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ACTORS, AUTHORITIES, AND SUBJECTS IN A PLURALISTIC GLOBAL POLITICAL SYSTEM

Josep Ibáñez

Introduction

The unitary and fragmentary trends found in the international legal order have habitually been treated from the perspective of the series of norms and institutions which conform this order. The development of this order over the last few decades has given rise to a complex debate surrounding the extent of the unitary character of international law and the disintegrating tensions which question its unity as a normative system. There has been a proliferation of both customary and conventional norms, as well as of international regimes, general legal principles and numerous non-binding norms, all of which has complicated the harmonious articulation of the systemic factors within the international legal order, in addition to creating a degree of normative complexity which many international lawyers interpret as fragmentary.[1]

Viewed from the political science perspective of International Relations, these normative phenomena are explained by the deep transformations which international society underwent during the second half of the twentieth century. The constitutive processes of contemporary globalisation, especially in political and economic terms, have created new normative demands and have given rise to new norms and institutions which, in turn, have facilitated the expansion, velocity, intensity and impact of globalising interactions.[2] However, far from being spontaneous, these changes have been provoked by various types of political actors, both State and non-state, and public

[1] Casanovas, O., 'Unidad y pluralismo en Derecho internacional público', *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. II, 1998, pp. 35-267, and Casanovas, O., *Unity and Pluralism in Public International Law*, Kluwer Law International, Dordrecht, 2001.

[2] Held, D. y McGrew, A.; Goldblatt, D. & Perraton, J., *Global Transformations. Politics, Economics and Culture*, Stanford University Press, Stanford, CA., 1999.

and private. This proliferation of actors within international politics was highlighted as far back as the 1970s by transnational currents and, since the 1990s, by authors who study the concept of private authority in international relations. Very few experts in the field today question the increased importance that non-state actors have acquired within what we could refer to as post-international society, which is distinct from the international society of States.[3] Within international public law, the evolution of international subjectivity and the identification of non-state international subjects have also received academic attention, though the doctrinal postures are highly diverse and differ depending on the technical-legal concept which they apply to international legal personality. Indeed, even those who argue that only States can be international subjects in the strict sense of the term have been forced to consider the possibility that many other actors within international relations may also qualify as international legal subjects.

In international life political and normative phenomena do not occur in isolation from each other. In order to fully understand these political-legal linkages we must rely on existing academic connections between International Relations and International Public Law, as well as promoting further links between these two related yet mutually evasive disciplines. Cooperation between the two camps is plagued with difficulties and is constrained by certain limits which have to be acknowledged, but the results of projects which have bridged the gap between the two fields are promising.[4]

By way of furthering interdisciplinary linkages, this article analyses the connections between the actor categories of authority and subject which have developed in parallel within political science and law. For many years the content and application of each of

[3] Post-international society can be defined as the set of social relations comprising the interactions that take place in the heart of the international society of States as well as the interactions between all actors within international relations, be these governmental or non-governmental, public or private, in accordance with behaviour patterns oriented towards basic objectives of social order. See Ibáñez, J., 'Sociedad postinternacional', in C. García & E. Vilariño, (coords.), *Comunidad internacional y sociedad internacional después del 11 de septiembre de 2001*, Gernika Gogoratuz/Munduan Paz y Desarrollo, Gernika, 2005, pp. 119-130.

[4] One of the first and most significant projects to come out of the joint efforts from both disciplines was developed by scholars such as Anne-Marie Slaughter, Kenneth W. Abbott, Judith Goldstein, Miles Kahler, Robert O. Keohane, Andrew Moravcsik, Duncan Snidal. See the monographic issue of *International Organization* (vol. 54, nº 3, 2000) on 'Legalization and World Politics'.

these seemed to be very strictly defined, but their recent evolution has led to the blurring of their profiles and the need to reflect on their articulation. This reflection is vital in order to be able to continue to consider them as useful analytical categories through which to understand international reality.

The article contends that the proliferation of actors and authorities in contemporary international relations has led to a blurring of the concept of international subjectivity within international public law, thereby reinforcing the pluralising trend in the international legal order. Hence, the increase in the number and range of activities of individuals, groups, organisations and entities of all types with some degree of power within world politics has led to an enlarged concept of what or who can be considered as a bearer of rights and responsibilities in international public law, which, in turn, has created greater fragmentary tensions within the international legal order.

The article starts out by analysing the concept of international actor and how this has evolved, as well as examining the proliferation of actors who can be considered as qualifying for this category and the implications of this for international relations. Secondly, there is a consideration of the issue of authority and the growing number of authorities - many private - which influence vital areas of international life and which produce new forms of interaction beyond State borders. Thirdly, the article examines the concept of international public authority, which is analysed with the aim of testing its theoretical effectiveness and of observing its practical implications for the international legal order. Finally, the limitations of traditional concepts of international subjectivity are highlighted and there is an analysis of the process through which this category is becoming increasingly blurred and how this plays out in the resulting fragmentary effects seen within the international legal order.

A pluralits approach to the concept of international actor

For a long period it was taken as given that international relations represented a political ambit which pertained exclusively to States, as these were the only units within the international system which held the power and authority required to determine the

outcomes of political interactions that transcended State borders. Whilst for some analysts this state-centric concept of international life has not changed, for the majority of International Relations scholars it is hard to comprehend many ambits of politics without considering the role of non-state actors and authorities.

The relevance of private actors (especially transnational companies) within contemporary international relations became manifest during the 1950s and 1960s, though this was questioned by Realist school of International Relations, which dominated the field at the time. In the 1970s various authors who would go on to be classified as *transnationalists* perceived the depth of the transformations underway in international politics and economics and conceived the interactions between a wide range of State and non-state actors[5] within a framework of *complex interdependence*.[6] This analysis highlighted the growing importance of transnational actors and activities, a fact that went unnoticed by Classical Realist analyses. The theoretical contributions of transnationalists would go on to be crucial in subsequent developments of the concept of the international actor[7] and in the ideation of a wider and more diverse society than that of the international society of States.

The essence of the notion of a political actor and an international actor is the aspect of power, that is, the capacity to influence other actors and structures within the framework within which these interact.[8] An individual, a group, an organisation, a political or economic entity etc. is an international actor insofar as it is able to deploy power beyond State borders, that's to say, in the degree to which it can actively participate in international relations. Thus defined, the concept of an actor allows us to categorise as such a broad sweep of units within the international system without using

[5] Mansbach, R.W.; Ferguson, Y.H.; Lampert, D.E, *The Web of World Politics. Non-state Actors in the Global System*, Englewood Cliffs, NJ: Prentice Hall, 1976.

[6] Keohane, R.O. & Nye, J.S., *Transnational Relations and World Politics*, Harvard University Press, Cambridge, Mass., 1972, and Keohane, R.O. & Nye, J.S., *Power and Interdependence: World Politics in Transition*, Little & Brown, Boston, Mass., 1977.

[7] García, C., 'La evolución del concepto de actor en la teoría de las relaciones internacionales', *Papers. Revista de Sociologia*, nº 41, 1993, pp. 13-31.

[8] Regarding the concept of power employed here, see Ibáñez, J., *El control de internet. Poder y autoridad en los mercados electrónicos*, Los Libros de la Catarata, Madrid, 2005, pp. 119-134.

taxonomic criteria. Evidently, not all actor-units are equal and not all of these units are permanent actors across time: a unit is an actor to the extent that it relates to other actors within a given space-time context.[9] It is true that some categories of actor, such as States, acquire power in international society in the moment that they are created, and this distinguishes them from other categories of actor whose power is not a function of their mere existence but rather is manifested by means of the activities they carry out in specific material ambits. What must be stressed is that, outside of Realist and Neorealist currents, sovereignty is no longer considered as the sole feature by which to identify an international actor; from a functional perspective, the most relevant aspects of an actor are its autonomy, influence and willingness to participate in international life.[10]

The increase in number and diversity of non-state international actors was spectacular during the second half of the twentieth century. From within States, an ever increasing array of regions, cities and sub-state political entities have started carrying out activities which are comparable with the foreign policy and diplomacy of States. Over recent decades what has become known as *paradiplomacy* has become established in international relations to an extent that State governments would previously have thought to be inconceivable and impermissible.[11] Furthermore, outside the realm of the State there has been a proliferation of international, intergovernmental and non-governmental organisations in a vast array of ambits, these using their influence to achieve outcomes in line with their interests. According to the Union of International Associations there are currently around 7,000 intergovernmental organisations and over 50,000 non-governmental organisations, with the latter growing faster than the former. In addition to non-governmental organisations, we must also consider as a unique form of international actor the numerous social forums, campaign groups and

[9] García, C., 'La evolución del concepto de actor en la teoría de las relaciones internacionales', *op. cit.*, p. 29.

[10] Pareja, P., *Actores y orden en las Relaciones Internacionales. El papel de la República Popular China y Japón en la construcción del orden regional de Asia oriental*, PhD thesis, Pompeu Fabra University, Barcelona, 2010, pp. 47-52.

[11] Aldecoa, F. & Keating, M. (eds.), *Paradiplomacia: las relaciones internacionales de las regiones*, Frank Cass, London, 1999; Michelmann, H.J. & Soldatos, P. (eds.), *Federalism and International Relations. The Role of Subnational Units*, Oxford University Press, Oxford, 1990; Knox, P.L. & Taylor, P.J. (eds.), *World Cities in a World-System*, Cambridge University Press, Cambridge, 1995.

international coalitions which have articulated the collective activities of global civil society over the last two decades.[12] Also at the transnational level, since the 1960s the surge in foreign direct investment has revealed the importance of transnational companies in political as well as economic terms. Whist there are currently over 90,000 transnational companies operating, the number of subsidiary companies affiliated to these is approximately ten times greater than this figure.[13] In all economic sectors, the activities of large transnational companies transcends what are purely business issues and has a decisive influence over institutions concerned with the organisation and functioning of markets, not to mention the political influence these companies have over governments and intergovernmental organisations in terms of the formulation of political-economic measures, international treaties, global political guidelines, etc. And within a different field of activity, recent decades have seen the rise of thousands of transnational criminal groups running all name of legal and illegal activities, including terrorist activities. Many of these groups have become significant international actors which are able to influence the policies of the most powerful States and which are considered to be real threats to international security.[14]

These are merely some of the categories of actors which have proliferated within contemporary international relations and which have altered the fundamental form of international public law and global politics more generally.[15] The international political

[12] Since 2001 the Centre for Global Civil Society / London School of Economics and Political Science produces an annual publication which observes the rise of these activities and the evolution of global civil society. Of these publications, of particular note due to their statistical data are: Anheier, Helmut; Glasius, Marlies; Kaldor, Mary (eds), *Global Civil Society 2001*, Oxford University Press, Oxford, 2002; and Albrow, Martin; Anheier, Helmut; Glasius, Marlies; Kaldor, Mary; Price, Monroe E. (eds.), *Global Civil Society 2007/8*, SAGE, London, 2008.

[13] Conferencia de las Naciones Unidas sobre Comercio y Desarrollo, *Informe sobre las inversiones en el mundo 2010 - Invertir en una economía de bajo carbono*, Naciones Unidas, Nueva York & Ginebra, 2010.

[14] Glenny, M., *McMafia: A Journey Through the Global Criminal Underworld*, Random House, New York, 2008; Naím, M., *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy*, Random House, New York, 2005; Rachel, Ph.L.(ed.), *Handbook of Transnational Crime and Justice*, Sage, London, 2005.

[15] For a systematic treatment of these implications according to actor categories, see Treves, T., 'International Law: Achievements and Challenges', *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. X, 2006, pp. 49-276. In this article individuals are treated as 'non-state actors' in terms of considering their rights and duties within the international human rights regime and international criminal law. Apart from the treatment that individuals deserve as legal subjects, considering individuals as

system hence no longer depends on States as the sole units of political reference, as the international order is no longer a society of States but rather a plural society comprising individuals, groups, organisations and entities with interests and objectives which are not determined by governments. The members of this society establish the normative and institutional conditions which give rise to the social order, this, according to Hedley Bull, referring to patterns of behaviour which aim to preserve the primary or elemental objectives of social life.[16] This is no longer an international order, as it is not determined exclusively by States, but neither is it a global order in the sense posited by Bull due to it not being established by humanity more generally. The notion of international community as defended by Oriol Casanovas has numerous advantages as a concept, as it combines 'an abstract concept, social reality and the reconstruction of structural forces,'[17] though this is too broad a definition if the aim is to highlight the shift from using *inter-state* as a point of reference to using *humanity as a whole*. Within the context of this shift, non-state actors are increasingly present and, over recent decades, there has been a proliferation of instances of authority outside the scope of States and intergovernmental organisations.

The proliferation of authorities in global politics

In conjunction with the rising power of non-state actors, since the 1970s it has become evident that international authority does not necessarily originate from or reside in public bodies, as the sources of authority are sometimes private in form. This was put forward by trasnationalist analyses which, within the context of increasing complexity in global politics, highlighted the existence of authorities which responded to the multiple loyalties of individuals. In addition, it was shown how these loyalties were constantly changing, meaning that the interests and aspirations of individuals and social groups could be better represented by bodies and organisations which were distinct from

international actors is only relevant if we are referring to those which have the power and authority to determine the outcome of political interactions which transcend State borders. In general terms individuals *tout court* can not be considered as international actors.

[16] Bull, H., *The Anarchical Society. A Study of Order in World Politics*, London: Macmillan, 1977.

[17] Casanovas, O., 'Unidad y pluralismo en Derecho internacional público', *op. cit.*, p. 153.

States.[18] It is thus that there may emerge potential and latent rivalries between traditional public authorities and new private authorities looking to gain the loyalty of members of society, as nation-states are territorially limited in their ability to respond to changing popular demands which increasingly transcend State borders.[19] Contemporary economic globalisation confirms this analysis and reveals the manifest variety of political entities which carry their own sources of authority with which to respond to the aims and desires of individuals or groups.

In the 1980s and 1990s, when exclusively state-centric approaches had less predominance, an increasing number of authors drew attention to the authority component of non-state actors in the sphere of political action. A key reference in this line of research are the works of Susan Strange, especially *The Retreat of the State*, which posits that the authority of States in the international political economy is being shared with, or displaced by non-state authorities which establish international market conditions in various sectors and professions.[20] These non-state actors enjoy structural power in that they are able to constitute the framework for relations between actors, and this is possible precisely because their political action is often accompanied by authority.[21] Authority therefore does not have to be public in nature, nor does it need to adapt to the legal framework of the State in which it is exercised, as is demonstrated by instances of international authority in diverse economic and professional sectors (banking, telecommunications, consulting, insurance, etc.), in international organisations and even in some transnational organised crime groups.

[18] Mansbach, R.W.; Ferguson, Y.H.; Lampert, D.E., *The Web of World Politics, op. cit.*, p. 34.

[19] *Ibidem*, pp. 35-36.

[20] Strange, S., *La retirada del Estado. La difusión del poder en la economía mundial*, Icaria / Intermón Oxfam, Barcelona, 2001 (1st ed. in English, 1996). See also Stopford, J. & Strange, S., *Rival states, rival firms. Competition for world market shares*, Cambridge University Press, Cambridge, 1991; Strange, S., 'Big Business and the State', *Millenium Journal of International Studies*, vol. 20, nº 2, 1991, pp. 245-250; Strange, S.,'States, firms and diplomacy', *International Affairs*, vol. 68, nº 1, 1992, pp. 1-15; and Strange, S., 'Territory, State, Authority and Economy: a new realist ontology of global political economy', in R.W. Cox (ed.) (1997), *The New Realism. Perspectives on Multilateralism and World Order*, Macmillan / United Nations University Press, Tokyo / New York / Paris, 1997, pp. 3-19.

[21] Strange, S., *States and Markets*, Pinter, London, 1988.

From a different theoretical perspective on authority, Peter M. Haas alludes to the political relevance of epistemic communities, these being understood as networks of experts or groups with specialised knowledge that grants them a certain degree of authority in political considerations of specific material ambits.[22] The members of an epistemic community share a set of principles and normative beliefs, a series of causal explanations and a similar set of notions of validity derived from intersubjectively and restrictively defined knowledge, as well as holding certain common political convictions regarding the practical application of knowledge. The authority and knowledge emanating from these groups allow their members to offer technical-political advice on issues such as the likely outcome of a decision, the advisability of adopting certain political measures, the identification of the interests of a State or of other State and non-state actors, or the formulation of public policy. In the current situation of growing technical complexity and uncertainty over the consequences of technological innovation in the environment, society and the market, public authorities and politicians have an increasing need to take recourse to experts who can offer authoritative recommendations with regard to public policy decisions.[23] Although recourse to, and control of, scientific authority by the State is nothing new,[24] in highly technical ambits consultation with authorised experts could lead us to conclude that the formulation of multilateral public policy depends more on scientific consensus on the issue being dealt with than on traditional inter-state negotiations. During recent decades this transformation may have served to cover up or neutralise political conflicts, but at the same time it has generated new risks for democratic political systems.[25]

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[22] Haas, P.M., 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, vol. 46, nº 1, 1992, pp. 1-35.

[23] *Ibidem.*

[24] Haas, E., 'When does power listen to truth? A constructivist approach to the policy process', *Journal of European Public Policy*, vol. 11, nº 4, 2004, pp. 569-592.

[25] Cornago, N., 'Conocimiento experto y ordenación internacional de pesquerías: un acercamiento crítico a las implicaciones políticas de la investigación científica marina', in J.M. Sobrino Heredia (coord.), *Mares y Océanos en un mundo en cambio: tendencias jurídicas, actores y factores*, Tirant lo Blanc, Valencia, 2007, pp. 749-772 (754-755); Warning, M.J., *Transnational Public Governance. Networks, Law and Legitimacy*, Palgrave Macmillan, New York, 2009, p. 182.

Beyond the academic controversies arising from the analysis of the concept of authority within political philosophy and social science,[26] authority is essentially concerned with communication between individuals, groups, organisations etc. within a given society. The ability to develop reasoned political arguments grants authority to a person communicating in a political process. This capacity to develop reasoned political arguments, in turn, comes from specialised knowledge in a wide range of fields, such as culture, religion, morality, history, technology etc. In modern societies, specialised knowledge, especially in the field of technology, is one of the most highly valued and widely utilised sources of authority. This is because many areas of life depend on specialised knowledge, such as numerous economic sectors and economic development more generally, financial markets, social welfare and the quality of life of citizens. This is the reason why political leaders take recourse to any source of authority which allows them to develop and apply public policies from a well-reasoned base that is thereby able to generate consent and legitimacy, this meaning they can avoid policy by imposition. Universities, research centres, think tanks, professional associations, companies, non-governmental organisations, pressure groups etc. are some of the actors which can provide the specialised knowledge sought by public authorities in order to facilitate the development of reasoned political arguments.

All these groups and organisations can possess the quality of authority, and insofar as this is acknowledged, diffused and used, those who possess it come to be considered as authorities, that is, entities from which authority is derived. The confusion between quality and entity has, for a long period of time, obscured our understanding of the political role of private entities such as companies or non-governmental organisations.[27] It is thus necessary to emphasise the difference between authority as a quality and authority as an entity.[28] The quality of authority should not be confused

[26] Friedman, R. B., 'On the Concept of Authority in Political Philosophy', in J. Raz (ed.), *Authority*, Basil Blackwell, Oxford, 1990, pp. 56-91.

[27] Friedman, R.B., 'On the Concept of Authority in Political Philosophy', *op. cit.*, pp. 77-85. As Friedman points out, there is a distinction between *being 'in authority'* (to have the quality of authority) and *being 'an authority'* (to be an authority, to have a position of authority).

[28] De Jouvenel, B., *The Pure Theory of Politics,* Cambridge University Press, Cambridge, 1963, pp. 100-101.

with its manifestation, as these two concepts do not always coincide.[29] Authority is a quality of public entities, but also of private entities. If authority can be either public or private, it is necessary to recognise the existence and political relevance of public and private authorities.

Whilst the distinction between the public and private spheres is generally assumed as a spontaneous development in modern societies, it is in fact a construction which arose from the consolidation of capitalist society and the liberal State. The separation that was established between the political and economic ambits between the eighteenth and nineteenth centuries has led to a normative definition of what is public and what is private. And, in accordance with this definition, political relations which take place through government institutions form part of the public domain, and economic relations which are carried out through market institutions form part of the private domain.[30] Claire Cutler has explored the consequences of this separation in terms of how authority in the global political economy is analysed.[31] Cutler argues that due to an analytical process which combines the distinction between public and private with a state-centric approach, the political relevance of private actors such as large transnational companies is completely overlooked. In addition, as authority is associated solely with the public sphere, the concept of authority is limited to States within their own borders, which complicates our understanding of interrelations between the global and local spheres of action as well as making it difficult to comprehend global power structures of a non-state nature.[32] Over recent decades

[29] *Vid.* Ruggie, J. G., 'The new institutionalism in international relations', in J.G. Ruggie, *Constructing the World Polity*, Routledge, London, 1998, pp. 45-61 (59).

[30] On the origins of the separation that economic liberalism created between market and society, on the one hand, and between the economic and political spheres on the other hand, see Polanyi, K., *La gran transformación. Crítica del liberalismo económico*, La Piqueta, Madrid, 1997 (1st ed. in English, 1944) and Schmitt, C., *El concepto de lo político*, Alianza Editorial, Madrid, 1999, 1st reprint. (1st ed. in German, 1932).

[31] Cutler, A.C., 'Locating 'Authority' in the Global Political Economy', *International Studies Quarterly*, vol. 43, 1999, pp. 59-81.

[32] *Ibidem*, pp. 73-74. Claire Cutler has referred to the crisis of legitimacy that has come about in international organisation and international law as a consequence of the systematic denial of legal personality to non-state entities and of the breach between theory and practice. See Cutler A.C., 'Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy', *Review of International Studies*, vol. 27, 2001, pp. 133-150.

these non-state global power structures have gained increasing relevance; however, as they have done this discreetly, their importance of this evolution has remained underestimated. Activities carried out by international institutions have received far more attention, with some analysts indicating that this is the referent model for the development of international public authority.

The notion of international public authority

One form of international actor -and, by extension, international legal subject- is that of international organisations, which, in recent decades, have gained greater relevance due to their contribution to global governance. These operate in a vast range of material ambits and their activities have a direct or indirect impact on the lives of individuals, groups, governments and organisations of all types. However, from a political science perspective, the nature and impact of these activities have not received much analysis, possibly owing to the debate being dominated by efforts to determine whether international organisations are in fact international actors or not.[33]

In recent years a collective research project has attempted to deal with this issue through the conceptualisation of 'international public authority', which is a laudable academic endeavour that facilitates a better understanding of international institutions as actors, authorities and subjects.[34] This theoretical approach shows that numerous instruments -normative and non-normative, binding and non-binding- constitute the unilateral exercise of power on the part of the institutions of global governance. Therefore, any of these governance activities 'should be considered as an exercise of

[33] Wendt, A., 'Driving with the Rearview Mirror: On the Rational Science of Institutional Design', *International Organization*, vol. 55, 2001, pp. 1019-1049.

[34] The results of the project are produced in the monographic publication: Bogdandy, A.; Wolfrum, R.; Bernstorff, J.; Dann, Ph.; Goldman, M. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Springer, Heidelberg, 2009. The original contributions were previously published in a monographic volume of the *German Law Journal* (vol. 9, nº 11, 2008), which will be referred to in the analysis of this question presented here. The introduction of this publication presents the objectives and main arguments of the research project: Bogdandy, A. von; Dann, Ph.; Goldmann, M., 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', *German Law Journal*, vol. 9, nº 11, 2008, pp. 1375-1400.

public authority if it conditions the behaviour of individuals, private associations, companies, States or other public institutions.'[35] Indeed, in a wide range of material ambits it is possible to see how this power exercised by international organisations and the contribution of this to global order is as, if not more, relevant than the power which derives from States. The objective of this collective research project is to develop 'an institutional international law which facilitates discourse on the validity and legality of normative instruments.'[36]

This objective complements parallel academic efforts regarding 'global administrative law', which is a theoretical approach which focuses on the standards used by the institutional structures, administrative procedures and regulatory norms which constitute the activities of global governance, regardless of whether the organs from which these standards derive are governments, intergovernmental organisations, transgovernmental networks, hybrid public-private bodies or totally private organisations. The ultimate goal of global administrative law approaches is to improve levels of accountability, transparency, participation and legality within the framework of global governance.[37]

Both these concepts of international law - that of international public authority and that of global administrative law - fully agree on the relative nature of international normativity, which is gradually being applied to binding and non-binding instruments, both of these forming part of the same global normative system. This concept is accepted by the theoretical framework of legalisation, which is developed together by scholars of International Relations and International Law.[38] From the perspective of

[35] *Ibidem*, p. 1376.

[36] Goldmann, M., 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', *German Law Journal*, vol. 9, nº 11, pp. 1865-1908 (1878).

[37] Cassese, S., 'Administrative Law without the State? The Challenge of Global Regulation', *Journal of International Law and Politics*, vol. 37, 2005, pp. 663-694; Kingsbury, B.; Krisch, B.; Stewart, R.B., 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, vol. 68, 2005, pp. 15-61; Cassese, S.; Carotti, B.; Casini, L.; Macchia M. (eds.), *Global Administrative Law: Cases and Materials*, University of Rome 'La Sapienza', Roma, 2006.

[38] The concept of legalisation distinguishes between different degrees of institutionalisation of a norm in terms of three types of criteria: a) duty, understood as the link between a State or other actor with a norm or commitment or with a set of norms or commitments; b) precision, understood as the degree of

International Relations, the principal advantage of normative relativism is that it integrates and highlights the growing number of norms which are largely or completely non-codified within international life. In the study of power and authority of international actors, the relevance of *soft law* and alternative instruments lies in their high degree of efficiency and compliance rather than in their nature or legal form.

Scholars of international public authority distance themselves from the concept of normative sources and put forward the concept of standard instruments in order to integrate less codified norms and alternative instruments which are not necessarily legal in nature. According to its own definition, a standard instrument is a combination of a rule of identification for authoritative instruments of a specific type and a specific legal regime that is applicable to all legal instruments coming under the rule of identification. Two broad categories of instrument are considered to be standard instruments: firstly, those which affect individuals, such as international administrative decisions, international administrative recommendations international administrative information documents; and secondly, those instruments which affect States, such as international public decisions, international public recommendations, international secondary norms, internal operative rules, international public standards, internationally applicable standards, preparatory expert assessments and national policy assessments.

This approach does not aim to break with international law in any way; in fact it considers itself to be compatible with international law and even considers traditional sources of law (treaties, customs etc.) as standard instruments.[39] However, its foundations and objectives are clear, as according to Matthias Goldmann, '[it is] based on the hope that an approach that looks closer at the specific authority of an instrument will foster the normative project of advancing international institutional law

definition established by norms in terms of the conduct they demand, authorise or proscribe; and c) delegation, understood as the authority granted to a third party for the application, interpretation and execution of norms, for the resolution of disputes, and for the creation of other norms. Each of these three related but autonomous dimensions is understood as a spectrum running from hard legalisation to a total absence of legalisation, passing through soft legalisation. See Abbott, K.W.; Keohane, R.O.; Moravcsik, A.; Slaughter, A.-M.; Snidal, D., 'The Concept of Legalization', *International Organization*, vol. 54, nº 3, 2000, pp. 401-419 (401).

[39] Véase Goldmann, M., 'Inside Relative Normativity…', *op. cit.*, p. 1879-1890.

in a fragmented legal order.'[40] Therefore, the fragmentation of the international legal order is not considered as a trend but rather as an empirical, consummated fact and as a base theoretical assumption. Furthermore, this approach does not aspire to maintain or reconstruct the unity of international public law, rather it seeks to develop an international institutional law, which has an undefined level of disaggregation and whose effectiveness and legitimacy remain unaffected by the relationship between its constitutive elements.

Theoretical approaches to international public authority are useful in explaining a significant part of global governance activities. In terms of the argument put forward in this article, the study of standard instruments, as well as of global administrative law approaches, highlights the pluralist tensions of the international legal order. If we accept that there are many bodies from which norms bearing authority derive, the unity of international public law will logically be affected by the proliferation of actors and authorities which carry out global governance activities, be that in competition or cooperation with States.

However, from a political science perspective, there are three critical observations which should be taken into account. The first of these reflects the overly limited concept of global governance with which the international public authority research project operates.[41] This research project fails to put forward a precise definition of global governance, opting instead to reduce the concept to 'any kind of governance activities by international institutions, be it administrative or intergovernmental.'[42] The notion of global governance, however, is much broader than this if we consider the way this has been developed within social science at the end of the twentieth century.[43] The

[40] *Ibidem*, p. 1881.

[41] This is not the case for global administrative law, which is much more flexible in terms of considering the entities from which the norms they study derive. This approach is not treated in so much depth here due to the fact that it gives less space to the categories of actor, authority and subject, which are the central object of study of this article.

[42] Bogdandy, A. von; Dann, Ph.; Goldmann, M., 'Developing the Publicness of Public International Law:...', *op. cit.*, p. 1376.

[43] The term *governability* was used and diffused by the political science community in the United States in the 1960s and 1970s, and was used by the Trilateral Commission in a report on the internal crisis of

meanings and uses of the concept of global governance are extremely varied and it is thus impossible to fix a generic definition for it,[44] but the minimum common denominator for all understandings of the term is the growing participation of private actors in governance tasks formerly reserved for public authorities. Governance is not just governing without government, it is a form of governing which includes the participation of public, private, governmental and non-governmental actors, meaning that countless public-private co-regulation and private self-regulation activities are included within the concept of governance if these relate to or affect global public goods or the global public interest more generally. Indeed, understood in this way global governance is an extensive, vague and inexact concept, and it is thus understandable that the research project in question considers it solely in terms of a public law approach to international public authority. However, it is problematic to allow this narrow definition to replace other approaches to global governance, as it reduces them by omitting the activities of private actors and authorities which transcend the public ambit.

The second critical observation refers to the abstract and partial nature of the way in which authority is analysed, with it being treated only as a quality and not as a body from which authority-carrying activities derive. The objective of the researchers involved in the project is to improve the understanding and legitimacy of both normative and non-normative standard instruments of a public nature, regardless of whether those who adopt them are, or act as, public authorities.[45] It is possible to

Western democracies. However, it was not until the end of the 1980s that the term *governance* came into common use when it started to be used extensively in international governmental organisations in reference to the internal governance conditions of some sub-Saharan African societies. In the 1990s the term was incorporated into International Relations theory and was diffused within a wider debate about the challanges presented by contemporary globalisation. See Rosenau, J.N. and Czempiel, E.O. (eds.), *Governance Without Government: Order and Change in World Politics*, Cambridge: Cambridge University Press, Cambridge, 1992, and Comisión de Gestión de los Asuntos Públicos Mundiales, *Nuestra comunidad global*, Alianza, Madrid, 1995.

[44] Rhodes, R.A.W., 'The New Governance: Governing without Government', *Political Studies*, vol. XLIV, 1996, pp. 652-667.

[45] Within the international public authority research project, only 'autonomous international bureaucracies' are treated specifically as authority entities, though these are interpreted more as actors with authority than as authorities in themselves. See Venzke, I., 'International Bureaucracies from a Political Science

assume that any authority-carrying activity derives from an authority body, but this premise carries with it a large risk of creating conceptual confusion, as it would mean that completely private organisations, such as the Internet Corporation for Assigned Names and Numbers (ICANN), could be considered as international public authorities. In fact, amongst the case studies chosen to analyse international public authority we find ICANN and other administrative organs, without there being any clear distinction regarding whether these bodies are institutions of public or private law. This distinction is by no means trivial, as it leads us to the paradox over whether or not an international private authority is also an international public authority when its activities constitute an exercise of public authority.

The third criticism refers to the normative, public-law vocation of the international public authority research project, which is oriented towards the 'development of legal standards for legitimate governance.'[46] The legitimacy sought by the theoretical reflection of this approach refers to standard instruments, to norms bearing public authority, but does not include the actors from which these norms derive. From the position developed within this article, the fact of considering legitimacy in terms of normative results is reductionist, as in many cases normative results can only be viewed as legitimate if the bodies from which they derive are also legitimate. To further illustrate this, according to the logic being put forward, the legitimacy of an intergovernmental organisation in terms of participation or representativeness would not be affected by the characteristics of the instruments which it adopts, as these do not determine any of the dimensions of legitimacy of the international institution in question. The article will return to the theme of the growing need for legitimacy in international politics at a later point, but for now it must be stressed that the political science concept of global governance requires us to analyse legitimacy not only in terms of the activities resulting from the exercise of public authority but also in terms of activities arising from the exercise of private authority, and it is also necessary to examine the public and private bodies which carry out these activities.

Perspective – Agency, Authority and International Institutional Law', *German Law Journal*, vol. 9, nº 11, 2008, pp. 1401-1428.

[46] Bogdandy, A. von; Dann, Ph.; Goldmann, M., 'Developing the Publicness of Public International Law:...', *op. cit.*, p. 1376.

The blurring of international subjectivity

Any legal system needs to determine who can be classified as legal subjects within it, that is, who has legal personality and, therefore, who bears rights and duties within the system. Whilst the essence of the notion of a political and international actor is the quality of power, the essence of legal subjectivity is the possession of rights and duties. This is the case in both domestic legal systems and the international legal order, though there are insurmountable differences between the domestic and international spheres of law and legal subjects are very different in each of these. However, be that as it will, it is still surprising to discover that within international public law there remain difficulties in terms of defining exactly who can be considered as international legal subjects and that the doctrine has not been able to formulate a common technical-legal concept of legal personality.[47] As Oriol Casanovas observes, 'For those who regard international law as a set of norms of the international community created by its own members, the abstract problem of who represents its subjects cannot be considered as a consequence or effect of a norm, rather it must be understood as an empirical question which depends on historic and social evolution.'[48]

It is certainly the case that, from a political science standpoint, legal empiricism is a more convincing concept for understanding international subjectivity than other concepts guided by the act of recognition or by general criteria based on the analogy with domestic law. A suitable interpretation of this phenomenon arises from looking at some basic distinctions. Firstly, a distinction is normally made between the primary and secondary subjects of a legal order: primary subjects are those who create the order and on whom its existence depends, whilst secondary subjects are created by other subjects and they are attributed legal personality by the established legal order.[49]

[47] Casanovas, O., 'Unidad y pluralismo en Derecho internacional público', *op. cit.*, p. 139.

[48] *Ibidem*, p. 141.

[49] Mosler, H., *The international society as a legal community*, Sijthoff & Noordhoff International Publishers B.V., Alphen aan den Rijn, 1980, p. 42; y Mosler, H., 'Subjects of international law', *Encyclopedia of International Law*, vol. 4, Elsevier Science B.V., Amsterdam, 1984, pp. 710-727.

Secondly, it is possible to distinguish between necessary and non-necessary legal subjects in the process through which a legal order is created in terms of whether their contribution to the creation of this order is essential or not.[50] Thirdly, there is a distinction between pertaining and recognised subjects. Pertaining subjects belong to a legal order and owe their legal personality to it, whilst recognised subjects owe their legal personality to a different order. This distinction allows us to see that some of the addressees of international law are not necessarily subjects of international law, though they may have legal personality by virtue of other domestic legal orders.[51] Furthermore, depending on the range of rights that an international subject enjoys, we must distinguish between full and partial or specific subjects. Full subjects are those who enjoy all possible rights granted by the legal order, whereas partial or specific subjects only posess some of these rights depending on their particular circumstances in a sector or normative sub-system of international public law.[52]

These basic distinctions mean we can define different categories of legal subject in the international sphere. States are primary, necessary, pertaining and full subjects of the international legal order. International organisations are primary (created by general international law), non-necessary, pertaining and specific subjects. Some exceptional non-state entities, such as the Holy See and the International Committee of the Red Cross are primary (created by customary law), non-necessary, pertaining and specific subjects. Some unique categories, such as insurgent groups or governments in exile are secondary, non-necessary, pertaining and specific subjects. Other entities such as non-governmental international organisations or transnational companies would be classified as secondary, non-necessary, recognised and specific subjects. However, these last two categories cannot be classified as legal subjects as such due to the fact that they cannot assert their rights and duties in a general manner within the international legal order, rather they can only do this in certain circumstances and depending on the domestic orders from which they gain their legal personality. A

[50] Casanovas, O., 'Unidad y pluralismo en Derecho internacional público', *op. cit.*, p. 156.

[51] Dominicé, Ch., 'La personalité juridique dans le système du droit des gens', *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Shubiszewski*, Kluver law International, The Hague / London / Boston, 1996, pp. 147-171.

[52] Casanovas, O., 'Unidad y pluralismo en Derecho internacional público', *op. cit.*, pp. 157-158.

similar case applies to individuals, who can be bearers of rights and duties in international public law, but only under certain conditions established by the norms which establish these rights and duties, and who cannot assert these rights and duties in a general manner within the international legal order. Finally, it is necessary to mention transnational organised crime groups, terrorist groups and other social organisations who operate outside the law (domestic and international) and to whom norms of international public law are applied without these organisations being considered as international subjects in any way.

This taxonomic reflection, like many others, may be shared to a greater or lesser extent by scholars of International Public Law and International Relations, but they will suffer from the lack of consensus within the doctrine of international law regarding the theme of international subjectivity. Beyond the formally legal arguments, many of these discrepancies are socio-historic in nature and did not exist when the concept of international legal personality corresponded almost exclusively to States. The proliferation of international actors and authorities throughout the twentieth century, especially in the latter part of the century, holds back the maintenance and reproduction of a general theory on international subjectivity. The diversity of actors and authorities, as well as the varied nature of the situations in which transnational activity takes place, blurs the borders of a legal category which is forced to recognise the rights and duties of individuals, entities and organisations who did not form part of the origins of the international legal order but who fully participate within the order in post-international society.

The complexity involved in determining who are international subjects detracts from the elements which provide unity to the international legal order. In fact, the diversity of situations arising from the asymmetric recognition of rights and duties in international public law constitutes a source of tension in the legal system and feeds into the pluralistic tensions which this is subjected to.

Conclusions

Whilst International Public Law and International Relations are related disciplines, this proximity has not facilitated the development of common theoretical tools, with shared approaches between the two fields being a rare occurrence. The transformations that have been brought about in recent decades within the international legal order and international relations may have contributed towards creating interdisciplinary bridges, but these are weak and difficult to cross, as they have depended, at least in part, on the possibilities for bringing together theoretical discourses and concepts which have had different trajectories which are conditioned by the respective demands of each field. Now, however, these demands may be shared in order to understand and improve the governance activities that are proliferating in a global public space in construction.[53]

The categories of actor, authority and subject are essential for understanding international life, although their articulation is fraught with difficulties which are difficult to overcome. The evolution of the notions of international actor (International Relations) and international subject (International Public Law) has contributed towards bringing the categories together, but this convergence has certain insurmountable limits. The essence of the concept of international actor lies in the exercise of power and authority on the part of units which participate in international relations, whilst the essence of the concept of international subject lies in the possession of rights and duties recognised within the framework of the international legal order. And whilst the categories of actor and subject partially overlap, they cannot be superimposed onto each other. An international actor may be an international subject and vice versa, but not all international actors have international legal personality and not all international subjects are actors within international relations.

The proliferation of international actors during the second half of the twentieth century has obliged international public law to create formulas for participation and inclusion in the international legal order for organisations and entities of all types, as well as for individuals. This historic development made it necessary to reconstruct the concept of

[53] Ruggie, J.G., 'Reconstituting the Global Public Domain –Issues, Actors and Practices', *European Journal of International Relations*, vol. 10, nº 4, 2004, pp. 499-531.

international subjectivity, a concept that had worked well in terms of accounting for the rights and duties of States and some other very exceptional entities but which was generating an increasing number of doctrinal discrepancies whenever the legal subjects under consideration differed from the traditional primary, necessary, pertaining and full subjects of the international legal order. This blurring of the notion of legal personality affects the unity of international public law as a whole insofar as it encourages pluralist tensions derived from the asymmetric recognition of rights and duties.

The political science and legal treatments of international authority constitute a potential area in which theoretical outlooks could come together, and this could help to gain a better understanding contemporary manifestations of the phenomenon of power in world politics as well as of that of subjectivity in the international legal order. However, from the standpoint of international public law interest in global governance would seem to have focused on what are known as standard instruments (both legal and non-legal) and global administrative law. In both theoretical approaches the focus is on normative processes and products and not on the entities from which these derive. In fact, entities receive only marginal attention and are confined to international institutions of a public nature, meaning that contributions to global governance from private actors and authorities are left out of the analysis. Private actors and authorities have also received insufficient attention from International Relations, although an ever increasing number of scholars highlight the relevance of this field of activity and emphasise the political risks and problems that it presents from a democratic and cosmopolitan perspective.

International institutions which exercise public authority beyond States need legitimation strategies for their global governance activities,[54] and these strategies are just as, if not more, necessary for private actors and authorities. Private transnational authority has limits which need to be clearly identified, as its excessive expansion

[54] Delbrück, J., 'Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?', *Indiana Journal of Global Legal Studies*, vol. 10, 2003, pp. 29-43.

generates legitimacy deficits or dysfunctions which manifest themselves both in domestic political systems and in international institutions.[55]

In political theory, legitimacy is a very broad concept which refers to three differentiated dimensions: (i) the legality or legal legitimacy which derives from the existence of legal norms and from the political action which adapts to these norms; (ii) the normativity of normative legitimacy which, from a moral standpoint, justifies the adoption of norms and actions adapted to moral criteria; and (iii) the representativeness or social legitimacy which generates and grants consent to a political actor and their actions.[56] Although these dimensions are habitually applied to the analysis of the legitimacy of States, governments and public authorities, it is also necessary to apply this to a broader analysis of authority, which includes private authority.[57]

In each of the three dimensions of legitimacy we observe different dysfunctions or deficits which need to be dealt with specifically. Firstly, the private actors and authorities directly or indirectly involved in the regulation of matters of public interest may lack normative legitimacy insofar as their values, objectives and efficiency do not meet broader needs or preferences in terms of the public interest. Secondly, the lack of social legitimacy or representiveness of private actors and authorities should be a cause for alarm when the public interest is in question and, above all, when the demands of these private actors - who use authority transmission channels to influence public actors - are taken up by public entities, with broader social needs thus being displaced. Thirdly, special attention must be focused on the shortcomings of responsibility that result from the proliferation of private authority in international relations. The growing

[55] Graz, J.-Ch. y Nölke, A. (eds.), *Transnational Private Governance and Its Limits*, Routledge, London, 2007.

[56] On the multidimensional approach to the study of legitimacy, see Beetham, D., *The Legitimation of Power*, Macmillan, London, 1991.

[57] The application of traditional political conceptions of legitimacy to the analysis of private actors such as non-governmental organisations has produced interesting results in works such as those of Anton Vedder, who takes the multidimensional approach of David Beetham and reformulates it in order to distinguish between the regulatory dimension (legal legitimacy), the soial dimension (social legitimacy or representivity) and the moral dimension (normative legitimacy). See Vedder, A. (ed.), *NGO Involvement in International Governance and Policy*, Martinus Nijhoff, Leiden / Boston, 2007.

participation of companies, non-governmental organisations and other private actors in decision-making processes at the State, transnational or global level has not been accompanied by mechanisms that guarantee commensurate levels of responsibility, especially in social and environmental matters.[58]

The political challenges presented by contemporary globalisation make it necessary to articulate mechanisms of global governance in which private and public actors cooperate with each other and actively contribute towards the elaboration and application of public policies which respond to the general interest of the societies to which they are addressed and which are affected by them. And this participation, be it of non-governmental organisations, companies or any other private actor, must be backed by sources of authority and authority-transmission channels which provide it with efficiency. However, this is not enough to give a fully satisfactory response to the needs and demands deriving from the public interest, which should be balanced with and given priority over private interests. The proliferation of private authority should be accompanied by an expansion of formulas for participation which guarantee the normative legitimacy, social representativeness and political responsibility of the policies and decisions adopted in areas relating to the general interest of societies.

[58] Ibáñez, J., 'La autoridad privada y la protección de los derechos de propiedad intelectual en el sector farmacéutico', in X. Seuba (coord.), *Salud Pública y Patentes Farmacéuticas. Cuestiones de Política, Derecho y Economía*, Bosch, Barcelona, 2008, pp. 129-168.

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