falls below the threshold of respecting a minimum European standard of general principles of public law and that its demand from the UN member states to freeze the funds of

⁹² While I am generally in favor if courts of one legal regime tend to interpret legal provisions of another legal regime if it is required in a pending case and, even beyond, if they assume functions of judicial review in another legal regime if that regime lacks a proper body to perform judicial review, they should abstain from assuming such a function in cases of jurisdictional conflicts. In such cases, they lack the required credibility and impartiality as representative of one legal regime to mediate in a conflict with another legal regime.

individuals without prior hearing is hence not acceptable for the European legal order. It should have concluded that the European Union will not be in the position to comply with the obligation imposed upon its Member States by the Security Council unless certain procedural minimum standards are fulfilled by the Sanctions Committee. In a structurally similar case the German Federal Constitutional Court stated that it would only abstain from the review of EC law by the standards of German constitutional law so long as the European Court of Justice guaranteed the protection of basic rights to a degree essentially equivalent to the level of protection prescribed by the German Constitution⁹³. Partly as a reaction to this ruling, the protection of basic rights at the European level as elaborated by the European Court of Justice improved significantly⁹⁴. The decision of the Federal Constitutional Court thus spurred the development of the protection of basic rights at the European level in enhancing the accountability of the European Court of Justice⁹⁵.

Instead of hierarchy, such an approach would make use of the logic of the center-periphery divide in the delineation of competencies of institutions of different legal regimes. In principle, courts of one legal regimes need to respect decisions of institutions of another legal regimes on the subject-matter in which that legal regime is specialized.⁹⁶ However, the respect for the decisions of institutions of another legal regime is never absolute. Courts should only implement such decisions in their own legal order so long as they remain in the periphery of its fundamental values and principles; if they affect the fundamental interests of the own legal regime, courts should be willing to set them aside.⁹⁷

⁹³ See the operative part of the judgment, 37 BVerfGE 271 (1974).

⁹⁴ See for example Stauder, Case 29/69 [1969] ECR 419, ECJ; Nold, Case 4/73 [1974] ECR 491, ECJ; Hauer, Case 44/79 [1979] ECR 3727, ECJ.

⁹⁵ This approach was adopted by the European Court of Human Rights in its *Bosphorus* decision with regard to the judicial review of acts emanating from the European Union that is not member of the European Convention of Human Rights. See European Court of Human Rights, *Bosphorus v. Ireland*, Judgment of 30 June 2005.

⁹⁶ The Security Council does have the mandate for the maintenance of peace and security in the international legal system. Its decisions on how to best counter the threat posed by Al-Qaida principally need to be respected and implemented to the extent it is required.

⁹⁷ The rationale behind this approach is well expressed in the opinion of Advocate General Maduro: "It is true that courts ought not to be institutionally blind. Thus, the Court should be mindful of the international context in which it operates and conscious of its limitations. It should be aware of the impact its rulings may have outside the confines of the Community. In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. As a result, the Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognise the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to

A good example of how to operationalize the center-periphery divide logic for the proper balance between the respect for the rules and decisions of institutions of another legal regime and the protection of the fundamental values of the own legal order is to contrast the *Bosphorus* decision of the ECJ with the opinion of the Advocate General in the *Kadi* case. In *Bosphorus*, the ECJ had to decide whether a regulation that was adopted to implement a Security Council resolution which imposed a trade embargo on the Federal Republic of Yugoslavia infringed fundamental rights and the principle of proportionality. The Court decided that the interest of “putting an end to the state of war in the region” outweighed the interest of a wholly innocent party to be able to pursue its economic activities using assets it had leased from a company based in the Federal Republic of Yugoslavia. In contrast, in the *Kadi* case the Advocate General proposed to invalidate the regulation implementing the Security Council Resolution because the assets of individuals were frozen in the fight against Al-Qaida without informing these individuals why they were listed and without providing them with a chance to explain themselves. While the latter scenario lies in the center of European fundamental values and principles intend to prevent, the desire of an innocent party to pursue its economic activities in a war region is rather located in the periphery; hence the decision of the Security Council of what steps are necessary for the maintenance of peace and stability should be respected in the former but not in the latter case.

Advocate General Maduro also proposes a feasible way of how to incorporate this balancing process in the methodology of legal interpretation in the European legal order even though there seems to be contradiction of his position with my argument laid out in this paper at first glance. I have argued in this paper that domestic courts should not plainly apply the domestic standard but only intervene if a minimum standard of general principles of public law as prescribed in the domestic realm is not met. On the other hand, Maduro disagrees with the respondents’ argument that “in the light of the international security interests at stake” the Court should “apply less stringent criteria for

weigh those fundamental interests. However, the Court cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect.” See *supra* note 53, para. 44.

the protection of fundamental rights.”⁹⁸ In contrast, he argues that there is no reason for the Court to depart from its usual interpretation of the fundamental rights.⁹⁹ However, the Advocate Generale also states that although the standard of protection should not change, the specific needs arising from the prevention of international terrorism “may result in a different balance being struck among the values involved in the protection of fundamental rights.”¹⁰⁰ It appears that he is willing to factor that the European regulation implements a Security Council resolution intended as a means to fight terrorism into the balancing process and ascribes it special weight. This is in conformity with my view that courts should only intervene if the core of general principles of public law is affected. The principles outlined in this paper are meta-principles that should be incorporated in the legal methodology of the respective legal order. The rights’ conception in the European legal order with the principle of proportionality and the balancing process at its core is well-suited to incorporate these meta-principles into its methodology. The principles outlined in this paper do not require European courts – or any other court in the world – to change their methodology but to incorporate these principles in the balancing process.

B. The Principle of the Transfer of General Principles of Public Law to the Global Administrative Space

The reflections on why domestic courts should hold GABs to account and the analysis of domestic court decisions in the areas of sport and security that actually held them to account or established a respective accountability mechanism point towards the establishment of the jurisprudential principle of the transfer of general principles of public law to the GAS. The purpose of the recognition of this principle, however, is not to undermine the GAS. The emergence of the GAS is the consequence of an evolutionary process following functional necessities in a globalized world but also the result of political decision-making of domestic executive and legislative actors that should not be circumvented by domestic courts. In principle, domestic courts have to respect the prevalence of

⁹⁸ *Id.* at para 42.

⁹⁹ *Id.* at para. 46

¹⁰⁰ *Id.*

the decisions and rules enacted by GABs. Against the background of the European constitutional space, *Kumm* insists on a strong presumption to apply EU law that is closely connected to the idea of legality¹⁰¹. “The presumption for applying EU law can be rebutted, however, if, and to the extent that, countervailing principles have greater weight”¹⁰². In my view, a similar kind of presumption should be applied if domestic courts face GAL. This assumption is based on the premise that domestic courts are, in principle, not the competent organs to decide cases on global administrative law. GABs and their respective tribunals and panels are,¹⁰³ and, in principle, domestic courts ought to respect this distribution of decision-making powers. However, the presumption in favour of the application of GAL should not have the same strength like the presumption in the European context. The European Union and its institutions are characterized by a far greater respect for general principles of public law than any global administrative body. The European constitutional space features a far greater common denominator of shared values and principles than the GAS. For these reasons, the presumption for applying GAL is less closely associated to the idea of legality. Especially with regard to hybrid intergovernmental–private arrangements like ICANN and private institutions such as IAAF, there is no basis for a presumption of legality. Therefore, it appears to be appropriate to speak of a presumption of functional adequacy in the GAS. It is based on the assumption that there are functionally good reasons why these decisions and rules are adopted by GABs. However, this does not imply that GABs ought to have a blanket licence. The presumption of functional adequacy may be rebutted if countervailing principles have greater weight. The charge for the rebuttal of the presumption of functional adequacy varies. One parameter determining the degree of burden required to rebut this presumption could be the five different types of GAL regimes elaborated by *Kingsbury/Krisch/Stewart*¹⁰⁴. Other possible parameters are the degree of impact a decision has on an

¹⁰¹ Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 E.L.J. 299 (2005 May).

¹⁰² *Id.*

¹⁰³ For whatever reason, they are the organ that has been chosen to take this kind of decision. ICANN seems to develop towards being the competent body for the worldwide administration of internet domains. The Security Council is the main body to maintain and to restore peace and security in the world.

¹⁰⁴ See supra note 7. There exists, for example, a continuum between the different types of regimes with respect to their legitimacy deriving from the nation-state as the primary legitimacy generating entity. The United Nations derive far greater legitimacy from the nation-state than ICANN or IAAF. This background partly explains why the LG Munich

individual, the existence of courts, tribunals or structurally similar institutions within GABs, or the degree to which the GABs considered general principles of public law when it enacted the challenged decision or rule. In any event, the presumption should be rebutted if individuals are affected by rules and decisions of GABs in a way that disregards the core of general principles of public law of the respective domestic legal order.

The possibility of rebuttal of the presumption of functional equivalence does not give domestic courts a mandate to directly review the validity of act of GABs, though, for their authority is limited to their own respective legal order. The holding of invalidity would include the claim that the reviewed rule or decision should not apply in the legal order of any other member state. There is no valid basis on which a domestic court could make a claim transcending its own jurisdiction. However, a domestic court may deny the recognition of an act or a rule of a transnational regulatory body on the basis that it does not meet the minimum requirements requested by general principles of public law of its respective legal order. In the case of *Krabbe v. IAAF*, the LG Munich should have stated that the decision of the IAAF-Council does not unfold prevalence in the German legal order. In the *Kadi* and *Yusuf* cases, the CFI should have declared the invalidity of the European regulation transforming the resolution of the Security Council into the European legal order on the basis of a violation of a minimum standard of general principles of public law. This would not involve the claim that this act or rule cannot be accepted in other domestic legal orders. Moreover, the domestic court has to take into account that it cannot impose the legal self-understanding of its own legal order on other member states. The membership in GAL regimes involves the willingness to compromise. This approach has two advantages. On the one hand, it enables the development and elaboration of genuine legal standards of the respective global administrative body based on minimum requirements of its members composing this body. On the other hand, the insistence on minimum standards enables a

could review the legality of the IAAF decision on the length of suspension of Katrin Krabbe with greater ease than the CFI the resolution of the Security Council. It can also be argued that ICANN as a hybrid intergovernmental–private arrangements enjoys slightly greater legitimacy than IAAF as a purely private body because nation-states at least participate in ICANN in the form of an advisory committee. In this sense, the five different regime types form a continuum with respect to the legitimacy derived from the nation-state. According to this parameter, the presumption to apply the rules and decisions of a global administrative body is far greater in the case of formal international organizations. In this case, the presumption is, in fact, closely related to the idea of legality. It is very weak or even virtually non-existent in the case of the fourth and fifth regime type.

certain degree of subsidiarity that leaves enough space for principles of constitutional importance in the respective legal orders.

IV. CONCLUSIONS

The elaboration of a judicial principle of the transfer of general principles of public law to the GAS represents the conceptual advancement of an evolutionary process that currently takes place. As the decisions in *Krabbe*, *Meca-Medina* and *Kadi* reveal, domestic courts already establish accountability mechanisms in order to prevent the circumvention of domestic general principles of public law by GABs. The decentralized and pluralistic transfer of general principles of public law to the GAS that follows from the establishment of accountability relations by domestic courts may not conform with a Kelsenian conception of the law. It reflects, however, the diversity and pluralism of a world that may be appropriately conceptualised as a multi-level system in which the institutional actors of distinct legal regimes of different levels of which none can claim the superiority of its laws interact with each other to shape an increasingly legalizing international legal system. The functional judicial principle of the transfer of general principles of public law to the GAS reflects this background. It is normative in its focus on the protection of individual rights in order to adequately fill the gap of guiding principles in the GAS. It is open and broad in its emphasis on general principles of public law in order to reflect the diversity and plurality of the GAS. It strengthens the validity of the claims of GABs by insisting on the presumption of functional adequacy that may only be rebutted if certain specified conditions are met. It fosters the interaction between the actors of distinct legal regimes of different levels on the basis of persuasion and accountability mechanisms and may thus pave the way for the elaboration of new (general) principles (of public law) in the GAS. It is hence a central component in the strive to counter the threat for an adequate protection of general principles of public law that is posed by the emergence of GABs in their current design.