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Hertie School
of Governance



**GLOBAL GOVERNANCE AS PUBLIC AUTHORITY:
STRUCTURES, CONTESTATION, AND NORMATIVE CHANGE**

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Whither the Private in Global Governance?

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Structures, Contestation, and Normative Change**

This Working Paper is the fruit of a collaboration between The Jean Monnet Center at NYU School of Law and the Global Governance Research Cluster at the Hertie School of Governance in Berlin. The Research Cluster seeks to stimulate innovative work on global governance from different disciplinary perspectives, from law, political science, public administration, political theory, economics etc.

The present Working Paper is part of a set of papers presented at (and revised after) a workshop on 'Global Governance as Public Authority' that took place in April 2011 at the Hertie School. Contributions were based on a call for papers and were a reflection of the intended interdisciplinary nature of the enterprise - while anchored in particular disciplines, they were meant to be able to speak to the other disciplines as well. The discussions at the workshop then helped to critically reflect on the often diverging assumptions about governance, authority and public power held in the many discourses on global governance at present.

The Jean Monnet Center at NYU is hoping to co-sponsor similar symposia and would welcome suggestions from institutions or centers in other member states.

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Prologue:

Global governance is no longer a new phenomenon – after all, the notion became prominent two decades ago – but it still retains an aura of 'mystery'. We know much about many of its instantiations – institutions, actors, norms, beliefs – yet we sense that seeing the trees does not necessarily enable us to see the forest. We would need grander narratives for this purpose, and somehow in the muddle of thousands of different sites and players, broader maps remain elusive.

One anchor that has oriented much work on global governance in the past has been the assumption that we are faced with a structure 'without government'. However laudable the results of this move away from the domestic frame, with its well-known institutions that do not find much correspondence in the global sphere, it has also obscured many similarities, and it has clouded classical questions about power and justification in a cloak of technocratic problem-solving. In response, governmental analogies are on the rise again, especially among political theorists and lawyers who try to come to terms with the increasingly intrusive character of much global policy-making. 'Constitutionalism' and 'constitutionalization' have become standard frames, both for normative guidance and for understanding the trajectories by which global institutions and norms are hedged in. 'Administration', another frame, also serves to highlight proximity with domestic analogues for the purpose of analysing and developing accountability in global governance.

In the project of which this symposium is a part, we have recourse to a third frame borrowed from domestic contexts – that of 'public authority'. It seeks to reflect the fact that much of the growing contestation over global issues among governments, NGOs, and other domestic and trans-national institutions draws its force from conceptual analogies with 'traditional rule'. Such contestation often assumes that institutions of global governance exercise public authority in a similar way as domestic government and reclaims central norms of the domestic political tradition, such as democracy and the rule of law, in the global context. The 'public authority' frame captures this kind of discourse but avoids the strong normative implications of constitutionalist approaches, or the close proximity to particular forms of institutional organization characteristic of 'administrative' frames. In the project, it is used as a heuristic device, rather than a normative or analytical fix point: it is a lens through which we aim to shed light on processes of change in global governance. The papers in the present symposium respond to a set of broad questions about these processes: what is the content of new normative claims? which continuities and discontinuities with domestic traditions characterise global governance? how responsive are domestic structures to global governance? How is global governance anchored in societies? and which challenges arise from the autonomy demands of national (and sometimes other) communities?

The papers gathered here speak to these questions from different disciplinary perspectives – they come from backgrounds in political science, international relations, political theory, European law and international law. But they speak across disciplinary divides and provide nice evidence for how much can be gained from such engagement. They help us better understand the political forces behind claims for change in global governance; the extent of change in both political discourse and law; the lenses through which we make sense of global governance; and the normative and institutional

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responses to competing claims. Overall, they provide a subtle picture of the pressure global governance is under, both in practice and in theory, to change its ways. They provide attempts to reformulate concepts from the domestic context, such as subsidiarity, for the global realm. But they also provide caution us against jumping to conclusions about the extent of change so far. After all, much discourse about global governance – and many of its problems – continue in intergovernmental frames. Global governance may face a transition, but where its destination lies is still unclear. 'Public authority' is an analytical and normative frame that helps to formulate and tackle many current challenges, though certainly not all. Many questions and challenges remain, but we hope that this symposium takes us a step closer to answering them.

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WHITHER THE PRIVATE IN GLOBAL GOVERNANCE?

By Christine Schwöbel*

Globalization invokes not government, but governance, a spontaneous process, pushed by private interests and actors in a thoroughly pragmatic process, accountable to no-one.¹

Abstract

In international legal scholarship, global governance ideas are being framed exclusively with recourse to public law – at the expense of private law. In this paper I question what the obscuring of private law conceptions and methodologies implies and whether international lawyers should pay more attention to such private law. Significantly, the burial or the obscuring of private law is predominantly occurring in theoretical rationalizations of ideas for holistic legal frameworks. *De facto*, private law has never been so prominent in the international sphere; indeed, it can be claimed that globalization is largely driven by private law. Suggestions for the accountability and transparency of transnational corporations, private military companies, and bilateral investment treaties are prominent examples of how public law solutions are being applied to private legal relations. Global governance and its inherent multifaceted and multifarious nature could capture private law impulses but instead is framed in a way to obscure them. In this, global governance is being aligned, largely by international lawyers, with other similar public law frameworks, including global constitutionalism and global administrative law. I argue that private law conceptions and methodologies should be taken seriously within global governance discourse as conceptions with progressive potential which do not take recourse to the power imbalances evident in most public law conceptions.

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¹ Martti Koskeniemi, *Global Governance and Public International Law* 37 KRITISCHE JUSTIZ 241, 244 (2004).

Introduction

Much recent scholarly attention has been directed towards the rationalization of global arrangements into coherent and self-contained systems which could be referred to as 'global edifices'. The word 'edifice' expresses the fact that such systems are *constructed* and that they carry an understanding of something *grand* in them. Global governance is today understood as one of these global edifices; global constitutionalism and global administrative law being further notable ones. Such global edifices have been constructed for the purpose of getting a grip on the complex and sometimes contradictory globalization processes. International lawyers are particularly good architects of global edifices. For the most part international lawyers argue in favour of the need for the exclusively public law nature of global edifices. Despite the description of global edifices being 'constructed', they are only constructed in the minds of their visionaries.² Accountability and transparency concerns, which are deeply entrenched in a public law tradition, are at the forefront of the rhetoric employed.

The following examines global governance as a public law global edifice. I argue for a need for critical analysis of such edifices and a reimagination which enables private law conceptions and methodologies to be taken seriously. For this, the global edifices must be collapsed in favour of something more flexible; something which is not predicated on the idea of a strict hierarchical order, and which allows for tensions and contradictions.

The paper begins with a brief overview of the contemporary global governance reality and its narrative. Given how slippery the employed terms are (global governance, globalisation, public/private law), this section is largely dedicated to terminology and taxonomy. Against this background, the next point of inquiry is the phenomenon of the faith international lawyers place in public law and the deeply entrenched fear of private law. The areas obscured by the dominant discourse are placed under the spotlight: The shortcomings of the public and the qualities of the private are examined. The paper ends with a suggestion for a multifaceted understanding of global governance, one which provides a space for the public, the private and the gaps in between.

² The expression 'castles in the air' comes to mind.

It should be noted that this is an inquiry from the perspective of an international lawyer. The knowledge of fields outside of international law is by no means extensive enough to merit this being considered an examination of global governance as an autonomous field. For the purposes of this paper, global governance is therefore largely viewed as a field relating to and significant for international law. This gives rise to a terminological issue; since I emphasize private law influences on the field, I will refer to 'international law' rather than 'public international law'. Given the erosion of the state as the sole actor, inter-*national* law is in fact no longer accurate either. In recognition of this, many scholars have turned to discussing 'world law', 'global law' or 'transnational law' as distinct from international law.³ For ease of reading (and for fear of alienation), I will continue with references to international law. By bringing private law conceptions and methodologies to the foreground, new avenues for research and reflection on global governance in international law can hopefully be opened.

It merits stating unequivocally that this is not a suggestion for a complete overhaul in favour of exclusively private law mechanisms, but rather that the private law already evident in the global space should not be rationalized away by means of public law. I aim to challenge the predominant approach by international lawyers, institutions and practitioners, which is focussed on an exclusively public law understanding (both in a descriptive and in a normative sense) of international law. I take issue with this preoccupation, asking the question: whither the private in global governance?

1. Privately Created Law and Regulated Private Law

Private law, or civil law as it is also often referred to, is the law that emerges through two individual and equal entities with legal personality agreeing on what should become binding obligations between them. A contract is the primary mechanism with which such law is 'made'. The distinction between the 'device of a contract' on the one hand and 'contract law' on the other hand is significant here. It is a distinction which can be mapped onto the 'principles of private law' and the 'private law apparent in a certain

³ ANGELIKA EMMERICH-FRITSCHKE, VOM VÖLKERRECHT ZUM WELTRECHT (Duncker & Humboldt 2007); Peer Zumbansen, *Transnational Law* 738-754 in J. SMITS (ed), ENCYCLOPEDIA OF COMPARATIVE LAW (Edward Elgar Publishing 2006); Jost Delbrück, *Wirksames Völkerrecht oder neues "Weltinnenrecht"?* *Perspektiven der Völkerrechtsentwicklung in einem sich wandelnden internationalen System* in KLAUS DICKE ET AL (eds), DIE KONSTITUTION DES FRIEDENS ALS RECHTSORDNUNG (Duncker & Humboldt 1996).

jurisdiction'. The device of a contract refers to the universal principles which govern our ideas of what is required for a contract (*privately created law*). Contract law or the law of contract, in contrast, is the vehicle with which such abstract and universal requirements are adopted in a particular society (*regulated private law*).⁴ It appears that international law is being reshaped in favour of the latter. In the transnational sphere, there is a myriad of privately created law based on principles; such principles are possibly universal, and apparently free-floating. The contemporary global governance literature is being employed as a mechanism to remodel such privately created law to become private law for a particular society, in which the state sets the parameters through public law.

An example may make this more tangible: Private military companies contract with a state's government, more specifically a state's Ministry of Defense, to provide military or security services. The individuals providing the services would have a contract of employment which is binding between the company (employer) and them (the employees). Although the activities would sometimes concern the use of force beyond the state, which has been largely regulated in international law, the relevant PMCs would be bound by their contracts only, not by international law. As non-state actors they are not strictly subjects of international law and can therefore not be liable under it. The law binding the PMCs is created through mutual obligations, it is *privately-created* law rather than regulated private law.⁵ Recently, amid revelations of misconduct, there have been calls for making PMCs legally accountable in a public law sense, particularly in regard to human rights violations.⁶ Accountability is understood to lie in the realm of public law and it is with various public law mechanisms (such as designating PMCs as mercenaries or members of the armed forces, state accountability, individual liability of international criminal law) that PMC activity is hoped to be reigned in. Multilateral treaties and conventions are thought to provide the legal mechanism for accountability; the state, or an international state-like body, is the entity which decides on guidelines, enforcement, and sanctions. Such state-driven

⁴ JILL POOLE, TEXTBOOK ON CONTRACT LAW 10 (9th ed, Oxford University Press (OUP) 2008).

⁵ Among a wealth of literature, see for example P. W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (Cornell University Press 2003).

⁶ See for example the contributions to the Symposium: Private Military Contractors and International Law in 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 961-1074 (2008).

accountability of private actors is tantamount to private law in the sense of the law of contract – it is *regulated* private law. This was of course just one example, but it is one of many. Ultimately, this begs the question: Is this the first step towards an international private law which is governed by an international public law?

Further to terminology: Private law in the following should be distinguished from private international law, which is otherwise known as the conflict of laws. Private international law is concerned with the conflict between different solutions in domestic laws while the inquiry here is focussed on inter-national or trans-national law as a law independent of (but of course also deeply tied to) domestic law.

In juxtaposition to private law lies public law. Public law refers to the relationship between a public power (mostly the state or an organ of it) and another entity with legal personality.⁷ The relevant public law principles include legality, rationality, proportionality, the rule of law and fundamental rights.⁸ As was mentioned above, accountability and transparency are the crucial principles regarded as missing in private law and attributed to public law.

Rather than referencing a particular domestic legal system, public and private law will refer to very broad understandings of these areas of law. In the following, they will continue to be referenced as the sum of a number of conceptions and methodologies. Although mapping out the above into the public/private dichotomy, I very much agree with Gunter Teubner's view that contemporary social practices are often reduced to an oversimplified understanding of a binary between the public and the private.⁹ Teubner suggests that the dualism state/society which is translated into law as public/private should be 'broken up and replaced by the multiplicity of social perspectives which then needs to be translated into law'.¹⁰ While an abandonment of the distinction may go too far, it does appear crucial to reimagine private law as more

⁷ In the following, I will refer to 'the private' and 'the public' as the areas pertaining to private law and public law respectively.

⁸ Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law* NEW YORK UNIVERSITY SCHOOL OF LAW PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES, Working Paper No. 11-07, (January 2011) available at: www.iilj.org/aboutus/documents/KingsburyDonaldson.PublicnessinIL.pdf 83.

⁹ For a summary of Teubner's views on the public/private dichotomy, see Gunther Teubner, *The private/public dichotomy: After the critique?* RE-PUBLIC: RE-IMAGINING DEMOCRACY (2007) accessible at <http://www.re-public.gr/en/?p=99>.

¹⁰ *Ibid.*

complex than the contemporary understanding.¹¹ Such reimagining is particularly important as regards private law's 'affinity', as Teubner describes it, to other discourses apart from economics. Perhaps Teubner's word of choice 'affinity' does in fact not capture how crucial private law is in many social and political contexts. The understanding of private law should include its central role (not mere affinity) in terms of environment, education, health, information, and many more issues and discourses. Teubner states:

[t]his has been the great historical error of private law doctrine: contract law is increasingly reduced to the law of market transactions; the law of private associations has been biled down to the law of business organizations.¹²

There is a paradox in this argument which requires addressing: Public International Law in its traditional Westphalian form has often been compared to private law. Treaties, the law-making mechanisms in international law, are described as quasi-contractual due to their largely consensual nature. And the lack of enforcement mechanisms make the quasi-private law indeed appear like *privately created* law rather than *regulated private law*. Yet, the argument here revolves around the prominence of public, not private law.

In order to deal with this circularity, it merits understanding how private law was historically conceived in international law. Hersch Lauterpacht, one of the most eminent international lawyers in the inter-war period, writing in the 1920s, observed that there were two instances when private law conceptions and methodologies are relevant in international law.¹³ First, there are instances in which analogies can be made with private law conceptions for 'rights and obligations of states as political entities, endowed with attributes of government'.¹⁴ Lauterpacht provides a number of examples, one being that recourse is had to private law rules of inheritance and succession for the

¹¹ The timid beginnings of a movement to reimagine private law may be identified. The Harvard Law School recently held a symposium on 'The New Private Law' (October 2011). The editors of the Harvard Law Review argue that the standard supposition in the US has been that "all law is public law"; but that this supposition has closed off the possibilities which private law encompasses. See http://www.harvardlawreview.org/issues///_8348.php.

¹² Teubner (note 10).

¹³ HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (Longmans, Green and co., ltd. 1927).

¹⁴ Ibid 3.

purpose of determining certain rights and duties of states arising out of changes of sovereignty, state succession for example. In his view, international law has drawn from the resources of private law – not from a specific domestic legal order – but from common private law conceptions and methodologies in such cases. This could be summarized as an instance in which private law shapes public law and the outcome is public law. Second, there are legal relations which are *prima facie* private law, but for the fact that a state is a party to these relations. An example for this is when a state leases real property or when a state enters relations for the purpose of constructing a bridge. This is an instance in which public law shapes private law and the outcome is private law. Lauterpacht, although aware that these are pertinent questions for international law and at times also its governance activities (which he notably refers to as ‘imperium’), excludes these relations from the scope of his international legal inquiry.¹⁵ The world has of course changed significantly since the 1920s but these distinctions remain useful for the examination of public law and private law in international law. Today, the second form of inquiry – when a state or other public law entity (an international organization for example) engages in private law - is increasingly considered as being a form of decision-making. It is regarded as a form of governance that should be considered part of international law so long as the exercise of authority has an effect beyond the merely domestic. Such (Trans-)state-activity of a private nature is not the only form of governance relevant today. Private activity of a public nature is an emerging and theoretically challenging focus of governance. Examples of this type of private activity may be encountered when a collection of businesses across the world organize a voluntary carbon offsetting trading system. This is an instance in which private law shapes public law.

In sum of the above, there are three instances of governance relevant to international law (a) Inter-national relations of a public nature (mostly government, not merely governance), (b) trans- or inter-national relations of a private nature in which the state is the primary actor, (c) trans-national relations of a public nature in which a private entity is the primary actor. Instances (b) and (c) are today understood as instances of global governance. As we know from Lauterpacht, they were previously not

¹⁵ Ibid 4, 93, 112.

even included in inquiries into international law. Yet, there is a continuation from Lauterpacht in that such private legal activity is only imported into international law today by means of public law regulation of the activity. The following critique of such regulation through public law will focus primarily on instances (b) and (c) but it is significant that, as early as 1927, Lauterpacht recognized the importance and influence of universal private law conceptions and methodologies on instance (a), namely on inter-state relations of a public nature.

2. Contemporary Global Governance Narratives

In continuation of the previous section, this section will also be concerned with getting a grip on terminology and taxonomy. In international legal debate, global governance, which – as opposed to global government - carries the idea of multifaceted power distributions in its name, is being framed exclusively in terms of public law. Particularly international lawyers are inclined to employ this type of interpretation. There is no global understanding of what global governance is or means. Indeed, it is easier to begin with attributes it does not possess: It is not composed of a unitary vision; it does not possess a centre of authority; it is not framed by a single discipline; and it does not have set paradigms. In terms of the common understanding of global governance, there appears to be consensus as regards two minimal attributes: First, global governance is stimulated by globalization (and vice versa); and second, there are various sites of global governance in the world.

Globalization is the most significant phenomenon compelling us to rethink global arrangements - arrangements that may have previously seemed clear yet today appear unclear. Globalization is chiefly driven by private law influences such as the increased interconnectedness of and through trade, investment, services, security, communications and travel. It should be stressed here that globalization is not a neutral term. What we understand as globalization has been shaped and dominated by a capitalist/Western view (what we have learned to refer to as neo-liberalism) and this in turn has had a reinforcing effect on the type of international law which has been strengthened. Not only the *type* of globalization discourses, i.e. market liberalization, have been introduced mainly by the Western world; the form of the discourse itself, its

language, has Western origins.¹⁶ The forms of international law which promote market liberalization, international economic law for example, have in turn strengthened the capitalist structures.¹⁷ It has become a mutually reinforcing process. The globalization we are speaking of therefore is neo-liberal globalization. Suffice it to say here that the term globalization is employed by the architects of global edifices as a supposedly neutral (ideology-free) reality while it is more accurately a partial reality.

Global governance in its broadest understanding can be thought of as a term which tries to capture the process of globalization in terms of power arrangements. A frequently referenced definition of global governance is James N. Rosenau's governance 'without government'.¹⁸ This understanding of global governance appears too narrow, implying some type of governmental authority as we would understand it in a public law sense. An understanding which includes the various private law actors, who can exercise power without exercising governmentality, seems more appropriate for the global space: *Transnational decision-making by a specialized entity with effects on the public* may be a more accurate starting point.

There are various sites of global governance. Global governance sites can be mapped in the following way: There can be (a) a geographic distinction between the various sites of authority; (b) an institutional distinction; and (c) a social organization distinction. The geographic distinction involves centres of governance that are localized in various sites. This perspective on global governance looks at the physical source of decision-making. In a geographic sense, global governance breaks down the traditional understanding of 'international' and 'national', even 'transnational'. It is a phenomenon that is not necessarily dependent on the significance of the 'national' at all. Indeed, this is the key to its appeal for international lawyers who are seemingly at a loss when it comes to such processes, but nevertheless hope to be able to rationalize them as being part of their discipline.¹⁹ For example, governance may occur by a decision-making

¹⁶ Martti Koskenniemi, *What Use for Sovereignty Today?* 1 ASIAN J. OF INTNL L 61, 68 (2010).

¹⁷ Jeffrey L. Dunoff and Joel P. Trachtman, *A Functional Approach to International Constitutionalization* in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN (ed), *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (CUP 2009) 5.

¹⁸ This phrase is commonly attributed to James N. Rosenau, see for example JAMES N. ROSENAU & ERNST-OTTO CZEMPIEL (eds), *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (CUP 1992).

¹⁹ I have argued this in regard to global constitutionalism elsewhere: Christine E. J. Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, GERMAN L.J. (forthcoming).

process of the pharmaceuticals industry, say in terms of which drugs it promotes. Decentred from a particular state (although often subject to domestic regulation), the industry is dominated by a few companies, all in the Global North, also known as Big Pharma, that are seemingly primarily interested in profits. Profits are naturally higher for drugs that cure 'Western' health problems and funding for health issues of the Global South is therefore not prioritized. Research and investment is reserved for health issues related, for example to stress, obesity and similar developed-country ailments, while such issues as AIDs and tropical diseases are neglected. The local decision on which drugs to research on, manufacture, and sell therefore has an impact on global health.

The second category, institutionalized forms of global governance, is apparent in specialised governmental and non-governmental organizations. The World Trade Organization (WTO) is such a specialized international organization, organized through Member States, regulating global trade. This organization makes decisions regarding the liberalization of trade; decisions which cut across all states party to it and therefore also all citizens of those states. It has centralized much of this decision-making, employing hierarchical distinctions between treaty law and derived legislation, and provides for a binding dispute resolution body.²⁰ In terms of framing governance in a public manner, the WTO is described as 'sophisticated' where other mechanisms are still 'primitive'.²¹

Not all forms of global governance are institutionalized, either in a corporate manner (like the pharmaceuticals industry) or public manner (like the WTO). There are also individual impulses of governance, characterized here as the third site of global governance, namely social organization. Social organizational forms of global governance can be exercised by individual experts or by spontaneous groupings. An expert in economic development – one of the Nobel laureates in economics for instance –, although not necessarily a statesman or representative of another public authority, may have a large impact on the understanding of economic development.²² Amartya

²⁰ This highly organized nature of the WTO caused a flurry of literature concerning the constitutionalization of the organization in the late 1990s to mid 2000s. See for example DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (OUP 2005); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INTERNL. ECONOMIC L. 19-25 (2000).

²¹ As the Director General, Pascal Lamy, of the WTO said in a speech in 2005, available at: http://www.wto.org/english/news_e/sppl_e/sppl12_e.htm.

²² See particularly David Kennedy, *Challenging Expert Rule: The Politics of Gobar Governance* 27 SYDNEY L.R. 5 (2005); DAVID KENNEDY, *OF WAR AND LAW* (Princeton University Press 2004).

Sen, who won the Nobel Economics Prize in 1998 for his work in welfare economics is for example credited with 'restoring an ethical dimension to economics'.²³ As was seen above, the global understanding of economics is closely related to sites of global governance. Such mapping of global governance activity confirms that global governance is 'not only an affair of public actors'²⁴; indeed it is a complex web of private and public actors and activity.

a. The Private Law Influences on International Law

The understanding of what comprises international law has changed significantly through the changes that globalization have prompted. Undoubtedly, a change has occurred to the effect that what we consider to be international law today is not the same as it was in the treaty-rich period after the end of World War II. The primary impulses in terms of private law have occurred in the past twenty years. In line with the neo-liberal understanding of globalization, the forces at play have been of an political-economic nature: The collapse of the Soviet bloc and with it the globalization of capitalism, the integration of China into the world economy (on the basis of capitalist trading paradigms), and global deregulation and privatization of formerly state-regulated service providers.²⁵ These economic forces have contributed to changing international law from a primarily treaty-based inter-state law that had sovereignty as its guiding principle (the so-called Westphalian model), to the complex area of law, with conflicting principles of sovereignty and responsibility, it is today.

Three areas of international law highlight the growing significance of private law particularly well: The calls for the accountability and transparency of transnational corporations, private military companies and bilateral investment treaties. All three highlight the need to rethink the theory underlying international law and whether such theory should be one of exclusively public law.

The increasing importance of transnational corporations (TNCs) in international law is an indisputable fact. That international lawyers are trying to come to terms with

²³ <http://www2.lse.ac.uk/aboutLSE/keyFacts/nobelPrizeWinners/sen.aspx>.

²⁴ Armin von Bogdandy, Philipp Dann, Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities* 9 GERMAN L.J. 1377, 1378 (2008).

²⁵ For a view that economic forces are the primary defining forces, encapsulating all other forces, see DAVID HARVEY, *THE ENIGMA OF CAPITALISM* (Profile Books 2010).

their significance from a more theoretical perspective becomes immediately apparent by the wealth of literature dedicated to the topic.²⁶ As multinationals became more involved in areas previously reserved for states, there was a demand for accountability in regard to possible violations of individual rights that may emanate from the contracts or their actions.²⁷

Much of the impetus for this field, now known as Business and Human Rights, originated from John Ruggie, who was appointed Special Representative of the United Nations Secretary-General on business and human rights in 2005. The field focuses on adopting human rights standards to the practices of businesses worldwide, whether this be certain minimum labour standards, or responsible sourcing of materials. The sub-discipline emerged as a force to be taken seriously, as did many of the 'new' specialist sub-disciplines of international law (international criminal law, international investment law), in the 1990s. In the US this was particularly evident through the Alien Tort Claims Act litigation, which has been employed as a possible tool for making multinationals responsible under civil law (sometimes even employing criminal law standards) for certain human rights abuses committed abroad.²⁸ In March 2011, Ruggie released a set of Guiding Principles for Business and Human Rights. Ruggie states that they 'seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity'.²⁹

The private military company (PMC) is a company providing martial services through a corporate legal framework.³⁰ The law which applies to PMCs is, needless to say, predicated predominantly on private law due to its corporate structure: Whoever

²⁶ ALICE DE JONGE, *TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT* (Edward Elgar Publishing 2011) is a recent monograph. See also the recent symposium issue *Transnational Corporations Revisited* in 18-2 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES (2011).

²⁷ See for example the Business and Human Rights Resource Centre, available at: <http://www.business-humanrights.org/Home>, Amnesty International's reports on business and human rights, available at: <http://www.amnesty.org.uk/content.asp?CategoryID=11587>, and the reports of the Corporate Responsibility Coalition, available at: <http://corporate-responsibility.org/>.

²⁸ So far, the question of suing companies for human rights abuses has not yet been considered by the Supreme Court. In 2010, the litigation appeared to stall when the United States Court of Appeals for the Second Circuit decided corporations could not be sued under the Statute in *Kiobel v Royal Dutch Petroleum* 621 F 3d 111 (2nd Cir, 2010). In October 2011, the Supreme Court announced that it will be hearing the case; a judgment can be expected by June 2012.

²⁹ <http://blogs.law.harvard.edu/corpgov/2011/04/09/un-guiding-principles-for-business-human-rights/>

³⁰ Hin-Yan Liu, *Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company* 15 J. CONFLICT & SECURITY L. 141 (2010).

wishes to make use of their services will sign a contract. In the last 20 years, the PMC has become a powerful global phenomenon.³¹ A number of factors have contributed to the growth in supply and demand of PMCs: The end of the Cold War saw the downsizing of armed forces, globalization saw the internationalization and ease of arms trade, and conflicts requiring military action arose. In international law they are part of the larger phenomenon of the increasing importance of non-state actors. PMCs, like TNCs, are not awarded with legal subjectivity as such and are therefore on the fringes of international law. The reason why PMCs are such an excellent example for private law influences on international law is that they have partly assumed one of the crucial (public) roles of states and one of the archetypal areas of international law: waging war. As PMCs became more involved in areas previously reserved for states, and as the crimes they committed drew the attention of the international media, there emerged a vigorous demand for accountability. The horrors of Abu Ghraib committed by employees of CACI and Titan, the rapes committed by DynCorp contractors in Bosnia and other contractors has made accountability of private legal entities an urgent project for international and human rights lawyers.

Bilateral investment treaties (BITs) are treaties establishing the terms and conditions of foreign direct investment – the private investment by individuals and companies of one state in another. International investment law emphasises the reciprocal promise-based obligations; a treaty therefore mostly includes private law conceptions such as fair and equitable treatment, conditions of expropriation, and the referral of disputes to a body of international arbitration.³² The primary purpose is to generate non-negative returns on that which has been invested. BITs and the law that regulates them have become increasingly important in international law; indeed, it has been described as an ‘explosion’ in the number of BITs over the past years.³³ Arbitrations arising out of such investor-state relationships have also increased, particularly in scope. William W. Burke-White and Andreas von Staden claim that the ‘traditional concerns’ of arbitrations in this field have expanded from ‘simple

³¹ SINGER (note 6) 9-18, 49-72.

³² For an overview see Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration* 74 BRITISH YEARBOOK OF INT’L L. 151-289.

³³ William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 383 (2010).

expropriations and nationalizations’, to subject-matters concerning a broad public law context.³⁴ Criticisms that have been voiced include concern that such treaties and the arbitrations arising from them do not show regard for the environment that may be affected through investments, the labourers that may be affected, the depletion of natural resources and the general danger of a lack of social and environmental responsibility of the investors.³⁵ These concerns have been voiced through demands for a public law mechanism that can provide accountability and transparency. Burke-White and von Staden for example claim that arbitration is no longer a suitable mechanism since it causes a ‘legitimacy gap’ where public law decisions are made.³⁶ Gus van Harten identifies, what he calls ‘flaws in the system’ to address the lacking public law criteria, prominently accountability.³⁷ In order to overcome the ‘unhappy marriage’ of international arbitration in investment law and public law requirements, he suggests a permanent international investment court.³⁸

The three examples above can merely provide a very cursory glimpse of a vast field and ever-expanding body of literature. The three areas of international law are not random examples of private law; they are all believed to be part of the phenomenon of global governance. At the same time, they are primarily being discussed in the international legal literature in terms of accountability mechanisms predicated on public law. Yet, this is not how global governance was originally conceived. Global governance is a term originally employed by international relations scholars to describe (non-hierarchical) networks.³⁹ International lawyers have adopted the terminology of global governance but have predominantly interpreted the processes as associated with a hierarchy of norms. There has therefore developed a great overlap, and sometimes even synchronization, with more ‘legal’ terminology and debates. There is, for example, a large body of literature on global constitutionalism, world legislation, and global administrative law, all of which are understood as either a part of or the entire

³⁴ *Ibid* 384, 385.

³⁵ S. D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions* 73 *FORDHAM L.R.* 1521 (2005).

³⁶ Burke-White & von Staden (note 34) 385.

³⁷ GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (OUP 2008) 153.

³⁸ *Ibid*, particularly Chapter 7 ‘The Businessman’s Court’.

³⁹ E.g. DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (Stanford University Press, 1995).

expression of global governance discourse.⁴⁰ Interestingly, these global edifices, built with the question in mind of how high they can go and what is at the pinnacle, are all currently competing visions. None has gained ascendancy as *the one* mechanism for ordering global arrangements.⁴¹ It appears that there is not enough political will to go beyond the imagining of such edifices, despite the status of the UN and reports of its constitutionalising. The real global construction has not begun.

This is contrary to developments in specialized areas of international law. Such specialization of areas, including their perceived legitimacy independent of international law in general has been dubbed the fragmentation of international law.⁴² The rapidly expanding field of international criminal law provides an excellent example of how a sub-area of international law can construct edifices: It is a field that has established its own international institutions and its own specialized legal principles and norms. Such undertaking has increased its legitimacy. The extent of legitimacy in the international community can be demonstrated by recent events surrounding the opening of investigations into violations of crimes against humanity allegedly committed by Colonel Gaddafi and his regime by the Office of the Prosecutor at the International Criminal Law.⁴³ Indeed, fragmentation is regarded as one of the foremost reasons why all-encompassing (rather than subject-matter-specific) global edifices as global governance cannot realistically be implemented.⁴⁴ Yet, fragmentation also makes the imagining of a global edifice which can encompass all specialized sub-areas particularly attractive.

⁴⁰ E.g. Nico Krisch and Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order* 17 EJIL 1, 2 (2006). JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN (eds), *RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (CUP 2009); JAN KLABBERS, ANNE PETERS, GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (OUP 2009).

⁴¹ Neil Walker, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders* 6 ICON 373-396 (2008).

⁴² In 2002, the International Law Commission, on the initiative of Martti Koskenniemi, formed a study group on the fragmentation of international law. The group found that fragmentation has resulted in conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law, see Report of the Study Group of the ILC, 58th session (2006) A/CN.4/L.682.

⁴³ <http://www.guardian.co.uk/law/2011/mar/03/icc-probe-libyan-violence>.

⁴⁴ See for example Christian Walter, *Constitutionalizing (inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law* 44 GERMAN YEARBOOK INT'L L. 191-196 (2001).

b. Managing Private Law Influences

Most contributors to the debate on global arrangements adopt a normative rather than a descriptive orientation. The normative orientation imagines what the global order should look like while the descriptive orientation considers which systems, orders and disorders are apparent. International relations scholars are more likely to use a descriptive approach, which often results in accounts of networks rather than hierarchies. International lawyers naturally approach global arrangements from a normative perspective, but often draw on descriptions that conveniently fit their vision, yet can be criticized for being more utopian than accurate. For example, there are a number of scholars who argue that the international sphere is constitutionalising and to make their case refer to analogies to their domestic legal systems.⁴⁵ The model that international lawyers often have in mind, either directly or indirectly, are the liberal democratic (commonly European) states they call home.

Whether it is specifically a constitution that these contributors are arguing in favour of or a form of overarching legislation, there is a desire to model the international on the domestic. As Martti Koskenniemi notes: ‘The international, we Europeans have learned to think, is fundamentally just another domestic...’.⁴⁶ Indeed, the domestic, at least the European domestic orders, are organized through a firm distinction between the public and the private – one established through an overarching public sphere that directs and regulates all behaviour. Yet, as a description of the international sphere, it seems more accurate to talk of disorder than of order: Multiple actors, processes, competing power forms and contradictions have created an altogether diverse world. The term global governance offers international lawyers the opportunity to frame processes within the single idea of global governance (the normative aspect) while at the same time capturing the fact that there are not only forms of public power but also forms of private power evident in the world (the descriptive aspect). But, international lawyers prefer to focus on false descriptions, which suit a hierarchical arrangement.

A recent article, part of a larger research project, authored by eminent international lawyers, is titled ‘Developing the Publicness of Public International law:

⁴⁵ E.g. Robert Uerpman, *Internationales Verfassungsrecht* 56 JURISTEN ZEITUNG 565-572 (2001). This can be referred to as Analogical Global Constitutionalism, see CHRISTINE E. J. SCHWÖBEL, GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE (Martinus Nijhoff, 2011) 43-48.

⁴⁶ Koskenniemi (note 2).

Towards a Legal Framework for Global Governance Activities'.⁴⁷ This project, based at the Max Planck Institute for Comparative Public Law and International Law, is an excellent indicator of the predominant approach to global governance as conceived by international lawyers. The article, published in a special issue on Public Authority & International Institutions in the German Law Journal, 'proposes a distinctly public law approach to the deep transformation in the conduct of public affairs epitomized by the term global governance'. The narrative begins with a description of the policy fields in which international institutions are exercising public power. Examples are a private real estate sale blocked by a decision of the UN Security Council Al-Qaida and Taliban Sanctions Committee and the legal challenge to the construction of a bridge on the basis that it would affect part of a UNESCO World Heritage site. The authors of the article draw from such private law issues that there has emerged a large area of authority which lacks accountability. There is a desire to fill this accountability gap in order to ensure that such governance activities 'satisfy contemporary expectations for legitimacy'. They are indeed of the opinion that public law scholars are under an *obligation* to see to filling this gap.⁴⁸

The public law approach to global governance that these scholars apply has a strong institutional tendency and is a combination of, what they consider as the three main approaches to global governance phenomena: constitutionalization, administrative law perspectives and international institutional law.⁴⁹ The Heidelberg-based scholars are part of a long tradition of German thinkers employing public law to make sense of the sphere that goes beyond the exclusively domestic.⁵⁰

A similar undertaking to the Heidelberg project, also responding to an alleged 'accountability gap' in international law, is the project on Informal International Law-Making (with the acronym IN-LAW)⁵¹. Asking whether international cooperation is

⁴⁷ Von Bogdandy, Dann, Goldmann (note 25) 1375-1400.

⁴⁸ 'This *calls upon* scholars of public law...' [emphasis added] Ibid 1376.

⁴⁹ Ibid 1390.

⁵⁰ Georg Friedrich von Martens, writing in Göttingen, and Johann Ludwig Klüber, writing in Heidelberg, produced the first books on the rules of coordination between sovereigns. See Koskenniemi, (note 2) MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 21 (CUP 2001).

⁵¹ For a project summary, see the website at <http://www.hiil.org/research/main-themes/transnational-constitutionality/new-international-law-mapping-the-action-and-testing-concepts-of-accountability-and-effectiveness/>.

increasingly escaping the needed constraints of both domestic and international law, this project aims at mapping the field relevant to international law-making, which includes informal moments of law-making, and also hopes to reform the field. Such informal international law-making may occur when certain formalities traditionally linked to international law are dispensed with: 'This relative informality concerns the identity of the decision-makers, the character of the decision-making procedure as well as the character of the decisions actually adopted'.⁵² The project participants, led by an institute possibly tellingly named The Hague Institute for the Internationalization of Law (HIIL), repeatedly note they consider informal international law as a 'problem' which involves 'moving away from law'.⁵³ Other such projects are underway as regards individual private law areas, particularly private military companies, the accountability of businesses and a public law framework for international investment law.⁵⁴

These projects respond to the increased activity of private actors, also often sweepingly referred to as 'non-state actors' in international law. As was mentioned above, the global edifices have not come into force; they are currently merely imaginations. One could argue therefore that the undertaking of reintroducing private law conceptions and methodologies into international law is a straw man argument: Where is the edifice which is threatening ideas of the separate legal sphere, equality and redistribution? Indeed, in one of his articles setting out the need for the Heidelberg project, Armin von Bogdandy writes:

So far the general principles of international law correspond mainly to private law principles or principles of litigation between equal subjects, i.e. private law litigation.⁵⁵

Although he references an article from 1995 here, one could nevertheless argue that von Bogdandy's descriptions still resonate with international law today. Although there have

⁵² Project Framing paper, February 2011 <http://nilproject.org/>, p 7.

⁵³ Joost Pauwelyn, *Information International Law-Making: Mapping the Action and Testing Concepts of Accountability and Effectiveness* IN-LAW Framing Paper available at http://www.hiil.org/assets/983/INLAW_Framing_July_2010.pdf 21 (2010).

⁵⁴ See also BERNHARD ZANGL & MICHAEL ZÜRN, MAKE LAW NOT WAR: INTERNATIONALE UND TRANSNATIONALE VERRECHTLUNG – BAUSTEIN FUER GLOBAL GOVERNANCE? 12 (Dietz 2004).

⁵⁵ Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field* 9 GERMAN L.J. 1909, 1914 (2008). He references Hermann Mosler, *General Principles of Law* in RUDOLF BERNHARDT (ed) II EPIL 511, 518 (1995).

been significant changes to international law, none of the visions for global edifices have gained ascendancy.

Interestingly, the more ambitious the global edifice visions are, the more likely the less ambitious (but similarly vigorous) visions become. Who would want to argue with a global standardization of private military companies when others are suggesting that the UN Charter is to be viewed as the global constitution? Judging by the above, the trend is going towards multiple suggestions for public legal frameworks which would occasion regulated private law. While there is no international private law at the moment, there is clearly a need to question its appeal.

Private actors have undoubtedly become increasingly important in the international sphere, indeed it appears that privatization in the global sphere is a phenomenon that is occurring analogously to the privatization in the domestic sphere.⁵⁶ In domestic law, governments have increasingly contracted with private organizations when it comes to areas such as health care, education, welfare, security, transport and communications. As a similar trend is sweeping the global sphere, it is interesting to note that it is assumed that the private sphere does not suffice in terms of standards of legitimacy and that therefore, private actors need to be enveloped in a public law framework. Privatization is only considered as legitimate if it occurs in a way which mimics the domestic systems – as regulated private law. What is left out of the picture however are the marginalizations and biases inherent in public law edifices on the one hand and the progressive *legal* potential of some private law conceptions and methodologies on the other hand.

3. Faith in the Public, Fear of the Private

The presence of private law in the global sphere is an undeniable, and possibly an irreversible, fact. As Laura A. Dickinson states: ‘The privatization train has not only already left the station, but has gone far down the track.’⁵⁷ Indeed, those promoting global edifices admit: ‘Global governance flattens the difference between public and

⁵⁶ See particularly Laura A. Dickinson, *Public Law Values in a Privatized World* 31 YALE J. INT’L L. 383 (2006).

⁵⁷ *Ibid* 387.

private phenomena, as well as between formal and informal ones'.⁵⁸ So why the attempts at consuming the private through the public and thus creating a hierarchy; in a sense erecting that which has become flattened? It appears that this is due to a chain of assumptions and responses. The first assumption is that the processes thought to be changing the global sphere are chaotic. This assumption is met with demands for order. Underlying this are a number of further assumptions most obviously that chaos must at all costs be prevented; the assumption about chaos is that it opens up a legitimacy-deficit, indeed a legality-deficit. Public law is understood as the site of order while the private is the scene of chaos. The international lawyer is accustomed to this very rhetoric of the faith in the public and the fear of the private: International lawyers, predominantly of course *public* international lawyers, assume control over public processes but find it difficult to get a grip on private legal processes.

What attributes do all these global edifices of international lawyers share? They all require a *system* and they all require some form of *hierarchy* within the world. Systematization, without doubt, offers many benefits: it orders, it offers control; but above all, it offers an answer to legitimacy.⁵⁹ The consequence is a public law superstructure that subsumes all other legal relationships under it. The motivation for such ordering by international lawyers lies in the need for filling the gap that has been left with the slow erosion of the Westphalian model of governance. Previously of course, it was the nation state that was the site of public authority and international law prescribed this to be so throughout the world. But with shifting sites of power, global power structures can no longer be captured in such a straightforward model. The erosion of the Westphalian model has thus supposedly opened up an accountability deficit. Accountability questions prompt the familiar narratives regarding legitimacy in and of international law. In that sense accountability is possibly most usefully regarded as a subcategory of legitimacy.

International lawyers have a deeply entrenched anxiety about legitimacy, which exaggerates the need for control and order and essentially the (partly irrational) fear of the private and the (blind) faith in the public. Such lack of confidence is particularly

⁵⁸ Von Bogdandy, Dann, Goldmann (note 25) 1381.

⁵⁹ 'Acts that are legal are generally presumed to be legitimate' Von Bogdandy, Dann, Goldmann, (note 25) 1390.

evident in the work of those international lawyers writing about the need for global edifices. The authors of the article *The Publicness of Public International Law* write that legal scholarship requires legitimacy in its attempt to understand and frame world order or else it is at risk 'of being marginalized by other disciplines, in particular by economics and political science'.⁶⁰ This fear of marginalization has been a continuing concern of international lawyers.

Much of the debate about the private sphere is focused on the lack of accountability. Again von Bogdandy and his team of researchers sum this up in a notable way: According to them, it is currently 'difficult, if not impossible', to attribute responsibility to authoritative acts, hence the necessity for public law. This then clearly implies that private actors are not responsible actors. Interestingly, this has led the private to be met with such a great extent of suspicion that it is often understood as an extra-legal sphere. It is the site of the particular while public law is the site of the universal. The relevant article states that global governance is 'deficient from a public law perspective as the concept of global governance does not allow for the identification of what the focus of a *legal* discourse should be.'⁶¹ This is particularly interesting, given that the examples at the beginning of the article (a private real estate sale and the issues pertaining to the construction of a bridge) are certainly *legal* issues, albeit *private legal* issues. Peter Warren Singer, who has written extensively on the private military industry, examined what he refers to as the 'vacuum of law' surrounding private military firms.⁶² But, this only holds true if one does not take account of the contracts which regulate and establish the legal relationships between the contracting parties. As Sara Kendall notes:

The notion that contractors are 'above the law' only works if we think of the law as a reified, singular field, rather than a fragmented multiplicity of legal domains.⁶³

⁶⁰ Ibid 1390.

⁶¹ Ibid 1376. [emphasis added].

⁶² P.W. Singer, *War, profits and the vacuum of law: Privatized military firms and international law* 42 COLUMBIA J. TRANSN'L L. 521 (2004).

⁶³ Sara Kendall, *Violence and the Comfort of the Juridical: "Lawlessness" and the Jurisdiction of Private Security in Iraq* Conference paper presented at *Law, Culture and the Humanities*, 8 (2008) [on file with the author].

Kennedy notably pointed out in regard to Guantanamo Bay's alleged 'black hole' of law that military operations and bases are among the most regulated areas in the world.⁶⁴ Such suspicion or fear of the private is further deepened through the language employed by commentators and reformers of private law influences. Recent publications on private military companies go so far as to suggest a demonization: Hin-Yan Liu's article 'Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company' evokes a frightening imagery of savagery and havoc (referencing Shakespeare's *Julius Caesar* to 'Cry havoc! And let slip the dogs of war') which can only be restrained by the law. Much the same rhetoric is employed in the domestic sphere. In the article 'Contracting out War? Private Military Companies, Law and Regulation in the United Kingdom', the authors write of the minimalist intervention of the state (in this case the UK) in matters of security and their exasperation is summarized as follows: 'it appears that nothing is sacrosanct in the onward march of the principles of neo-liberalism'.⁶⁵ A similar exasperation with the desecration of the sacrosanct is apparent on the international sphere: The public as the sacrosanct and the private as the desecrating demonic.

It appears that the demonization of private law may also be a function of the broad categorization of 'non-state actors' in international law. In terms of subjects of international law, there is a supposedly simple binary between state actors and non-state actors. The latter term has become pertinent in international law through events concerning terrorist activity and guerrilla soldiers; hence the association of non-state actors with irresponsible and gruesome actions. The term non-state actor is however needless to say very broad, encompassing all manner of actors.⁶⁶

If one questions the underlying assumptions, some new avenues of understanding may be opened: Is order in the global sphere desirable? Should some forms of chaos be maintained in order to ensure flexibility and openness? Does only public law offer forms of accountability? Can private actors indeed also be regarded as responsible actors? Does the faith in the public obscure some of its very real limitations?

⁶⁴ KENNEDY (note 23).

⁶⁵ Clive Walker, Dave Whyte, *Contracting out of War?: Private Military Companies, Law and Regulation in the United Kingdom* 54 INT'L COMPARATIVE L. QUARTERLY 651 (2005).

⁶⁶ Dickinson (note 57) 383.

4. The Shortcomings of Public Law and the Qualities of Private Law

Public law has no doubt contributed to many progressive projects. Particularly coupled with democratic visions, it has the capacity to bring about significant and important social change. The right of women to vote, the abolition of the slave trade, the civil rights movement in the US, the recognition of LGBT rights are all milestones for public law. But, what about the blindspots and biases that public law has not, and will not, overcome? Power imbalance is, it seems, the one insurmountable attribute of public law that will inevitably always lead to exclusions and marginalizations. Not to speak of the issue of *how it was* that women could not vote, how slave trade could be legitimized, how discrimination could be entrenched in the laws of the US and South Africa and how being homosexual was criminalized.

The faith in public law derives from viewing the public only as a sphere of restriction of power and not one in which power is allocated and legitimated. This one-sided view of public law allows for the flourishing of an environment that does not question the public. In *The Publicness of Public International Law*, the authors describe public law ‘in keeping with the liberal and democratic tradition, as a body of law to protect individual freedom and to allow for political self-determination’.⁶⁷ This, surely, is only half of the story of public law.

In the global governance suggestions that centre on public law (and its inherent power-imbalances in favour of the state), power is allocated to a decision-making organ, a force that could then itself deprive people of political and social freedom.⁶⁸ Feminist voices were the first to use the slogan ‘the personal is political’ to express problems inextricably linked with the public/private dichotomy.⁶⁹ Some feminists argued that the ‘masculine’ ethical orientation is for justice and rights and the ‘feminine’ ethical orientation is for care and responsibility.⁷⁰ While justice is allocated to the public sphere, care is allocated to the private sphere, leading to the exclusion of female assertions in the public sphere. The division public/private is in this way mapped onto

⁶⁷ Von Bogdandy, Dann, Goldmann, (note 25) 1383.

⁶⁸ HELD (n 40) 9.

⁶⁹ See Carol Hanisch, *The Personal is Political* in SHULAMITH FIRESTONE & ANNE KOEDT (eds), NOTES FROM THE SECOND YEAR: WOMEN’S LIBERATION IN 1970 (Radical Feminism, 1970). In a new Introduction from 2006, Carol Hanisch clarifies that she was not the one to give the original paper its title, but rather that it was the editors, Firestone and Koedt.

⁷⁰ CAROL GILLIGAN, IN A DIFFERENT VOICE (Harvard University Press, 1982).

the division male/female.⁷¹ It is of course significant that (certainly the first wave) feminists were therefore interested in becoming a part of the public sphere – they wanted to be freed of the restrictions and lack of representation of the private sphere. While men have traditionally been regarded as asserting their interests in the public sphere, women allegedly remained captives of the private sphere, unable to adequately assert their interests.⁷² The state (the public) is constructed on the basis of abstract equality and serial individuals, whilst the private becomes the site for individuality. One could therefore claim that the public sphere indeed helps to produce, maintain and reinforce gender divisions and other inequalities, even as it promotes norms of non-discrimination.

The public is the legal mechanism through which universalism occurs. With reference to the universality of the rule of law for example, scholars argue that their understanding of global governance is the universal understanding of the idea. Certainly since Marx, we know that universalism can be used as a tool of hegemony and disadvantage. In *The German Ideology*, Marx and Engels explain how the ruling class:

is obliged, even if only to achieve its aims, to represent its interests as the common interests of all members of society; that is to say, in terms of ideas, to give its thoughts the form of universality, to present them as the only reasonable ones, the only ones universally valid.⁷³

Although public law has clear progressive potential, it also has limitations that provide a strong reason for not covering international law in a blanket of public law.

So what are the qualities of private law? Before discussing these it appears crucial to acknowledge that there could be a pertinent ideological issue at hand which was briefly alluded to above. Private law, with its focus on property rights, often feeds into economics and the free market; could therefore the suggestion to take the private seriously legitimize free trade and liberal hegemony? Stephen Gill warns against a 'neo-liberal discourse of governance', one that stresses efficiency, welfare of the strongest in

⁷¹ SEYLA BENHABIB, *SITUATING THE SELF* (Polity Press, 1992) 158.

⁷² JUDITH SQUIRES, *GENDER IN POLITICAL THEORY* (Polity Press, 1995) 25, citing GILLIGAN (n 68).

⁷³ Karl Marx, *From the German Ideology* in JOSEPH O'MALLEY (ed) *EARLY POLITICAL WRITINGS* (CUP 1994) 146.

society, freedom of the market and actualization of self through the process of consumption.⁷⁴ All these concerns seem entirely valid, if not in need of urgent attention.

In a recent article, Kennedy notes that North American legal scholarship can be divided into critical scholarship on the left and 'law and economics' on the right.⁷⁵ Should private law conceptions be regarded as the tool solely of scholars on the right? The scholarship on international law and transnational economic governance, from the US and from Europe, appears to strengthen this view, not weaken it. While Christian Joerges and Ernst-Ulrich Petersmann include economic legal relations in their studies of governance, they argue in favour of 'effective constitutional safeguards' in their vision of transnational economic governance.⁷⁶ Although seemingly writing about 'law and economics', in fact their undertaking is one of critical scholarship which attempts to manage international markets and liberal trade through public law mechanisms. Again, it is worth noting that the suggestion for taking private law conceptions and methodologies seriously is not a call for a wholesale abandonment of public law in favour of private law. When state actors act, public law should continue to be the reference point but when non-state actors' actions are assessed, it may be more useful to look to private legal conceptions and methodologies. This requires a reinterpretation of private legal theory, a reinterpretation of its very core, as not exclusively concerning economics. Such a reinterpretation would take into account that private law plays a crucial role in environmental, educational, health, information, and many other issues and discourses. And this role is one which is not necessarily purely directed towards profit and growth for growth's sake. So, are the law and economics scholars onto something? Onto something that they are not even aware of: The progressive properties of private law? I believe that a consideration of private law as possessing progressive potential has possibly been wrongly ignored by the critical left. Indeed, taking some of these private law methodologies and conceptions into account instead of a public law edifice speaks very much to the critical left's long-standing scepticism toward state power.

⁷⁴ STEPHEN GILL, *POWER AND RESISTANCE OF THE NEW WORLD ORDER* (2nd ed. Palgrave Macmillan 2008) 126.

⁷⁵ David Kennedy, *A Rotation in Contemporary Legal Scholarship* 12 GERMAN L.J. 338 (2011).

⁷⁶ CHRISTIAN JOERGES & ERNST-ULRICH PETERSMANN, *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SELF REGULATION* (Hart Publishing 2006).

Private law, in the sense of privately created law, entails certain principles that are either obscured entirely by the public law frameworks suggested for international law, or are at the very least marginalized. I will focus on three qualities distinctly associated with private law, qualities worth maintaining and exploring further in international law: (a) a legal sphere created by private law is a *separate legal sphere* that functions on the terms of the legal entities opting into it; (b) the legal entities privy to the private law are *equal*; (c) private law offers a *range of remedies* in case a breach occurs. Taking private law seriously would not only address the need for law to respond to reality but can also remedy certain exclusions and marginalizations apparent in dominant public law conceptions.

a. A Separate Legal Sphere

In most rule of law societies, private law is of course not entirely separate from public law, but there is nevertheless a significant distinction between public law and private law. Private law is more or less strictly regulated by public law. On the international sphere, or more accurately transnational sphere, the lack of a central government means that there are only specialized pockets of regulated private law (in the World Trade Organization for example), but there is no standardized regulated private law. Thus, there is a larger amount of privately created law, which may occur quite spontaneously. The parties agree on what is binding between them and through this practice *make* law.

There is of course a direct parallel here with the Westphalian model of international law: It was mentioned above that Hersch Lauterpacht, in the first part of *Private Law Sources and Analogies of International Law*, argues that the founding fathers of international law made use of Roman private law analogies.⁷⁷ Indeed, the private law nature of classical, Westphalian, international law is most evident in the quintessential law-making mechanism of international law: the treaty. One could even argue that it seems odd and unfair to demand the non-consensual enveloping of public

⁷⁷ Lesaffer also stresses such intention in Lauterpacht's book. See R. Lesaffer, *Argument From Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EJIL 25, 27–31 (2005). A complementary reading is that Lauterpacht was trying to prove that international law was 'complete' since general principles of law, borrowed from (Roman) private law, could fill the gaps occasionally found in the system. See Martti Koskenniemi, *Hersch Lauterpacht (1897-1960)*, in JACK BEATSON AND REINHARD ZIMMERMANN (EDS.), *JURISTS UPROOTED: GERMAN SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* 601, 616–20 (OUP 2004).

law over private law entities in international law if the states – the primary actors of international law, and the most ‘public’ actors – are provided with the privilege of the private law conception of consent. Why should a state, a public authority, be able to opt in and out of a treaty while businesses, private entities, cannot? A call to embracing private law discourses may therefore in a sense also be a call to remind international lawyers of the governing principles of international law as it was first conceived.

From a public law perspective there is a constant danger that a separate legal sphere could be established and exercised irresponsibly. This prompts the need for (public law) rules and regulations which ensure accountability and transparency in a procedural sense and fairness and distribution in a substantive sense. Public law’s focus on democratic processes is most likely the most compelling reason for the ongoing faith in the public and those writing about the short-comings of the public, even those writing about Empire, always return to the need for the politicization of international law in more democratic terms.⁷⁸ And indeed, this appears to be where the most progressive potential for international law lies: with the politicization of structures that have so far become inflexible and rigid.

So one cannot help but feel discomfort when private actors are granted with a sense of responsibility. Kennedy writes:

In my own experience, I have certainly found that the corporate lawyers, investment bankers, and businesspeople of the global economy understand how to manage, instrumentalize, or simply operate within a plural and disaggregated global legal order far more distinctively than do their counterparts in national government service, diplomacy, or the world of international public institutions.⁷⁹

Given our knowledge of the meltdown of the global financial market, which, as we are told, was down to greedy investment bankers and businesspeople, such observations do not sound very convincing. Yet, such suspicions of the actors of the private sphere have caused suspicions of the private sphere in its entirety and it is the entirety of it that I take issue with. The fear of the private in its entirety necessitates a faith in the public,

⁷⁸ See for example SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS* (OUP 2000).

⁷⁹ Kennedy (note 23, *Challenging Expert Rule*) 41.

which can be troubling. Such faith in the public overlooks the possible interventionist activities that are about establishing and maintaining an oppressive power rather than about the establishment and maintenance of fairness. The existence of a separate sphere of legal interaction therefore also ensures a space in which intervention and hegemony cannot occur.

b. Equality of the Parties

Inextricably linked to the separate legal sphere is the equality and independence of the parties. Equality is in stark contrast to the power imbalance evident in public law in favour of the state. Such power imbalances are a *sine qua non* of public law: it always necessitates the centrality of power in one space and the lack of it in another. The principle of the equality of the parties in international law can be traced in the principle of sovereign equality of states, which means that only what the parties have consented to can be binding. A function of equality of the parties is that they may have the option to choose the form of dispute settlement. BITs generally provide for disputes to be settled in arbitration rather than in the adversarial court system. This allows for negotiations and for maintaining a working relationship beyond the dispute.⁸⁰ The equality of parties, which aims at a so-called equality of arms, is a mechanism for ensuring that hegemonial aspirations are kept at bay. In international law it is, significantly, the smaller and weaker states which insist on sovereign equality since it is this principle that ensures that their interests are not overlooked in light of militarily and economically more powerful states.

Would an appeal to the equality of the parties mean going full circle back to sovereignty of states? It does appear that the days of purely state-led law, if this was ever apparent, are well and truly over. A globalized world requires international law to take non-state actors seriously. But, the idea of sovereignty may nevertheless remain important as a mechanism with which to ensure equality between parties, whether these be states or non-state actors. Indeed, there could even be a radical potential in sovereignty: viewing – and employing - sovereignty as a means to regain an equality of arms where an imperial decision-making was predominant. After all, as Martii

⁸⁰ KENNETH J. VANDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (OUP 2010).

Koskenniemi reminds us, sovereignty was first conceived ‘to do away with papal and imperial power and pacifying European societies’.⁸¹ Sovereignty in the 17th century was a push-back against the transcendental, for it was the transcendental, the religious and the universal power, which had enabled suppression and war.⁸² Similar impulses may be required today. As the claim of the transcendental becomes more of a proxy for power, it may become necessary to return to the principle of equality of parties.

c. Range of remedies

Related to the previous point regarding the settlement of disputes, private law historically offers a range of remedies, specifically those that open up the possibility of redistribution in economic terms. In the past years, some international criminal tribunals, and of course the ICC too, have opened their doors to victims, allowing for their participation and enabling awards of reparation.⁸³ This has been a slow process, which is still in its infancy, and is facing many challenges and exceedingly high expectations. The idea that an individual must recompense their victims for harm committed, is a principle which has clearly been adopted from private law.⁸⁴ Previously, (international) criminal law, as a part of public law, was a rather blunt (or one could also say a particularly sharp) instrument, only knowing the remedies of ‘guilty’ or ‘not guilty’. Since the introduction of private law mechanisms, most notably the International Criminal Court’s Trust Fund for Victims which offers reparations mechanisms to the victims of international crimes, a wider spectrum of relief is available.

International human rights law and international humanitarian law have also made use of the private law remedies available through payment of reparations. Previously the only relief for a victim of human rights abuse would have been the changing of legislation or the insipid ‘naming and shaming’ aspect of human rights. This was due to the faith that public law would be exhaustive for remedies and the only legitimate mechanism. As Kennedy wrote in his seminal article *The International Human Rights Movement: Part of the Problem?:* ‘Human rights implicitly legitimates

⁸¹ Koskenniemi (note 51) 61, 65.

⁸² *Ibid.*

⁸³ See Article 68 of the Rome Statute of the International Criminal Court.

⁸⁴ See the illuminating article by Liesbeth Zegveld, *Victims’ Reparations Claims and International Criminal Courts – Incompatible Values?* 8 J. INT’L CRIMINAL JUSTICE 79, 85 (2010).

ills and delegitimizes remedies in the domain of private law and nonstate actors'.⁸⁵ The focus of human rights, and indeed public law, on participation and procedure, has come at the expense of distribution thereby possibly implicitly legitimating the unequal distribution of wealth, the higher status of the economic elites and the unequal power distributions.⁸⁶ An overall public law super-structure over global governance would have the same effect. It would freeze the status quo in wealth distribution. There has been a move to opening up human rights law to private law influences, similarly to such moves in international criminal law. The US Alien Tort Claims Act (ATCA) was an unlikely vehicle for this, but has proved a useful mechanism. Although the private law influences on human rights law and international criminal law are still suffering from growing pains, and may indeed need substantial rethinking, they speak to the necessity to provide for distribution mechanisms in international law. In view of the partial understanding of globalization as in line with a neo-liberal ideology, it seems crucial for law to have access to the economy rather than being separated from it.

5. Private Law Actors as Responsible Actors?

So where to go from here? How can the above private law conceptions and methodologies be accorded with more of a prominent position to overcome their image problem? It was mentioned above that there needs to be a serious effort to reinterpret private law. It appears that much time and effort is invested in conceptualising global edifices while a strengthening of private law conceptions and actors through the recognition of their being able to be responsible actors may allow us to pay attention to the actual problems in the world. Michel Foucault famously claimed that structures, imagined and formed by the rulers of society, have led to the devaluation of the 'event' in their attempt to order the general tide of history. Aberrant events are thus ignored if they do not fit into 'those beautiful structures that are so orderly, intelligible and transparent to analysis.'⁸⁷

⁸⁵ David Kennedy, *The International Human Rights Movement: Part of the Problem?* HARVARD HUMAN RIGHTS J. 101, 109 (2001).

⁸⁶ *Ibid.*

⁸⁷ Michel Foucault, in COLIN GORDON (ed) *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (Pantheon Books 1980) 114.

Wendy Brown drew attention to this problematic in regard to the human rights narrative; she said that if we aim to apply human rights to all suffering in the world, we must necessarily reduce the idea of human rights to a bare minimum of ‘the most we can hope for’.⁸⁸ If, however, human rights law is applied to suffering caused by states, and other human suffering is met with alternative solutions, we may be able to be more ambitious with addressing suffering in the world. This thought can be applied analogously to the global governance debate: If we try to interpret global governance as a public law framework of accountability, we will need to reduce our expectations of the public to a bare minimum. After all, if we speak of ‘the public’ – who really is this ‘public’ in international law? There is no sign, thankfully, of a central democratically elected authority and global institutions are far removed from democratic processes. Thus one could argue, there is also no ‘demos’.⁸⁹ Since there is no evident ‘public’ that could be subject to the public law edifices, these visions necessarily need to minimize our understanding of ‘public’ and ‘democratic’ to something almost meaningless. For how can we respond to the question: Accountable to *whom*?

If then, global governance is thought of as an interplay between various public law and private law conceptions and methodologies, including some gaps in our understanding, the concept of global governance can address a wider variety of concerns in the world. It is worth noting again that private law cannot of course deal with concerns on its own. Public law and regulation is of course required. As the financial crisis taught us, without regulation and without consideration of social and environmental externalities, free-market capitalism (to be placed in the realm of private law) has the potential to turn into a potentially disastrous process in which more and more wealth is concentrated in fewer and fewer hands. But, to address the root causes of these issues, it may be more useful to start with the understanding of private law and its sympathy for market liberalization.

This will require a rethinking of what constitutes a responsible actor in global arrangements. Corporate social responsibility, for example, a mechanism based on a

⁸⁸ Wendy Brown, “*The Most We Can Hope For...*”: *Human Rights and the Politics of Fatalism* 103 THE SOUTH ATLANTIC QUARTERLY 451-463 (2004).

⁸⁹ Kingsbury & Donaldson (note 9) 84. This corresponds with J.H.H. Weiler’s view of governance as ‘Governance without government and without the governed.’ in J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy* 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VERWALTUNGSRECHT 547, 560 (2004).

mix of regulatory and voluntary activity, may be a more useful means of reducing suffering through private actors. Interesting research projects are currently underway in which mixed regulatory regimes are examined.⁹⁰ Although the current research seems to be based on policy recommendations, as a mechanism for introducing practice into the theory,⁹¹ the research may open up interesting avenues for creativity. Furthermore, it may be a useful endeavour to look more closely at the contracts between private actors as a source of solutions. Laura A. Dickinson believes that contracts can and do include public law concerns.⁹² While she views private law as a ‘threat to public law concerns’,⁹³ the idea of taking the contracts more seriously as independent law-making mechanisms appears suitable to international law. In Dickinson’s view, contractual provisions ‘are not a panacea’, but they ‘may be at least as effective as the relatively weak enforcement regime of public international law.’⁹⁴ This possibly causes a shift from accountability (public law responsibility) to individual regulation (private law responsibility),⁹⁵ which could adequately reflect the possibility for private actors to be responsible actors. Individual regulation would work on a case-by-case basis, whenever regulation is necessary. It would not be introduced before a specific problem occurs to an indefinite number of actors and situations.

Conclusion

The debate on global governance captures a moment in international law in which some reorganization is occurring. Rather than being understood as a constructed and grand global edifice, global governance should be understood as close to reality and modest. Global governance offers a space for flexibility and contradictions. It has been shown that it offers scope for the increasing private law influences on the global sphere, which

⁹⁰ See, for example, the ‘Private Transnational Regulatory Regimes – Constitutional Foundations and Governance Design’ project coordinated at the EUI by Fabrizio Cafaggi, at <http://privateregulation.eu/>. Interestingly, this project is also funded by HIIL, the funding body for the IN-LAW project. On the European level, the University of Amsterdam Faculty of Law is undertaking a project titled ‘Private and Public European Law’, see <http://www.jur.uva.nl/research/priority-areas.cfm/9549E1BA-1321-B0BE-68BFC787B8C895E1>.

⁹¹ As regards the binary between theory and practice see Andrew Hurrell, *The Theory and Practice of Global Governance: The Worst of all Possible Worlds?* 13 INT’L STUDIES REVIEW 144-154 (2011)

⁹² Dickinson (note 57) 383-426.

⁹³ Ibid 386.

⁹⁴ Dickinson (note 57) 386.

⁹⁵ Kendall (note 64).

is particularly important in a globalising world in which the scope of privatization is consistently widening.

Where other global edifices such as global constitutionalism and global administrative law make claim to being the exclusive means for viewing a global legal order, global governance is broad enough to include *competing* visions. It should be accepted in its multifariousness and for being contested and contradictory. This means that the term global governance itself will constantly be in flux and subject to reinvention.⁹⁶ The sites of inquiry should be limited to specific issues or specific geographies. In order to reimagine global governance, which requires the reimagining of private law, a process of politicization is key. But, this does not necessarily take us back to public law frameworks. Politicization can occur spontaneously, or it can be guided, it can occur through democratic processes or through civil society, grass roots impulses.

⁹⁶ Kennedy (note 23) 40.