

Global Regulation, Jus Gentium, and Inter-Public Law  
(Two Papers)  
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Global Regulation and the New Jus Gentium

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The unreality of framing much international regulatory activity in terms of the traditional *jus inter gentes* (law between states, made by their own will, as epitomized in Lassa Oppenheim's well-known 1905 International Law textbook), has prompted several responses within the field in recent decades: transnational law (Jessup), transnational legal process (Chayes, Ehrlich, Lowenfeld, Koh), governmental networks (Slaughter), fragmentation (Koskenniemi), theory of autonomous systems (Luhmann), global business regulation (Braithwaite, Drahos), etc. I argue that many traditional attributes of international law remain important, and that international law must have a distinctive place within a broader *jus gentium*, a place it will occupy better if international law is reconceived as inter-public law. The argument for an inter-public conception of international law is made in a separate paper, written earlier. In that paper, I do not address the comparative merits of international law and its legal competitors as means to address issues of global regulatory governance. I begin to turn to that issue here.

In the present short sketch, I consider conceptual issues raised in one specific area of global administrative law: how should one legal or governance institution appraise a rule or decision concerning global regulatory governance made by an institution or agency that is not part of the same politico-legal system. I use examples of decisions taken in assorted courts and tribunals to highlight basic categorical differences between various approaches taken to these issues. The fundamental conceptual differences between these approaches might be celebrated, as part of an argument that the ease with which international law accommodates multiple sources and concepts is a strength, serving the moral objective of value pluralism as well as the pragmatic objective of responsiveness to context that characterizes good functional governance. But reading these cases, many of which were decisions of first impression, it is clear that the judges struggled with challenging problems for which no comprehensive theoretical apparatus was available: what are the proper sources of rules to be applied; how should the relevant governance regime and the forum court's role within it be understood; whether, and if so by reference to what rules or criteria, the forum court should review the procedural elements or indeed the substantive content of the external decision. I do not put forward a theory purporting to provide well-grounded general answers to these problems. Instead I focus on the possible role of a refurbished concept of *jus gentium* as a source of principles to be applied in such cases, and as a way for institutions confronted with a particular case to determine the status, significance and methodological priority to be attached to such principles. I argue that trying to model these principles within the traditional concept of *jus inter gentes* is relevant and proper in some cases, but that the regulatory functions of the current normative practice of global administrative law could be more accurately modeled, and better structured and channeled, if the concept of *jus inter gentes* were (re-

)integrated into a wider concept of jus gentium. If a concept of a regulatory jus gentium were adopted, public international law would be required to play a more distinctive and normatively coherent role, which could be achieved by framing it not simply as jus inter gentes, but as inter-public law. I make the argument for an inter-public conception of international law in a separate paper, which is attached.

In the next section I introduce basic concepts of Global Administrative Law. This should be skipped by readers already familiar with recent work in this field.

## 1. Introduction: Global Regulatory Governance as Administration

Patterns of transnational regulation and its administration in global governance now range from regulation-by-non-regulation (*laissez-faire*), through formal self-regulation (such as by some industry associations), hybrid private-private regulation (for example, business-NGO partnerships in the Fair Labor Association), hybrid public-private regulation (for instance, in mutual recognition arrangements where a private agency in one country tests products to certify compliance with governmental standards of another country), network governance by state officials (as in the work of the Organization for Economic Cooperation and Development (OECD) on environmental policies to be followed by national export credit agencies), inter-governmental organizations with significant but indirect regulatory powers (for example, regulation of ozone depleting substances under the Montreal Protocol), and inter-governmental organizations with direct governance powers (as with determinations by the Office of the UN High Commissioner for Refugees of individuals' refugee status). Instead of neatly separated levels of regulation, a congeries of different actors and different layers together form a variegated "global administrative space" that includes international institutions and transnational networks as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects.<sup>1</sup> For example, the World Bank supervises developing countries in their adoption and implementation of very detailed externally-devised standards for matters ranging from the structure of insurance markets to the conduct of environmental assessments. The Forest Stewardship Council, a private entity, has developed detailed sets of criteria for sustainable forest use, and for certification of products from such forests.<sup>2</sup>

These evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions, and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character.

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<sup>1</sup> This paragraph summarizes basic material from Benedict Kingsbury, Nico Krisch, Richard B. Stewart, and Jonathan Wiener, "Foreword: Global Governance as Administration", 68 *Law & Contemporary Problems* 1 (Summer-Autumn 2005).

<sup>2</sup> See Errol Meidinger, "The Administrative Law of Global Public-Private Regulation: The Case of Forestry" (2006) 17 *Eur. J. Int'l L.* 47 (2006); the chapters by Steven Bernstein and Benjamin Cashore, and by Tasso Rezende de Azevedo, in J. Kirton and M. Trebilcock, eds., *Hard Choices, Soft Law: Combining Trade, Environment, and Social Cohesion in Global Governance* (New York: Ashgate, 2004) at 65-94; and Benjamin Cashore, Graeme Auld & Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (2004).

The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance. The sense that there is some unity of proper principles and practices across these issue areas is of growing importance to the strengthening, or eroding, of legitimacy and effectiveness in these different governance regimes.

The normative approaches just described are also being adopted by some non-governmental agencies, which work largely outside any *jus inter gentes* framework. A few non-governmental global governance agencies now have impressive administrative codes and review mechanisms. An example is the International Olympic Committee's drugs code under the supervision of the World Anti-Doping Agency, which includes procedural protections and a review structure to adjudicate complaints by athletes that they have been unfairly banned from competition, culminating in appeals to the International Court of Arbitration for Sport.<sup>3</sup>

This congeries of normative practices by diverse global governance actors is being brought together under the label Global Administrative Law (GAL).<sup>4</sup> By GAL we mean the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.<sup>5</sup> We describe this as 'global' rather than 'international' to avoid implying that this is all part of the *lex lata* of the *jus inter gentes*: we seek to reflect practice by including a large array of informal institutional arrangements (many involving prominent roles for non-state actors), and normative practices and sources that are not encompassed within standard conceptions of 'international law'. Whether we are right to try to bring together so many of these fragments in this way is an open question. But the argument that there is some common normativity in this area seems to us to be becoming increasingly compelling.

If it is right that there is some shared normativity across various of these disparate practices, should this set of norms and practices be thought of as falling within the ambit of international law? This might be answered simply by stipulation: international law is

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<sup>3</sup> Alec van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime Arbitral*, NYU Institute for International Law and Justice Working Paper IILJ 2005-11, [www.iilj.org](http://www.iilj.org). Decisions of the ICAS are generally enforceable in national law, in similar fashion to international commercial arbitration awards; and national courts tend to accord a lot of deference to these specialist arbitral bodies provided the procedures they apply are fair.

<sup>4</sup> NYU Law School Institute for International Law and Justice's research project on global administrative law has a website, including a series of working papers and extensive bibliographies as well as links to papers from other scholars around the world, reached via [www.iilj.org](http://www.iilj.org). Sets of papers from this project appear in three journal symposia: Kingsbury, Krisch, Stewart & Wiener (eds), *The Emergence of Global Administrative Law*, *Law and Contemporary Problems*, 68:3-4 (Summer-Autumn 2005), pp. 1-385; Krisch and Kingsbury (eds), *Global Governance and Global Administrative Law in the International Legal Order*, *European Journal of International Law* 17 (2006), pp. 1-278; and the *Global Administrative Law* symposium in *NYU Journal of International Law and Politics* 37:4 (2005).

<sup>5</sup> Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law", *68 Law & Contemporary Problems* 15 (Summer-Autumn 2005).

jus inter gentes, and any other norms and practices are not international law but something else. This has the merit of delimiting the field. More importantly, adherence to a positivist sources-based conception of international law may be the best way to maintain legal predictability and to sustain rule of law values in international relations.<sup>6</sup> It may be preferable to retain a unified view of an international legal system than to countenance the deformatization and the mosaic pattern that a jus gentium approach may imply. Against this is the strong pragmatic argument that people who study, profess and practice international law are in practice bound to be concerned with, for example, the work of the International Standards Organization (ISO), which consists of one national standard-setting body (public, private, or hybrid) from each of country. At present, this body goes almost unmentioned in general international law works. Yet it has set over 15,600 standards and comparable instruments, including many with important economic, social, and environmental implications, and its insufficiently-studied procedures include some 192 technical committees, 541 sub-committees, 38 ad hoc groups, and 2188 working groups,<sup>7</sup> which altogether involve over 40,000 people. It has direct ties into jus inter gentes: while each country is in theory free to apply or not apply a particular ISO standard, the effect of WTO law is to insulate from challenge those national standards that are based on ISO standards, and to place considerable burdens of justification on countries that choose to set their own standards instead.<sup>8</sup> It is also important in shaping markets. Corporations exporting to other markets or needing complementarity with other products often find it cheaper to pay the cost of changing their production to the ISO standard rather than hold out, even if their national government is willing to resist the ISO standard. National governance and international governance of standards are closely intertwined: for example, European standard-setting organizations are better adapted to influence the ISO process than are US ones, so more US than European corporations have to pay the costs of changing when a new ISO standard is produced,<sup>9</sup> leading the US Commerce Department to begin to develop a counter-strategy.

## 2. Problems as to the Legal Bases of Global Administrative Law

In sum, global administrative law, like much of the law that falls outside jus inter gentes, is practiced at multiple sites, with some hierarchy of norms and authority, and some inter-site precedent and borrowing of principles, but considerable contextual variation. It is influenced by treaties and fundamental customary international law rules, but it goes

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<sup>6</sup> This argument is explored in Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', *European Journal of International Law* 13 (2002), pp. 401-36.

<sup>7</sup> For figures as at Dec 31, 20005, see

<http://www.iso.org/iso/en/aboutiso/isoinfigures/archives/January2006.pdf>.

<sup>8</sup> On the ISO, see Eran Shamir-Borer, *The Evolution of Administrative Law-Type Principles, Mechanisms and Practices in the International Organization for Standardization (ISO)* (unpublished paper, September 2006), available at: [http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers\\_papers.html](http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers_papers.html). ISO standards do not have the express recognition in GATT, GATS, or the Technical Barriers to Trade (TBT) Agreement that the standards of the Codex Alimentarius Commission and other bodies receive in the Sanitary and Phytosanitary Standards (SPS) Agreement. ISO standards are nevertheless important in TBT Agreement practice.

<sup>9</sup> Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, *World Politics* 56 (2003), p. 1.

much beyond these sources and sometimes moves away from them. Its shared sets of norms and practices are in some cases regarded as obligatory. But they are also meshed with other sources of obligation applicable to that site—sources which may include the national law of the place, the constituent instrument and regulations of the norm-applying institution, contracts establishing private rights, or norms of general international law. An effort to accommodate these features of existing practice leads to consideration of a *jus gentium* model.

That a *jus gentium* model is not presently near becoming a widely accepted one is evident from consideration of the recent cases in which judges in national and supranational tribunals have confronted novel cases in assorted areas of global regulatory governance, cases that have in common the requirement to decide what weight and effect, if any, to accord to a decision of a regulatory body not part of the same legal system as the forum court. The next sections catalog, by reference to recent and older judicial decisions, some of the different approaches that are open in dealing with these issues, and note various strengths and problems encountered in each. After that, I will propose an approach to the new *jus gentium*, consider its implications for traditional *jus inter gentes*, and argue that a *jus inter gentes* reconceptualized as inter-public law should play an important and distinctive role within the *jus gentium* approach.

### 3. *Jus Cogens*

In *Kadi* (2005), *Yusuf* (2005), and *Hassan* (2006),<sup>10</sup> the European Court of First Instance (ECFI) considered challenges by individuals arising from their designation as persons whose assets should be frozen under European Union measures implementing UN Security Council sanctions against specified persons suspected of financing terrorist activities. The EU does not itself provide notifications or conduct inquiries into the merits of a listing, it simply follows the Security Council. Member states often have no independent information in freezing a person's assets, they do so simply because the name appears on the Security Council and EU lists. (The EU has its own procedure for listing additional persons and groups, exercised in particular in relation to organizations allegedly involved in activities related to terrorism but not appearing on the Security Council list—this EU procedure also raises due process problems.) The implementation of the UN lists raised problems because the Security Council does not have an adequate procedure for persons who have been listed to contest the listing and seek removal from the list (let alone an *ex ante* procedure providing an opportunity for those under consideration for listing to make representations). The state of the person's nationality or residence may request delisting, but initiating this process is discretionary, it then requires bilateral negotiations with the listing state which may be protracted or fruitless, and it does not result in delisting unless and until the relevant Security Council sanctions committee so decides by consensus. In *Hassan*, the ECFI sought to strengthen one link in the process by determining that EU law obliged member states to exercise diplomatic protection where a national or resident sought delisting. Since no such obligation is formulated in the relevant EU regulation, the legal foundations for this determination

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<sup>10</sup> T-315/01, *Kadi v. Council and Commission* (2005); T-306/01, *Yusuf v. Council and Commission* (2005); T-49/04, *Hassan v. Council and Commission* (12 July 2006).

were said to be either the rights traditions of the EU member states, or the fundamental rights respected by the EU and set forth particularly in the European Convention on Human Rights. Neither source is compelling in establishing an obligation of diplomatic protection. In any event, a state raising a delisting claim half-heartedly will have little effect, and even states such as Switzerland, Sweden, and Germany when energetically seeking a delisting have had great difficulties in getting the Security Council's delisting procedure actually to reach this result.

In addressing Hassan's claim, the ECFI declared that the Security Council is constrained by the UN Charter and by norms of jus cogens. It thus asserted authority to determine whether the Sanctions Committee's listing and delisting procedure complied, in Hassan's case, with norms of jus cogens. This itself is a contestable holding. The ECFI is not a United Nations institution, was not set up by reference to the UN, and has received no express mandate to rule on compliance of UN organs with the UN Charter or with general international law. The implicit claim is thus that it is proper for any court of law in any legal system to form its own assessment of the conformity of a UN decision with standards of jus cogens defined by the forum court, in proceedings in which the UN is not in any way represented. By contrast, the European Commission makes strenuous efforts to avoid member states seeking determinations of EU law in non-EU tribunals, as in the MOX Plant arbitration, and the Iron Rhine Arbitration.

How could a court in the situation of the ECFI have dealt with this differently (this question will come before the European Court of Justice in 2007, on appeal from the ECFI decisions in Kadi and Yusuf)? As an EU court, with authority in relation to relevant acts of EU institutions in prescribing the sanctions and member states in implementing them, the ECFI could confine itself to deciding whether these acts comported with EU law (including human rights law, and the provisions of EU law enabling and requiring that effect be given to UN Charter obligations) and jus cogens. (The ECFI did not conduct such a review, on the grounds that only EU rather than national measures were in issue before it in these cases, and the EU measure was not discretionary if required by a valid binding decision of the Security Council, and hence was not reviewable.) The Security Council process would be assessed, but simply to establish whether it in itself addressed the requirements and could thus be relied upon as a substitute for EU or national review mechanisms. Insofar as the affected individuals had insufficient opportunity to trigger a review process, a remedy would be for the EU itself (unlikely in practice, but perhaps indirectly through bringing together different national review tribunals) or the member states directly involved in implementing the assets freeze (in Hassan's case, the UK) to establish a review procedure, perhaps involving a specially-appointed judge or tribunal with access to confidential information. Such a mechanism could operate in cases where a person alleges mistake of identity, or lack of evidence. It could also be used in periodic reviews, where a person or organization claims either that new exculpatory evidence has been found, or that they have reformed. A finding by a review tribunal that a person should not have been, or should not now be, listed, would be made public. It would not in itself compel the state or the EU to terminate the listing, but would raise pressure on the Security Council to act, and could trigger an obligation of compensation to be held in an escrow account. Such a

review mechanism could address state actions dealing with matters such as household expenses exceptions to freezes, family assets, succession to assets on the death of the listed person, etc.

Having decided to address the compatibility of the Security Council actions with *jus cogens*, the ECFI got into difficulties in finding authoritative sources of normative material to articulate the precise content, and limits, of “*jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.” (Kadi, para 226). In Kadi the ECFI concluded (para 290) that, despite the lack of any effective judicial mechanism for review of the Sanctions Committee’s actions, the Sanctions Committee’s own procedures “constitute another reasonable method of affording adequate protection to the applicant’s fundamental rights as recognized by *jus cogens*.” In Hassan the ECFI held that the asset freeze “is not incompatible with the fundamental rights of the human person falling within the ambit of *jus cogens*, in light of the objective of fundamental interest for the international community” of combating terrorism (para 101). This and other passages may be interpreted as introducing an attenuated proportionality test in the assessment of possible infringements of *jus cogens*: does the measure have a legitimate objective, how important is the objective, are the rights-infringing measures actually taken disproportionate to that objective? This is not untenable, but it pulls against the standard view, already accepted by the ECFI, that no derogation is permitted from *jus cogens* norms. Might there have been any way other than *jus cogens* of framing the norms at issue in these cases: right to review by a court, right to a hearing, rights to property? I will turn now to some of the other possibilities.

#### 4. Customary International Law

“Customary international law” is often used as the basis for claims about the quotidian aspects of GAL (administrative issues which, while important, fall far short of murder and brutality toward human beings), as for example by the NAFTA Arbitral Tribunal in *Pope and Talbott v. Canada*. This is met by a standard Benthamite line of criticism of custom, about the unsustainability of real custom under modern conditions. It is thought that customary law is not adequate for the regulatory needs of advanced capitalism: it is not sufficiently precise, it changes too slowly, it gives too much weight to status-quo interests and too much negotiating power to hold-outs. More than that, the social conditions for customary law have been eroded (or in some places are now finally being eroded) by modernity. Communities once held together by networks of social obligation are now monetized, what was so much valued as to be normative before is now not, and new customs can not emerge with enough stability of obligation in the casual interactions fostered by monetized markets.<sup>11</sup>

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<sup>11</sup> Jane Collier, *Durkheim Revisited: Human Rights as the Moral Discourse for the Postcolonial, Post-Cold War World*, in Austin Sarat and Thomas Kearns eds., *Human Rights* (2001), pp. 63-88. She chronicles the change in the Tzetzil-speaking Maya community of Zinacantán in Chiapas during the course of her own field work from the 1960s to the late 1990s. From an obligation-based socio-economic system of the kind “in which real rewards of power, prestige, and privilege accrue to those who can claim to be sacrificing



Yet, as Durkheim and many others noted, this kind of alienated socio-economic life needs its own moral discourse.<sup>12</sup> Human rights provides one such discourse. Defined in written texts and couched in the language of universals, and tied at the universal level to law and legal institutions as a principal mode of operationalization, the specific practice of human rights is normative but highly variegated. If there is *lex* in the specific operationalization, it is *lex non scripta* to a surprising extent. This is a normatively-based practice, or argument, claim, and response. It draws on universal norms, but it is highly contextual: not only in how the issues are addressed, but in who the active participants are, who wins and loses, and what specific reconciliations between conflicting arguments are established. This very contextual practice in turn informs the formulation of universals and their institutionalization and interpretation in global bodies. The grand abstractions may be customary international law in the traditional sense. But the networks of normativity that give it meaning are not. I suggest, however, that they may be described as a new *jus gentium*. They are not networks simply of norms and transmission. The human agency that makes all of this operate is now being studied more systematically. Comparing their practice with that of the normative agents of traditional custom is an area requiring much more research. It is suggested, however, that while advanced capitalism may be destructive of some kinds of custom, it generates a counter-demand for a kind of morality that, when practiced through human rights norms, assumes a legal role.

Distilling this set of ideas, it seems unlikely that customary international law (in the mode of widespread state practice accompanied by *opinion juris*) provides a sufficient or satisfactory basis for modeling much of the body of global administrative law. Custom provides the authoritative basis for one important form of positive international law. But it does not accurately model the commitments to basic rights and justice that play some role in global administrative law, and its functional limitations mean its role in providing a basis for fast-changing norms among many kinds of actors must be a truncated one.

## 5. General International Law

The use of general international law as a resource for inter-regime accommodation in international legal practice is long established. Some of the reasons for its use are illustrated by the decision of the English Court of Appeal in *Occidental v. Ecuador* (2005),<sup>13</sup> a case in which Ecuador sought to challenge an adverse arbitral award issued against the state by an arbitral tribunal established under the Ecuador-US Bilateral Investment Treaty. (The substantive case concerned Ecuador's denial of a VAT exemption for oil exported by Occidental.) Ecuador's challenge came before the English

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themselves for others', the society has become one in which people seek to accumulate money rather than distribute surplus food: 'while the cultural rhetorics of obligation may survive and even flourish with ethnic revivals, the material rewards accruing to apparent self-sacrifice tend to evaporate as people participate in capitalist markets.' (p. 81)

<sup>12</sup> Emile Durkheim, *The Division of Labor in Society* (trans George Simpson, 1933).

<sup>13</sup> [2005] EWCA Civ 1116, 9 Sept 2005, Lord Phillips MR, Clarke and Mance LJJ.

courts because, although the case had no other relation to the UK, the seat of the arbitration was England. Occidental argued that the court should find Ecuador's challenge non-justiciable, on the ground that it involved interpreting an inter-state treaty (the BIT) not incorporated into UK law, and thus trespassed on the relations of foreign sovereigns inter se (that is, relations between the US and Ecuador). The Court rejected Occidental's argument. While the BIT was indeed a treaty between foreign sovereigns, the agreement to arbitrate was between Ecuador (whose consent to arbitrate was given by the BIT) and Occidental (whose consent was given by its request for arbitration.) This agreement was, in the Court's view, governed by international law, even though Occidental is not a governmental entity. Thus the norms the court should apply to it were to be found in international law, not in Ecuadorian or other national law.

The Occidental v. Ecuador case uses general international law as a legitimate (because overarching) means to address inter-institutional review on issues concerning global commerce and investment, and related questions of property and social policy.

A fundamental use of general international law is in the "elementary considerations of humanity" that the International Court of Justice relied upon in the Corfu Channel case (where Albania had failed to warn the British navy of mines posing an imminent danger to life), or that Judge Simma discusses in addressing physical assaults by DRC personnel on people waiting at Kinshasa airport in the DRC v. Uganda case, or that judges of the International Tribunal for the Law of the Sea have applied in condemning unnecessary violence against seafarers when a coastal state is arresting a vessel. In such cases, the Tribunals reached beyond applicable treaties and relied upon such a notion to establish a rule against the offending conduct, without seeking to show that the rule derived from widely followed practice accompanied by *opinion juris* as standard accounts of customary international law require.

This kind of approach seems consonant with the late 18<sup>th</sup> and early 19<sup>th</sup> century understanding of the law of nations on great moral questions, slavery above all. As Joseph Story expressed himself in *La Jeune Eugenie*,<sup>14</sup> "no [customary] practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admit the injustice or cruelty of it." Custom can be part of the overlay of positive law that displaces the application of reason-based natural law and morality, but custom is not itself natural law or morality.

General international law might be a way of framing an accurate account of GAL. Some analogy may be drawn from common law—judges have been able over time to construct systems of administrative law (admittedly, somewhat different systems in different common law countries) without comprehensive specification in statutory or constitutional text. It is now possible plausibly to assert that some of the core principles are so deeply part of the common law that they will often be applied by judges in hard cases, even in the face of apparently inconsistent statutes or constitutional provisions. But the method of the common law, in a more-or-less unified judicial system for the most part built on a

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<sup>14</sup> 26 F. Cas. 832, 846 (C.C.D. Mass. 1822).

unified professional formation of judges and lawyers educated for that system, is more precise than that of general international law. (In addition, the elusive concept of custom remains much more central in international law than in the common law). While 'general international law' is an acceptable category in that many participants in international legal processes would not reject it, it is not methodologically precise. At this level of generality, the content of its norms, and their authority in relation to competing norms, are difficult to specify and evaluate. It is therefore necessary to consider other models that may (or may not) fall within this amorphous category.

## 6. 'General Principles of Law' as International Law

One possible approach to a global administrative law problem is to try to utilize (and enlarge) the rubric of 'general principles of law' as a source of international law (it is listed as such a source in the ICJ Statute, although the fit with *jus inter gentes* has troubled many). Such a project to accommodate the principles of global administrative law faces two practical obstacles that, while not insuperable, will not easily be overcome. First, the sources of global administrative law are more diverse, its content much fuller, and its scope more comprehensive, than the propositions the ICJ has hitherto endorsed in its very limited jurisprudence of 'general principles of law.' Second, the status of 'general principles' would imply that the principles of global administrative law all enjoy the hierarchical status of international law vis-à-vis other normative systems, such as national law. Practice is a long way from this at present. Principles are applied, but often without a strong sense of hierarchical obligation or even of formal sources.

## 7. Conflict of Laws

Conflict of laws approaches offer a potentially attractive pluralism and neatness of application, in situations where one legal regime or tribunal recognizes that the law of another legal regime governs the substance of the issue. In *Dred Scott*, Justice Nelson (from New York) sought to use conflicts of laws (private international law) to find a less controversial path, that would nevertheless deny Scott and his family their liberty. Applying the Vattelian language of the independence of distinct and separate sovereignties, he would treat this as a case controlled by Missouri law, that being Scott's state of residence and current location. Extraterritorial application of other laws was excluded unless prescribed by the US Constitution. In practice, as the *Dred Scott* case demonstrated, disagreement over the criteria for deciding which law governs, and what its content is, or over exceptions such as those grounded in the public policy of the forum, or over jurisdiction and institutional issues, can make these solutions much less clear-cut. The effort to apply these to global regulatory governance problems is only just beginning in the academic literature,<sup>15</sup> but this will become an increasingly important area of practice and research.

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<sup>15</sup> See e.g. Hannah Buxbaum, *Transnational Regulatory Litigation*, *Virginia Journal of International Law* 46 (2006), 251; Paul Schiff Berman, *The Globalization of Jurisdiction*, *University of Pennsylvania Law Review* 151 (2002), 311; Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, *Columbia Journal of Transnational Law* 40 (2002), 209.

## 8. Comity

Comity, connoting a respectful engagement with or deference to a decision issued on the same specific subject matter by a different body, has become a notable feature of contemporary US Supreme Court jurisprudence on global governance issues, notably in opinions of Justice Breyer.<sup>16</sup> It has been argued that the Supreme Court's 2004 opinion in *Rasul v. Bush*, which accorded some procedural rights to Guantanamo detainees but did not refer to international law in doing so, can be read as an implicit request to other juridical actors outside the US to accord comity to this US approach.<sup>17</sup> In purporting to base comity on a discretionary choice rather than on international obligation, and in proceeding without an account of the role of international law in the regulation of comity decisions, the US courts have drawn criticism. The *Austria v. Altmann* case,<sup>18</sup> while open to the same criticism for treating the immunity of foreign sovereigns in US courts as a matter of comity rather than international legal obligation, has potential jurisgenerative implications for that reason. In particular, claimants in national courts whose suits against foreign sovereigns for human rights abuses have been defeated by immunity claims, have in the past been unable to convince the European Court of Human Rights that upholding the defendant's immunity breaches their rights. The reason was that international law required foreign sovereign immunity in such circumstances. But the *Altmann* analysis, if widely accepted, would defeat that argument, and potentially give greater scope to national court adjudication of foreign sovereign activities in exceptional cases. Thus the comity approach, while lacking a sophisticated theory of legal obligation and authority, has significant policy attractions for those who envisage a growing role of national courts in supervision of external entities as part of the juridical structure of global governance.

## 9. The 'Forum Law/Forum Institution's Action' Basis of Review

The conclusion that, absent clear statutory or higher authority, a court cannot review the action of an institution not part of the legal system of the forum court has a long pedigree. In the *Hirota* case, for example, the majority of the US Supreme Court ruled that it had no jurisdiction to consider a habeas corpus petition by persons who had been convicted by the International Military Tribunal in Tokyo.<sup>19</sup> The grounds were that this Tribunal had 'been set up by General MacArthur as the agent of the Allied Powers', so this 'was not a tribunal of the United States.' This case dramatizes the obvious problems of such a self-denying approach, that in the present situation of global governance there might then be

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<sup>16</sup> See e.g. his opinion for the court in *Hoffman-LaRoche v. Empagran* 124 S. Ct. 2359 (2004), and his concurring opinion in *Sosa v. Alvarez-Machain* 124 S.Ct. 2739 (2004).

<sup>17</sup> Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, *Berkeley Journal of International Law* 24 (2006), 273, at 324. the Court's decision in *Hamdan v. Rumsfeld* (June 2006) places international law, specifically Common Article 3 of the 1949 Geneva Conventions, much more at the centre of its holding on the illegality of the Military Commissions as then proposed, although this holding was reached on the basis that the authorizing statute on which the administration relied itself referred to the "laws of war".

<sup>18</sup> 124S.Ct. 2240 (2004).

<sup>19</sup> *Hirota v. MacArthur*, 69 S.Ct. 157 (1948).

no suitable review tribunal at all, and that a strong incentive is created for a state wishing to escape national rule of law controls, to instead arrange for measures to be taken by an international institution it helps establish, or indeed by another state or private entity.

The DC Circuit Court of Appeals in some respects faced no such problem in its important decision in August 2006 in a case brought by the Natural Resources Defense Council challenging a rule adopted by the US Environmental Protection Agency.<sup>20</sup> The NRDC challenged the EPA's rule on critical use exemptions from the restrictions on methyl bromide, on the ground that it did not comply with an administrative decision of the Meeting of the Parties (MOP) to the Montreal Protocol concerning methyl bromide. Thus the court was able to review the EPA's implementing (or non-implementing) action. The US Clean Air Act stated that the EPA may exempt critical uses "[t]o the extent consistent with the Montreal Protocol". The Montreal Protocol prohibits the production or consumption of methyl bromide except "to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses." The court's holding could be read as a narrow one, that this MOP decision was not "the Montreal Protocol" for purposes of the controlling US statute, and hence provides no basis for a challenge in a US court to the EPA's rule. Formally, the court might be thought to confine its review to the actions of a US agency, judged simply against standards defined in a US statute. However, some of the court's remarks are broader. The court asserts that the "Parties' post-ratification actions suggest their common understanding that the decisions are international political commitments. to be enforceable as a political matter at the negotiation table." It is undoubtedly true that these are political commitments, but the court does not address (it does not even mention) the question whether they are also international legal commitments. Instead, it asserts that the Parties did not intend these decisions to be judicially enforceable domestic law. No direct evidence for this view of the Parties' intentions is offered. The court switches to an assertion about US legal process. "Without congressional action, however, side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts, but through international negotiations." This may be simply a statement that where a treaty is self-executing and is given effect in US courts under the supremacy clause, a decision taken within that treaty's subsequent process is not self-executing (at least where the treaty depended on approval by the Senate or by the House and Senate). More likely, however it reflects an anxiety about ex ante delegation of law-making power to an international body. This anxiety would apply not simply to MOP decisions, as to which it was not clear what the intention of Congress might have been, but to all changes in the treaty rules unless and until incorporated by Congress ex post into legislation. Thus the court's concern would apply to "adjustments" to the Protocol, which Congress purported to approve as the legal standard in advance (in the Clean Air Act.) On this reading, the court is concerned with how US law is made, and thus against what rules a US agency may be reviewed by a US court. It does not purport to review the acts of MOP, nor to decide on the status under international law of their actions (although this reading would admittedly be more compelling had the court

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<sup>20</sup> NRDC v. EPA, DC Ci. No. 04-1348, Aug. 29, 2006 (Henderson and Randolph, Circuit Judges; Senior Circuit Judge Harry Edwards filed a concurring opinion).

noted, as it perhaps should have done, that its remarks about the MOP decision a political commitment did not imply a view of the international legal status of those decisions.)

The review by the British Columbia Supreme Court of the arbitral award in *Metalclad v. Mexico*, initiated by Mexico because BC was the place of arbitration, also focuses initially on the application of the relevant national law, in this case the relevant BC statute, the International Commercial Arbitration Act.<sup>21</sup> The court treated this statute as establishing not only the court's powers and responsibilities, but also the scope and standard of review. It refrained from utilizing an emerging jurisprudence of Supreme Court of Canada in what might be called the common law of administrative review, which applies a 'pragmatic and functional' approach. The BC court then engaged directly in the interpretation of NAFTA, holding that the arbitral tribunal's interpretation of 'international law' in NAFTA Article 1105 went beyond the established meaning of 'international law' without an adequate basis to do so, and wrongly imported into NAFTA chapter 11 an obligation of transparency, thus exceeding the scope of the submission to arbitration. In crossing into international law, the BC court did not shift explicitly into a different interpretive mode—in this respect, its approach is more comparable to that of the ECFI in *Kadi*, *Yusuf*, and *Hassan*.

#### 10. Jus Gentium—The Practice of the 'More Advanced Nations', or 'International Common Law'

The Roman phrase 'jus gentium' had different meanings at different times in the development of the Roman empire and of Roman law. In the early construction of what became modern international law, up to and after the works of Grotius, 'jus gentium' was used in various way which in modern translations are all rendered as 'law of nations'. The formal articulation of 'jus inter gentes', in Hobbes' *De Cive* (1642) and shortly afterward in the works of Rachel and others, did not mark a dramatic break at the time, although later writers looked back on this as marking a concept of inter-nation law that was to become inter-state law.

Grotius believed that the law of nature could be established, on a probabilistic basis if not with certainty, by demonstrating that a norm 'is believed to be such among all nations, or among all those that are more advanced in civilization.'<sup>22</sup> He quoted Porphyry: "Some nations have become savage and unhuman, and from them it is by no means necessary that fair judges draw a conclusion unfavourable to human nature."

Jeremy Waldron, in arguing that national courts may and should refer to decisions of foreign courts, or to international law, endorses the view that in some US cases this may properly be restricted to the practices of "civilized" or 'freedom-loving' countries.'<sup>23</sup> Like Grotius, Waldron sees law as a matter of reason, not simply of will. Jus gentium is not

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<sup>21</sup> 2001 BCSC 664, Tysoe J.

<sup>22</sup> *De Jure Belli ac Pacis*, I.xii.1 (1625/1646).

<sup>23</sup> Jeremy Waldron, *Foreign Law and the Modern 'Ius Gentium'*, *Harvard Law Review* 119 (2005), 129, at 143.

foreign—it is the accumulated worldwide overlap, duplication, mutual elaboration, checking and re-checking of results that is characteristic of persons engaging in natural science. It does not displace controlling national law, but guides its elaboration and development, and may help in filling gaps. Like Grotius, Waldron is more confident in *jus gentium* when it embodies something close to a consensus, albeit with outliers who may be the benighted or the next innovators. For Waldron's purposes, "customary international law," "general common law," "fundamental maxims of the common law", and "universal law administered in all civilized countries" all refer to broadly the same jurisprudential enterprise. The extent to which *jus gentium* is applicable in a particular case is a matter of reflective equilibrium, between the existing positive law and the sense the actors have as what the right premises are from which to approach a particular problem. There is of course a potential difficulty, hinted at by Waldron's frequent descriptions of *jus gentium* in terms of accumulation: "the accumulated legal wisdom of mankind" is how he puts it in one place, "the accumulated legal wisdom of mankind" in another. What if the legal issue presents itself as a new one, or at least one on which the accumulated learning does not have a clear answer? This is chronically the case with global governance issues—many of the regimes have not existed for long, their coverage and approaches change quickly, their evaluators are highly diverse, and the political and market conditions for their operation may not be stable for a long enough period for this kind of accumulation to occur. Thus the accumulated experience may no longer be wise, and such wisdom as is available may not have been duplicated, checked and re-checked. Does this disqualify *jus gentium* as a source, and with it all of the rough synonyms which Waldron associates with the same jurisprudential enterprise? Is the court thus thrown back onto the usual resources of the forum?

This leads the inquiry back into the *jus gentium* tradition. For Grotius, consensus or widespread practice was a means of ascertaining the *jus gentium*. When it came to ascertaining the law of nature, however, consensus was much less important than was reason.<sup>24</sup> This was an important distinction. Grotius's concept of *jus gentium* places it simply as part of the human voluntary law. It subsists alongside the *jus civile* (the law of a single nation), and the law that is the command of a *paterfamilias* to family members or of a master to a slave. These multiple legal orders are not necessarily in strictly hierarchical relationship one with the other, nor need they be strictly horizontal. Grotius thus has little difficulty accommodating a plurality of normative orders. Grotius was able to keep this pluralism morally and socially coherent through reference to the more fundamental normative systems of divine voluntary law and natural law. To give a doctrinal illustration, Grotius viewed slavery that results from capture in war as a legal structure of the *jus gentium*, but not of natural law.<sup>25</sup>

Struggles on these issues are at the forefront in the US Supreme Court's infamous *Dred Scott* decision (1857). Chief Justice Taney thought that British and European practice at

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<sup>24</sup> Pufendorf famously rejected Grotius's effort to integrate customary practices as an element of proof.

<sup>25</sup> JBP, II.vii and III.xiv. Grotius did not accept that anyone was a slave by nature, but he accepted slavery by consent, by punishment of a delict, by capture, and in certain circumstances by birth to a mother who is a slave. Justinian's *Institutes* 1,3,2: 'Slavery is an institution of the *jus gentium* by which one person is subjected to the ownership of another contrary to nature.' See John Cairns, *Stoicism, Slavery, and Law*,

the time of the Constitution showed that slaves taken from Africa, and their descendants, were not included in the body politic. Any later evolution in views in those countries, even if somehow embodied in the law of nations, could have no bearing on the question of whether persons could be and were a form of property held by other persons and for the purposes of the property rights guaranteed by the US Constitution. Justice McLean in dissent rejected the relevance of European slave laws prior to the Constitution, arguing that the Constitution was an advance beyond this. With Justice Curtis, he argued that uniform European practice against return of fugitive slaves from free territory that had developed since the time of the Constitution was relevant, because it was evidence of the law of nations, and that law was, under Blackstone's principles, part of the common law of Missouri.

The *jus voluntarium* is not necessarily a benign enterprise. Nevertheless, it is clear that it must be important in dealing with current global governance. Pufendorf's minimization of the role of *jus voluntarium* is not now a viable strategy. But does *jus voluntarium* now exhaust the field? Or does something lie behind the kind of voluntaristic *jus gentium* that Waldron describes, perhaps something that would temper its non-benign excesses? If there is not a viable natural law for global governance (bracketing for now the kinds of 'elementary considerations of humanity' that the ICJ and some of its judges have relied on), is there nevertheless a jurisgenerative equivalent of reason? The inter-public conception of international law, with its focus on the publicness of law and the terms of inter-public engagement, suggests that there might be, but that its substantive value commitments cover only a limited range.

The WTO Appellate Body's decisions on administrative law issues in the Shrimp-Turtle case represent a non-*jus inter gentes* approach to a specific governance question that might be understood as being based on the reason of inter-public international law. In the first decision (October 1998), the Appellate Body held that shrimp from India and several other states had been improperly excluded from US markets. The administrative procedures followed by the US, in applying its turtle-protecting legislation, constituted 'arbitrary and unjustifiable discrimination between Members', and hence the US was precluded from defending its turtle-protecting measures under the GATT Article XX exceptions. The Appellate Body pointed out that the US procedure for certifying the shrimp industries of particular states as meeting turtle-protecting standards provided:<sup>26</sup>

- no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it..
- no formal written, reasoned decision, whether of acceptance or rejection.
- [no notification of such decisions, and]
- no procedure for review of, or appeal from, a denial.'

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<sup>26</sup> United States–Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body, 12 Oct 1998, (1999) 38 ILLM 121, para 180.



In light of proceedings leading to this adverse decision,<sup>27</sup> the US amended its administrative procedures, and the measures were held WTO-compliant in the second Appellate Body ruling.<sup>28</sup> The administrative principles articulated by the Appellate Body are only to a limited extent embodied in standard sources of the *jus inter gentes* (such as the WTO treaties the Appellate Body is charged with applying). The Appellate Body drew these administrative principles from national administrative law (especially US law), European Union law, and many different treaties, but the stitching of them together and their rendering in a way applicable to the shrimp import exclusion proceedings may well be based on reason. This is a significant precedent for a practice of reason, but it does not introduce a theory of reason, which remains lacking in the legal literature of global regulatory governance.

## 11. Appraising and Managing Normative and Institutional Multiplicity under a *Jus Gentium* Approach

What techniques and methodologies ought to be used when a judge in one legal system (say a national judge) is presented with a rule or decision from a different legal system (in particular a legal system of a different order, such as an international law rule or a rule from a non-treaty global governance instrument? Mattias Kumm has argued persuasively that such a question should not be, and in practice typically is not, answered either by a formal analysis based on the source of the international law rule (treaty, or custom), or by the standard pragmatism which says that it is all a matter of policy choice in the circumstances of each case. He argues for a normative approach, one which attaches presumptive but not dispositive weight to complying with international law to maintain the integrity of it as law, and beyond this requires each situation to be analyzed in terms of jurisdiction/competence, proportionality, protection of basic individual rights, and a commitment to the principle of subsidiarity. This analysis is not limited to the usual question to how national courts should receive international law, but opens the possibility of a wider unified theory which also provides a basis for international judges to use in considering national law, and for different bodies in global governance to consider rules emitted by other such bodies.<sup>29</sup> This dimension is developed in some interesting ways in the paper where he points to insufficiencies both in the standard focus on nationally-framed conflicts-type rules for the reception or exclusion of international law, and in non-authority based dialogue-between-courts approaches. He argues instead for an approach which takes authority seriously but regards it as graduated, and which develops rules for

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<sup>27</sup> Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed.Reg. 36,946 (July 8, 1999). While the U.S. explained in the WTO how the concerns of the Appellate Body had been carefully met, in national adjudication the Justice Department emphasized the national legislation and internal State Department interpretations and policies as the sources for action.

<sup>28</sup> WTO Appellate Body Report: United States - Import Prohibition Of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW, Adopted by Dispute Settlement Body, 21 November 2001.

<sup>29</sup> Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement', in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (forthcoming 2006).

engagement that provide a normative basis (not simply a sources basis) for dealing with different cases.

In addition to the normative political theory case made for such an approach, positive political theory and structural considerations may point broadly in the same direction. Departing from the established model of *jus inter gentes* can mean that the normative practice is not formally regarded as international law, and so is not necessarily applied by bodies whose job is to apply international law, and does not stand in the same hierarchical relationship to other norms (e.g. different kinds of national law) that international law may have under say a national constitution. This can have benefits and costs. A *jus gentium* approach may be attractive because it does not require costly standardization, it leaves scope for local variance driven by specific histories or contemporary legal or socio-environmental contexts, it allows for experimentation and improvement through mutual learning, and it captures the democratic and other normative benefits of regulatory pluralism. Beneficial regulatory competition may ensue. But regulatory pluralism and non-converging regulatory competition can each have costs. In complex governance systems involving meshed markets and dense interactions, it is to be expected that there will be frequent transactional disputes, conflicts about the legitimacy of institutions, and struggles about control of processes for changing rules and procedures. Repeat players have an incentive to agree on some definite way of handling this. The choice among the multiple equilibria may be influenced by predictions as to which one will be most stable, or most adaptive when the need for change arises, or less at risk of failing because it draws in familiar structures that have worked before. International law, especially when conceived as inter-public law, may meet many of these requirements better than does a looser *jus gentium* approach. Weighing these questions in different areas of global administrative law depends in part on careful empirical and analytical work which on most issues has not yet been done.

Governance mechanisms can be arrayed along a spectrum between essentially political and essentially legal modes of operation, based upon the degree of commitment to deliberation and reason-giving in their decision-making. A purely political mechanism, such as the casting of votes in a secret ballot, involves no obligation to give any reasons or to seek to persuade anyone else. Conversely, a judicial mechanism usually involves an obligation to state reasons and a considerable effort to make these reasons convincing to the parties and to the relevant audience. In between are modalities that are more political but have a deliberative rather than arbitrary decisionist mode of operation. In developing such an analysis, John Ferejohn has hypothesized that purely political mechanisms (such as electoral choices) that play a vital part in national democracies can seldom be routinized in global administration, where democratic legitimation of political decision-making is not achievable. As a substitute, actors with the power (individually or in coalition) routinely to impose political decisions must usually give reasons to overcome the legitimacy deficit that otherwise would generate contestation or non-cooperation from necessary parties.<sup>30</sup>

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<sup>30</sup>John Ferejohn, *Accountability in a Global Context* (October 2006) available at: [http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers\\_papers.html](http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers_papers.html).

The demand to increase reason-giving and deliberation in global governance, as a substitute for unattainable democratic legitimation, confronts two basic dilemmas that beset all institutional design in global environmental administration. The first is the dilemma of expertise and the second is the dilemma of local knowledge. The dilemma of expertise arises in relation both to effective rule-making and to the administration of rules. The continuous increase in regulatory complexity means that only experts can draft workable technical rules and amend them in response to practical experience and new knowledge. The real work of detailed rule-making must be done administratively (not by national legislatures and not by international treaties). A political body may formally approve the detailed rules, but it will probably not be able to deliberate in a reasoned way over most issues arising in them, and cannot deliberate too extensively without causing so much delay as to frustrate the effective administration of a workable regime. The technical complexity also means that no one other than experts can really review rules for compliance with substantive standards or can review the substance of complex administrative decisions taken under the rules.<sup>31</sup> Thus, a system of independent judicial or administrative review is unlikely to be effective on substantive issues, although it may be a control on the procedures used by experts in rule-making and administration.

The dilemma of *local* knowledge arises from the tension between the advantages of uniformity and centralization of standard setting (market integration, reduced transaction costs, pooling of expertise, and so on) and the advantages of policy-making and administration being carried out by those with specific local knowledge and involvement. As James C. Scott argues, in denouncing the failures of high-modernist state planning in land collectivization, agriculture, and scientific forestry, '[t]he necessarily simple abstractions of large bureaucratic institutions...can never adequately represent the actual complexity of natural or social processes.'<sup>32</sup> Capitalist markets and state minimalism are the Hayekian solution to the problem of energizing local knowledge and responding rapidly to its changing experiences. Scott's rejoinder addresses a subset of cases, relating particularly to large-scale infrastructure and industrial or agribusiness projects: '[L]arge-scale capitalism is just as much an agency for homogenization, uniformity, grids, and heroic simplification as the state is, with the difference being that, for capitalists, simplification must pay.' Global governance increasingly seeks to utilize market mechanisms, local consultations, and, in some cases, community initiation of activities. These can be structured through locally driven experiments, the results of which are reported, diffused, and framed as generalized benchmarks to help raise standards in local governance elsewhere. However, such solutions are often flawed in practice.

Like most forms of politics, global governance typically co-exists with forms of special interest rent-seeking and welfare-reducing local chauvinisms. But it also co-exists—and ought to co-exist—with normatively important forms of resistance and counter-power. These can be a substitute (albeit a faint substitute) for forms of popular self-expression and even for visceral forms of popular political resolution that play an important role in

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<sup>31</sup> Martin Shapiro, "'Deliberative,' 'Independent' Technocracy v. Democratic Politics: Will the Globe Echo the EU?" *Law & Contemporary Problems* 68:3-4 (2005), 341.

<sup>32</sup> James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998), at 262.

democratic politics. A *jus gentium* approach to global regulatory governance allows space for such forms. Such an approach can include a substantial place for a more restrictive and formal international law, especially if international law is understood under the conception of inter-public law. Even international law institutions which in themselves leave little space for democratic populism, such as the WTO, may be designed to leave their member states with some space to accommodate popular politics. Thus when public opinion in the European Union is against allowing imports of beef produced with growth hormones, or genetically modified foods, despite the rules of the WTO, the WTO in practice allows the EU to continue its restrictions on these imports and simply accept some limited trade retaliation by the US as the price. International law is a way of articulating global values and of representing that different interests around the world have been taken into account, or at least ensuring that they have a common normative language by which to contest their exclusion. Whether this form of articulation is enough, or whether global governance must also accommodate more direct forms of popular expression, resistance and protest, is one of the most pressing contemporary issues, to which the inter-public approach to international law invites attention.

## International Law as Inter-Public Law

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### I. Introduction

In this essay I seek to take some steps toward the development of a theory of international law that is an alternative—I hope a better alternative—to the standard account of international law simply as *jus inter gentes*, the law established between governments of states to regulate relations between states as juridical entities. I do not here present anything approximating a full alternative theory, but I try to indicate some features such an alternative theory could have. I argue that international law should be theorized as the law between public entities outside a single state, these public entities being subject to public law and to requirements of publicness. I focus in this paper on the entities whose practice counts in making international law, on the processes whereby these entities make international law, and some implications about the content of international law. My account incorporates most of the substance and institutions of the established *jus inter gentes*: much international law is indeed made by the agreements or the practices of national governments among themselves. But I offer a different view of the reasons for treating that as international law, a broader view of the entities responsible for making international law, and a more demanding view of what is needed to make international law. My project is concerned with the generation and modification of international law. I do not in this essay propose any different view to the prevailing one on the question of who is or could be regulated by international law: states, corporations, individuals, inter-state organizations, private standard-setting organizations, and so forth.

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## A. Problems Calling for an Alternative Theory

I begin by highlighting three features of the contemporary world which pose deep puzzles for the prevailing *jus inter gentes* model of international law. First, the concept of the state as a juridical unit, a central concept in the model of international law as *jus inter gentes*, does not adequately reflect the quality of states as public law entities, a quality that distinguishes them from mere 'rational actors'. Second, the *jus inter gentes* model of international law does not account adequately for the burgeoning activities of regulatory entities that are neither states nor simple delegates of states. Third, efforts to get beyond the obvious limitations of the *jus inter gentes* model of international law (e.g. proposals to refer instead to transnational law, or global law) have had the quixotic effect of buttressing that model: this is because these alternative ideas are generally not framed conceptually, and so do not set meaningful conceptual limits to what they include, making them unconvincing catch-alls. In the next few paragraphs I will elaborate on each of these three puzzles, and argue that they impel the effort to develop a viable alternative theory of international law, of the sort this paper seeks to advance.

### 1. States and Other Public Law Entities.

Traditional *jus inter gentes* theories of international law (of the type represented by Lassa Oppenheim's 1905-06 treatise on International Law) embrace a coarse but robust statism, which analyzes the state as a legal personality with a single directing mind.<sup>33</sup> Such theories, however, do not take account of the fact states are producers of national rules which are increasingly required to meet conditions for law which go beyond those of

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<sup>33</sup> This approach to international law is sustained by a realist view of international politics that presumes that the (foreign) policy of the state and its enunciation in international assemblies is tightly controlled by a few key leaders and governmental agencies, that these state institutions are very strong vis-à-vis other institutions and social forces in the polity, and that the leadership acts rationally in identifying and pursuing a reasonably coherent view of the national interest. These presumptions are ideals – the realist tradition from Machiavelli has been much concerned with urging government leaders not to depart from these ideals, and statist international lawyers have built innumerable devices to keep idiosyncratic international institutions and legal arrangements intelligible within this framework. For details and references on statism see Kingsbury, *The International Legal Order*, in *The Oxford Handbook of Legal Studies* (Peter Cane and Mark Tushnet eds, 2003), 271 at 282-7; and Kingsbury, *Review of Stephen Krasner, Sovereignty: Organized Hypocrisy*, *AJIL* 94 (2000), 591-5.

command backed by sanction: these national rules have a quality of publicness in their orientation. When states -- as public law entities and committed to publicness in law -- come together with each other in an international legal rule-making and decision-making normative process, the results are not identical in form or meaning to what would result from a comparable process among unitary rational non-public actors.

This idea makes more space to meet democratic demands by institutions and groups within the state to have greater influence on and roles in global regulation. It offers scope to encompass legal governance forms adopted in inter-societal relations (e.g. cross-border governance institutions of co-religionists), in transnational relations among elements of states (e.g. networks of government regulators, such as the Basle Committee of central bankers), and in the jurisgenerative work of bodies that do not depend on states. Rather than treat the entities that act in such legal contexts as if they were externalized Hobbesian sovereigns-*manqué*, or as if they were simply delegates of such sovereigns under a statist theory, I propose treating them as public entities. These entities, along with the states that are the archetypical public entities, are the actors in an inter-public order that is, I suggest, the basis for a concept of international law preferable to the prevailing statist one.

## 2. Transnational Normative Governance That Is Not Traditional Inter-State Law.

A vast amount of normatively-framed regulatory practice does not fit within the standard model of international law as the law between states. Patterns of transnational regulation and its administration in global governance now range from regulation-by-non-regulation (*laissez-faire*), through formal self-regulation (such as by some industry associations), hybrid private-private regulation (for example, business-NGO partnerships in the Fair Labor Association), hybrid public-private regulation (for instance, in mutual recognition arrangements where a private agency in one country tests products to certify compliance with governmental standards of another country), network governance by state officials (as in the work of the Organization for Economic Cooperation and Development (OECD))

on environmental policies to be followed by national export credit agencies), inter-governmental organizations with significant but indirect regulatory powers (for example, regulation of ozone depleting substances under the Montreal Protocol), and inter-governmental organizations with direct governance powers (as with determinations by the Office of the UN High Commissioner for Refugees of individuals' refugee status). Instead of neatly separated levels of regulation, a congeries of different actors and different layers together form a variegated 'global administrative space' that includes international institutions and transnational networks as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects.

A theorist informed about all of this practice might answer simply by stipulation: international law is *jus inter gentes*, and any other norms and practices are not international law but something else. This has the merit of delimiting the field. More importantly, adherence to a positivist conception of international law sourced in the will and consent of states may be the best way to maintain legal predictability and to sustain rule of law values in international relations.<sup>34</sup> It may be preferable to retain a unified view of an international legal system than to countenance the deformalization and the mosaic pattern that some of the likely alternative approaches may entail. But I will argue that a theory of international law must be concerned with the normative production and the regulatory activities of such entities, at least when they exercise governing powers.

### 3. Limits to an International Law that is not confined to *Jus Inter Gentes*

Any theory of international law that accounts for more than just traditional inter-state law must be coherent and set cogent limits to the concept of international law. Herbert Hart pointed to the problem of treating international law simply as morality (in the way Austin does): the result is that morality becomes 'a conceptual wastepaper basket into which go

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<sup>34</sup> This argument is explored in Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', *European Journal of International Law* 13 (2002), 401-36.



the rules of games, clubs, etiquette, the fundamental provisions of constitutional law and international law, together with rules and principles which we ordinarily think of as moral ones.<sup>35</sup> Treating every normative assertion in transnational governance as international law, on condition only that it is made with a claim to authority and establishes a sense of obligation, seems certain to lose many of the useful distinctions that the concept of international law presently helps to draw. I share Hart's view that a theory of international law, like a theory of law in general, should distinguish law from coercion (or, more generally, from the expression of coercive power), and should distinguish law from morality. Thus it is to be expected that there will be rules and principles of political order that are not legal rules and principles. (Indeed, the rules and principles of political order can handle some international issues better than legal rules and principles could.) Likewise, many moral rules are not rules of international law and many international law rules are not in themselves moral.

Yet while Hart directs attention to the right problem, the approach he takes to international law in chapter 10 of *The Concept of Law* does not seem to provide the basis for a solution. It was perhaps tenable to say in 1961 that a set of rules, not unified by any rule of recognition and hence not a 'system' in his sense, might nevertheless be a bounded set, given that the rules he addressed were associated with perhaps 100 states and a small number of significant inter-state organizations. The dominant line among international lawyers now is to update chapter 10 by proposing a rule of recognition to render international law a unified system, rather than the mere set of rules Hart concluded it was. One retort is that for practical purposes 'international law' is rightly divided into different substantive areas, or different clusters of institutional practices, or different sets of participants, and no grand unity is needed. But I doubt it is possible over a long period to sustain such fragmentation. Some reasons for this are political and social—recurrent war and violence in high politics spill into low politics, the gross illegitimacy or injustice of one part of an institution colors the work of its other parts. Others are to do with the understandings of international lawyers that their subject is general—it is a unified formation, with common resources of method and authority, not flints lying in a pile. In

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<sup>35</sup> HLA Hart, *The Concept of Law* (2<sup>nd</sup> edn, 1994), at 227.

an environment with weak institutions and little organized coercive power, law's claim to authority is acutely difficult to sustain without some colorable claim to a unity or system of law.<sup>36</sup> Thus I agree that the unity of international law calls for a unity of understanding and of justification (this leads me to put my claim in this paper in general terms.) But a convincing rule of recognition for a legal system that is not simply the inter-state system has not been formulated, so far as I am aware. Even if a convincing formulation could be devised, the updated Hartian concept of international law would probably still be too austere. Hart's jurisprudential critics have not, for the most part, focused on the applicability of their criticisms to problems of international law. This is much to be regretted, as international law, although in many ways a special case, is also in some respects a limiting case. In my view, more is needed for an adequate concept of international law than chapter 10 can provide. I try to sketch some further elements in this paper, without returning much to Hart's *Concept of Law* and the body of work connected to this, but acknowledging the considerable influence of that corpus on the argument that follows.

## B. Framing The Argument

The aspiration of this project is to build, eventually and imperfectly, a theoretical account of international law which is both normatively attractive and practically operable. The normative and the practical possibilities are acutely constrained by the heterogeneity of interest, beliefs, aspirations, and life possibilities among the vast array of actors who have a stake in any such global project. A further constraint is that a theory of international law ought to make reasonable sense of the actually existing rules, institutions and practices of transnational governance and international politics, including the aspirations and possibilities that lie within these. Such a theory must speak in the language, and encompass the patterns of thought and argument that international lawyers share or recognize, else it will not recruit them to the enterprise embodied in such a theory. The

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<sup>36</sup> Gunther Teubner's account of law, in terms of the mutual checking between formal and informal elements in a series of self-validating social-economic sub-systems largely autonomous from politics, is one which seems to eschew any claim that a unified system of law is needed. See e.g. his contributions to Teubner (ed.), *Global Law Without A State* (1997).

theorist must thus look at once to normative theory and positive practice, blurring putative separations between these, a technique which is both a comparative advantage of international law and a comparative oddity.

Thus such a project is immediately confronted with a set of problems about how to build a theory of international law given the conflicting pulls toward moral universalism and pluralism. One approach begins at the pluralist end, with independent actors constrained by no external law, and envisages the building of law by their acts of will. Such an approach might begin with a dyadic analysis of the legal relations between every pair of actors in the system (an approach emphasizing the bilaterality of legal relations, the applicable rules depending on what each particular pair of states have agreed), then look at the gradual construction of dense lattices of bilateral obligations (particularly treaties) treaties that are tied to each other (e.g. through most-favored nation provisions, and through replication and reliance) so that extrication of a single one from the structure is scarcely tenable, then at the eventual sedimentation of these into a fused mass of general international law.<sup>37</sup> Another approach begins at the universalist end, deriving general legal norms from core moral requirements, then attenuating these to make them operable in practical contexts, including not only the accommodation of institutional and informational shortfalls and situation-specific problems, but also the resolution of apparent conflicts between different moral imperatives or with different religious and cultural understandings. I am going to argue for a model of international law that envisages universalist engagement but amongst normative sites each embedded in their own specific moral and legal-institutional contexts. This emergent inter-public model is cosmopolitan and universalist in its normative community, and local and pluralist in specific decisions, but is neither strongly universalist nor radically pluralist in the authoritative derivation of norms or in their application. The key point is that the normative content of law arises not in its derivation from or consonance with universal moral principles, nor in the self-governing power of each and every politically-organized community, but in the public nature of law itself.

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<sup>37</sup> This is one of the lines of accretion illuminated by Joseph Weiler in his ongoing work on a 'geologic' approach, see e.g. J.H.H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy,' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64 (2004), 547-562.

A second set of problems concern the normativity of international law, which I will explicate and defend on the basis of a three-part typology: distinguishing between realist regularity and Grotian normativity on the one hand, and between Grotian normativity and cosmopolitan morality on the other hand. I will present a view of international society and its law as a structure of “inter-public” public law, an alternative both to realist understandings of international law and institutions as the mutable product of interactions between rational actors based largely on the pursuit of their different interests under the existing distribution of power, and to a cosmopolitan universalism which aspires to a global constitutional order. In contrast to the realist model of unitary rational egoistic interest-maximizing states, in which international law is an epiphenomenal summary of the configuration of power among states at any particular moment, I argue that international law does have a normative dimension that shapes its content and that pulls and constrains states and other actors—it thus helps constitute and embody a modest international society. In contrast to cosmopolitanist accounts of international law, which define the ideal content of international law by reference to free-standing universal moral principles (sometimes formulated as principles upon which agents reasonably could agree or could not reasonably reject), and then formulate principles for the non-ideal world of international law in terms of the approximation or facilitation or non-obstruction of eventual attainment of this ideal, I argue that the normative content of international law is immanent in the public quality of law in general and in the inter-public quality of international law. It emerges through the *practice* of seeking law-governed relationships rather than as a deduction from *a priori* principles of morality. The content that emerges through this repeated practice has general and recognizable features that function to constrain actors in their myriad interactions with one another. These regulative norms are identifiably present in multiplying sites of international and transnational decision-making. They appear whenever there is a felt demand for presenting decisions as non-arbitrary, as more than the result of power-inflected bargains between parties in a contractual arrangement.<sup>38</sup>

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<sup>38</sup> In this paragraph and the preceding one I have drawn heavily on an elegant and economical summary of my argument by Melissa Williams, who in summarizing it also contributed much clarity to it.

The paper makes two major arguments. The first argument is that law—especially public law -- has a distinct quality of publicness, which refers to the claim of law to stand in the name of the whole society and to speak to that whole society even when any particular rule may in fact be addressed to narrower groups. I argue that this quality is increasingly part of the concept of international law, and that this quality is having a transformative effect on the sources of international law, reducing the significance of voluntarism, bilaterality and opposability, and increasing the significance of generality, solidarity, and the integration of international law into a conception of world public order. The second argument is that international law is shaped by the inter-public nature of the various processes in which states and certain other public entities come together to establish rules and institutions. My intuition is that states, being themselves creatures of public law, and being producers of national rules which have a quality of publicness in their orientation, come together with each other in an international legal rule-making and decision-making normative process that is not identical to a comparable process among unitary rational non-public actors. This intuition runs against standard rational-actor bargaining models of international lawmaking. Whether it also runs against contemporary cosmopolitan universalism is more complex. My argument is not inconsistent with a public of publics, or a society of societies, or even (to use John Rawls's phrase) a community of communities. But proponents of these formulations generally envisage a greater unity in international society than I do—in my discussion I will emphasize the irreducible pluralism of publics, and international law as a form of *relationship* between them rather than an overarching order, something that lies between publics while at the same time integrating them through the relational quality integral to law. This inter-public law consists, in part, of the internationalization of public law, and in part of an international law dimension of public law. In both cases the relevant normative practices are conducted at multiple sites, each site subject to local considerations as to legal principles, institutional meshing, and sources of authority, so that there is neither a simple unified global hierarchy on the internationalist model, nor a complete disjunction between different sites of law.

After this Introduction, the next two sections of the paper present the two arguments noted in the previous paragraph. A further section distinguishes the view I am espousing from a commitment to democracy in international law. The Conclusion returns briefly to the implications of my view for universalism and pluralism.

## **II. Publicness as a Necessary Quality of Law: International Law Issues**

### **A. Publicness in the Legal Theory of Modern Democracies**

I begin here with a core jurisprudential idea: ‘publicness’ is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.<sup>39</sup> By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.<sup>40</sup> This quality of aspiration to publicness is, as Jeremy Waldron has observed, what Weber misses in his means-oriented definition of the state (as the monopolist of legitimate violence), and what analytical jurisprudence misses in its formal analysis of legal systems.

Publicness might be simply another way of referring to the specific attributes of law that Lon Fuller enumerated: generality, publicity, non-retroactivity, clarity or intelligibility, non-contradiction, non-impossibility of compliance, constancy through time, and congruence between declared rule and official action.<sup>41</sup> Clearly they overlap. But the

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<sup>39</sup> Jeremy Waldron, ‘Can There Be a Democratic Jurisprudence?’, March 2004 revised draft of Wesson lectures at Stanford University. I refer to this presently unpublished draft because its brief discussion of this issue is important and has been a stimulus to my project. But I do not here enter into debate about particular formulations.

<sup>40</sup> This claim seems to sit uneasily with the role of many national democratic legislatures in adjusting entirely particular and private matters by legislation - the vast number of private bills in the US Congress and state legislatures, for instance. But we might defend Waldron by saying that these private bills are classified as private, in the US Congressional Record for example, precisely to distinguish them from public laws, which do indeed present themselves as oriented in the direction of the public good.

<sup>41</sup> Lon Fuller, *The Morality of Law* (rev edn, 1969). See also Neil MacCormick, *Questioning Sovereignty* (1999). The Lon Fuller-type claim that the orientation of law is toward the general, not simply to

idea of publicness as used here goes beyond these largely procedural attributes. It goes to the way law speaks to those it addresses, and to the orientation and amplitude society expects of its law. These are relational qualities. I will turn shortly to elaborate on the meaning of the requirement of publicness.

Before doing that, a brief note on the legal theory problems I am not going to address here. Lon Fuller regarded the attributes in his list as representing an ‘inner morality’ of law—whereas Joseph Raz has argued that these attributes are not moral, but are simply instrumental, making law effective for whatever purposes it is being used for.<sup>42</sup> A broader conception of publicness may raise more challenges than this for theories of law. Such a quality of publicness is not, of course, sufficient for law—many theorists would argue that it must be supplemented by (inter alia) an efficacy condition. Efficacy is difficult to achieve or sustain without the subjects of law feeling a sense of obligation that is not mere compulsion, or self-interest, and the quality of publicness described here may be incorporated into legal theory as part of the way in which law generates this sense of obligation.<sup>43</sup> This kind of ‘publicness’ may also be incorporated into the kind of rule of recognition proposed by H.L.A. Hart.<sup>44</sup> But the fit is not exact.<sup>45</sup>

## B. Public Law as a Special Case of the Requirement of Publicness in Law

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particular commands, is treated by Waldron as separate from the claim about publicness, but seems to me to fold into it.

<sup>42</sup> Joseph Raz, ‘The Rule of Law and its Virtue’, in Joseph Raz, *The Authority of Law* (1979), 210.

<sup>43</sup> See for instance Samuel Pufendorf, *Of the Law of Nature and Nations: Eight Books*, I.vi.5 (translated Basil Kennett, 4<sup>th</sup> edn, London, 1729): ‘Now, altho’ there are many other Things which have an Influence on the Will, in bending towards one side rather than the contrary, yet *Obligation* hath this peculiar Force beyond them all, that whereas they only press the Will with a kind of natural Weight or Load, on the Removal of which it returns of its own Accord to its former Indifference; *Obligation* affects the Will in a moral Way, and inspires it inwardly with such a particular Sense, as compels it to pass Censure itself on its own Actions, and to judge itself worthy of suffering Evil, if it proceed not according to the Rule prescrib’d.’

<sup>44</sup> *The Concept of Law* (1961).

<sup>45</sup> Part of Waldron’s argument for a greater interest in democratic jurisprudence is that topics such as the quality of publicness in law have been insufficiently attended to in recent analytic legal theory.

Public law' may be subject to different requirements as to publicness than other kinds of law.<sup>46</sup> The reasons for this are both functional and normative. Public law, like the organization of politics, is concerned above all with managing problems of deep disagreement. Public law is also centrally concerned with the organization and delivery of security, services, education, religion or religious opportunities, welfare—the modern equivalents of Cicero's *salus populi*.<sup>47</sup> These concerns can be framed in Hobbesian terms by reference to the self-interests of the citizenry. But modern states play a further role in enabling citizens to discharge some of their moral duties toward others, or to achieve their aspirations of altruism. Legal structures for benevolent services typically have both interest-based and altruistic strands woven through them<sup>48</sup>—welfare is understood as both social insurance and charity. Public law, and politics, are also concerned with varieties of liberty: libertarian freedom from unnecessary constraint and intrusion, freedom to make and live out choices that might be described as autonomy and measured in terms of capabilities, freedom to participate and to shape the public sphere that might be described as republican citizenship. These concerns of public law provide special functional as well as normative reasons for requirements for publicness in national public law. These requirements could be to better advance the wider public interest by in some ways mobilizing, and in others channeling and restricting, state power for public purposes. Or they might be requirements giving effect to what many public lawyers in common law systems argue is a distinct set of public law values, that may give special meaning to 'publicness' in this context. Demands for similar requirements of publicness are increasingly evident in public international law, although the realization of such demands is presently very uneven, and will not become prevalent without considerable further development.

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<sup>46</sup> Jeremy Waldron suggests, en passant, that in a democracy it is the business of society to be concerned with the whole of the law that stands in its name, even law focused only on private actors, so that a requirement of publicness *prima facie* applies to private and public law without fundamental distinction. But his argument is made against those who would in some way insulate private law, or private property and markets, from ordinary public-political engagement. This does not necessarily reach the question whether special requirements might apply to public law.

<sup>47</sup>Cicero, *De Legibus*, III.6; Hobbes, *De Cive*, XIII.2; Pufendorf, *De Officio Hominis*, II.xi.3.

<sup>48</sup> Duncan Kennedy, *The Structure of Blackstone's Commentaries*, *Buffalo Law Review* 28 (1979), 205; and his *Form and Substance in Private Law Adjudication*, *Harvard Law Review* 89 (1976), 1685.



### C. Components of Publicness: General Principles of Public Law

General principles of public law combine formal qualities with normative commitments in the enterprise of channeling, managing, shaping and constraining political power. These principles provide some content and specificity to abstract requirements of publicness in law. Principles potentially applicable within any system of public law, and in relations between different systems of public law -- may include to different degrees some of the following. This is merely an indicative list, without any comparative or doctrinal analysis, but it is sufficient to suggest that the principles embodied in such a conception of public law are significant.<sup>49</sup> These are normative principles, that do real work, yet they are not principles of substantive justice in the Dworkinian sense. In accepting the idea of the rule law, of the unity of basic normative principles rather than the rule of arbitrary power or the rule of the philosopher, this is the kind of list one gets:

(i)The Principle of Legality. One major function of public law is the channeling and organizing of power. This is accomplished in part through a principle of legality—actors within the power system are constrained to act in accordance with the rules of the system. This principle of legality enables rule-makers to control rule-administrators. The agent is constrained to adhere to the terms of the delegation made by the principal. In a complex system of delegation, it is often preferable to empower third parties to control the agent in accordance with criteria set by the principal, creating the basis for a third-party rights dynamic even in this principal-agent model. In the case of inter-state institutions, the states establishing the institution often style themselves as principals (severally or collectively), with the institution as agent, but their direct control of the agent may be attenuated, a problem they typically mitigate both by legal controls and by limiting the operational capacity of the agent. Thus international institutions usually depend on individual states to act as agents in operational implementation.

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<sup>49</sup> See generally David Dyzenhaus (ed), *The Unity of Public Law* (2003), esp Michael Taggart, 'The Tub of Public Law', in *Ibid*, 455-80.

(ii) The Principle of Rationality. The culture of justification has been accompanied by pressure on decision-makers (and in some countries, on rule-makers) to give reasons for their decisions, and to produce a factual record supporting the decision where necessary. This is part of both political and legal culture. In both contexts it leads those institutions with review power into continuous debates about whether and on what standard to review the substantive rationality of the decision: manifestly unreasonable, incorrect, etc.

(iii) The Principle of Proportionality. The requirement of a relationship of proportionality between means and ends has become a powerful procedural tool in European public law, and increasingly in international public law, although some national courts (e.g. in the UK) have balked at unfamiliar arguments based on it.

(iv) Rule of Law. The demand for rule of law can mean many things. The dominant approach is proceduralist,<sup>50</sup> meaning a general acceptance among officials (and in the society) of particular deliberative and decisional procedures. This is prima facie in tension with a conception of the rule of law as simply a structure of clear rules, reliably and fairly enforced, without regard to their substantive content (the ‘rule book’ conception); and with ‘the ideal of rule by an accurate public conception of individual rights’ (the ‘rights conception’).<sup>51</sup> Proceduralists argue for adhering to procedures even at the price of unsatisfactory outcomes—but face problems in explaining why any decision taken in accordance with prescribed procedures should not then be part of the law which adherents of the rule of law must uphold.<sup>52</sup> David Dyzenhaus has argued for an approach which shifts the focus of rule of law from law (and rules), to the element of ruling—so a breach of procedural requirements is not unthinkable, but involves a compromise of legality that must be carefully weighed.<sup>53</sup>

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<sup>50</sup> An illustration is Richard Fallon, ‘The Rule of Law as a Concept in Constitutional Discourse’, *Columbia Law Review* 97 (1997), 1.

<sup>51</sup> Ronald Dworkin, ‘Political Judges and the Rule of Law’, in Dworkin, *A Matter of Principle* (1985), 12.

<sup>52</sup> Jeremy Waldron, ‘The Rule of Law as a Theater of Debate’, in Justine Burley (ed), *Dworkin and His Critics* (2004), 319, 323.

<sup>53</sup> See David Dyzenhaus, ‘Aspiring to the Rule of Law’, in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone eds., *Protecting Human Rights: Instruments and Institutions* (2003).

(v) Human Rights. I mean here the basic rights the protection of which by the legal system is almost intrinsic (or natural) to a modern public legal system. This category overlaps a lot with the previous four categories, but I list it separately to leave scope for arguments that some human rights (perhaps of bodily integrity, privacy, personality) are likely to be protected by public law as an intrinsic matter (without textual authority), yet without being subsumed into 'rule of law'.

#### D. Publicness in International Law

How does the requirement of publicness operate in relation to international law?

If publicness were simply publicity—openness to all to know - we might easily trace a liberal (Benthamite) project to make international law knowable to all, and in making it knowable, to increase accountability of particular makers of international law to others who have some claim on them. When Woodrow Wilson called for an end to 'secret diplomacy' and a new order of 'open covenants, openly arrived at' (a norm still embodied in the UN Charter requirement that treaties be registered with the UN Secretary-General for publication in the UN Treaty Series), he had in mind that this publicity, in causing leaders to take more account of public sentiment and to defend their international commitments in public debates, would democratize foreign policy and dampen diplomatic tendencies to bellicosity. Almost every intergovernmental institution currently faces demands to increase the openness of its decision processes: the Basel Committee of central bankers now publishes drafts of its proposals to receive comments from interested private sector groups before adoption, NAFTA arbitral tribunals now accept amicus briefs from third parties, and so on.<sup>54</sup> This political commitment to publicity as an element going to the legitimacy of governance is often expressed as a requirement that legal rules and decisions be made publicly accessible if they are to qualify as law. This claim has not completely dominated the field, but it has had the effect of raising doubts about the law-quality of much secret or unpublicized state

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<sup>54</sup> Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance* (Paris, 1919), *Indiana Journal of Global Legal Studies* 10 (2003), 45; Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', *Michigan Journal of International Law*, 18 (1997), 183–286.

practice which a century ago would probably have satisfied the sources test for international law pedigree.<sup>55</sup> Many inter-state agreements and understandings on security matters and intelligence are kept secret, but much of this practice—e.g. the silent transfers of suspects without extradition processes, or promises to share intelligence information—is not generally analyzed as making international law or generating international legal obligation, in the way that other state practice is thought to do. The IMF keeps not only the deliberations of its own Board secret, but also many pieces of ‘advice’ to, and understandings with, borrowing countries. It seems to accept that doing this means these materials can not easily be jurisgenerative. A different kind of case is the WTO Appellate Body, which issues important rule-based opinions employing legal reasoning just as a court does, but has had to resist characterization as a court issuing judgments, not only for WTO structural reasons, but also because it is constrained to hold almost all of its hearings behind closed doors, and is thus debarred from modern requirements of openness to the public in legal courts.<sup>56</sup>

Yet publicness is not simply (nor does it always entail) publicity. Publicness is a way of describing that quality of law which entails law claiming both to stand in the name of the whole society, and to speak to that whole society. The idea of international law standing in the name of a wider society has long animated internationalist writers and legal scholar-practitioners. Many participants see international law as having an expressive function for the realities of international society, or the hopes for it. The language of international law is used not only to conduct international politics (although international law certainly is a language of politics), but also to express a degree of commonality in some sort of world order system,<sup>57</sup> perhaps a human social system for general purposes,<sup>58</sup> or perhaps a series of social sub-systems for regulating specific issues in which

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<sup>55</sup> Société Française pour le Droit International, Colloque de Genève, *La pratique et le droit international* (Paris: Pedone, 2004).

<sup>56</sup> In 2005 the Appellate Body for the first time held such a session in public, with the agreement of the disputing parties. Many other international rule-making and decision-making bodies try to find a way of both being jurisgenerative and not too constrained by the public, by finding ways to avoid publicity for their documents and proceedings while also not keeping them formally secret – they want to be part of international law, but they fear that their good work as technocratic experts will be slowed down by NGO agitators or self-serving industrialists.

<sup>57</sup> Kai Alderson and Andrew Hurrell (eds), *Hedley Bull on International Society* (2000).

<sup>58</sup> John Meyer et al, ‘World Society and the Nation State’, *American Journal of Sociology* 103 (1997), 144.

participants in that sub-system are interested. Many people, particularly activist groups, seek to use international law as a means of articulating moral positions, in the absence of other universal languages for international affairs. Some of these moral commitments—in particular, non-discrimination—have become almost immanent in the way international law is understood.

The idea that international law should speak to the whole of society is evident in the continuous efforts to nudge the field beyond states-will theories of sources, beyond bilaterality and opposability toward community norms, beyond a focus on managing disputes and adversarial proceedings toward a deeper structure of normative enunciation and claims arising from neighborhood and impact rather than contract and technical legal interest. It appears in the idea of *jus cogens*—peremptory norms applicable to all, which no group of states can contract out of—and in other modern natural law ideas. It appears in the frequent resort to ‘general international law’ rather than simply the specific agreement made by the parties in a dispute—for example, when the WTO Appellate Body applies principles of general international law such as proportionality, or a version of the precautionary principle, or a general principle about treaty interpretation. It appears in the 20<sup>th</sup> century quest for universality of participation and for equality among participants.<sup>59</sup> This idea is one of the main obstacles to the use of ‘club’ models in international relations—the struggle between diplomatic-club and legalist-universal models has been a major theme in the WTO and several other institutions.<sup>60</sup>

Practical examples of the operation of these two elements of publicness in international law are difficult to elucidate sharply in the flurry of pragmatics. I will offer two, while acknowledging that I am simplifying each rather drastically.

The first example is the law of foreign state immunity. International law requires that a forum state (say Canada) grant immunity to a foreign state (say Argentina) if anybody

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<sup>59</sup> Georges Abi-Saab, ‘International Law and The International Community: The Long Road to Universality’, in R. MacDonald (ed.), *Essays in Honour of Wang Tieya* (1994), 31.

<sup>60</sup> Robert Keohane and Joseph Nye, ‘The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy’, in R. Porter et al. (eds.), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (2001), 264-94.

tries to sue Argentina in Canadian courts, provided that the acts for which Argentina is being sued were public, rather than being commercial acts which a private actor might equally well have undertaken.<sup>61</sup> This often involves examination of the public law of the state being sued, as well as examination of the nature of the acts themselves. Thus the US was immune from suit in Canada over employment on a military base in Canada, Saudi Arabia was immune from suit in the US over police brutality toward an American there, and Germany was immune from suit in the US by an American over WWII reparations. But each of those decisions, despite showing respect for foreign public law actions, was criticized on grounds that this grant of immunity did not speak fairly for the whole society of the forum state, nor did the legal actions of the foreign state comply with the requirement of being fairly addressed to all those affected.<sup>62</sup> The European Court of Human Rights, in very cautiously floating possibilities that forum states should override foreign sovereign immunity where necessary to allow individuals to pursue claims for violations of their human rights by foreign states acting in their public capacities,<sup>63</sup> raises concerns about human rights and the minimum requirements of publicness of law which are both heightened and blurred by the principles of respect for the autonomy and political character of foreign public law.

The second example is the *Shrimp-Turtle* case.<sup>64</sup> The US prohibited import of shrimp from India, asserting that Indian shrimp vessels did not meet US statutory requirements concerning protection of turtles. The WTO Appellate Body did not hold that the US

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<sup>61</sup> I say that international law requires this, because this is what most experts globally believe. But the US Supreme Court in *Republic of Austria v. Altmann* (June 7, 2004) said that this is a matter of comity, not international legal obligation.

<sup>62</sup> Not surprisingly, the subordination of foreign public autonomy to competing interests in pursuing claims against foreign states came initially with regard to financial markets. The US Supreme Court holding in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), that Argentina had no immunity in US courts when sued on bonds it had issued as part of a restructuring to prevent financial collapse of the Argentine private sector, was based on the commercial nature of a bond default, without giving any weight to circumstance of the bonds being issued by the government acting for public purposes.

<sup>63</sup> See dicta in *Al Adsani v UK*, although the Court held that the UK did not breach the Convention by applying foreign state immunity to prevent a Kuwaiti bringing a torture claim against Kuwait in UK courts. See also dicta in *Waite and Kennedy v. Germany*, in which the Court implied that in upholding immunity of an international organization from labor rights claims in a national court, it was relevant that other remedies achieving an equivalent level of rights protection were available against the international organization.

<sup>64</sup> WTO Appellate body, 12 Oct 1998, (1999) 38 ILLM 121.

acted contrary to GATT in refusing to treat Indian shrimp in the same way as identical shrimp from elsewhere, even though the text of GATT seemed to call for this. The Appellate Body deferred to a US public law decision that demand from US markets for shrimp was not going to be permitted to more grievously threaten turtles. But the Appellate Body held that the way in which the US authorities took their legal decision was arbitrary or unjustifiable, in so far as the US did not provide India with proper notice of its plans to find Indian vessels non-compliant, an opportunity to contest these proposed findings in advance, or a reasoned written decision it could challenge. In effect, the US process did not meet some of the requirements for publicness in law, as these requirements were not limited to a public comprised of US citizens, but included affected Indian interests as well.

In giving these as examples, I do not mean to suggest that international lawyers have been uniformly committed to the view that publicness is necessary to international law. One branch of the grand tradition of the juriconsult locates the international law adviser inside the Foreign Ministry, moving seamlessly between legal advice and diplomacy but placing the national interest above all.<sup>65</sup> However, even among the juriconsults a different tradition holds the Foreign Ministry legal adviser as committed to basic values of the general applicability of international legal rules and the need for ministers to be able to explain a legally defensible position in a public context, even if the government chooses not to act on this legal advice—a tradition symbolized by Sir Gerald Fitzmaurice's advice to the British Foreign and Commonwealth Office against the Suez invasion in 1956.<sup>66</sup> That is, a public responsibility to uphold international law arises, for these national civil servants, from the public nature of the law. Outside the special context of government service, the idea of a quality of publicness as an aspiration in international law seems increasingly, although not universally, accepted by practitioners and professors of the field. But if this aspiration is widely shared, it is tempered by

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<sup>65</sup> See e.g. the reflections of the then French Foreign Ministry Legal Adviser: Guy Ladreit de Lacharrière, *La Politique juridique extérieure* (1983).

<sup>66</sup> Geoffrey Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', *ICLQ* 37 (1988), 773-817. Press reports of the resignation of Elizabeth Wilmshurst from the FCO legal department after the invasion of Iraq in 2003 indicated that she did not regard the invasion as lawful under international law.

recognition of special functions of public international law in relation to politics. Public international law, perhaps even more so than public law in general, employs gaps and silences as part of the enterprise of establishing, maintaining, and regulating the political sphere.

#### E. Gaps and Silences in Public Law

The discursive practices of public law also include the use of gaps and silences to accommodate the political. International law, like all public law but often to a greater degree, has such gaps and silences. These gaps and silences are not usually total—they interact with positive principles and legal values in managing different questions in specific contexts. The gaps and silences may circumscribe, but do not necessarily negate, requirements of publicness in law; indeed, such bedrock requirements may help to give meaning to the gaps and silences. The following are illustrative examples of gaps, silences, and abstentions and of their relations to requirements of publicness in international law, in three different structural postures: 1. national public law on national issues; 2. national public law on foreign policy or trans-border issues; and 3. legal competences of international institutions.

1. Examples of an international legal institution respecting the political dimension of national public law on national issues are readily found in the jurisprudence of the European Court of Human Rights. *Gorzelik v. Poland* illustrates a characteristic line of approach.<sup>67</sup> At the behest of government authorities, the Polish courts had rejected an application to register an organization called the 'Union of People of Silesian Nationality' which in its memorandum of association claimed to be 'an organization of the Silesian national minority.' The EHCR ruled that this did not violate the right to freedom of association. The Court focused on the structure of Polish electoral law, which entitled parties of national minorities to enter Parliament even without reaching the normal 5% threshold, but was operated without any definition in Polish law of a national minority. The electoral procedures seemed to enable any organization registered by the government

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<sup>67</sup> (44158/98), [2004] ECHR 72 (17 February 2004), Grand Chamber.



processes as a national minority organization to claim the benefit of this exemption without further process. The European Court seemed to accept this structure of Polish public law as being relevant to the international public law of the ECHR. The result was that the human rights claim was not allowed to displace the political process for dealing with what are, in Poland, weighty political issues, namely the issues of minority representation in the legislature.<sup>68</sup> In another decision in a similar pattern, the ECHR accepted Turkey's argument that the forced dissolution of the Refah party in 1997-98, preventing this Islamic party from contesting an election it may well have dominated, was justifiable because of what the Grand Chamber accepted was incompatibility between some statements of the Party's MPs and core values of the Convention and of Turkey's secular democracy.<sup>69</sup> In earlier decades, the ECHR similarly upheld complex Belgian linguistic and region-based electoral arrangements, despite unfairness to some voters which in other circumstances might have been held to be rights-infringing, on the ground that Belgium had adopted a transitional compromise in a fraught political situation that ought not to be destabilized.<sup>70</sup>

2. Illustrations of international law accommodating a special political quality of national public law on trans-border issues abound on security matters,<sup>71</sup> but a more representative illustration because not overwhelmed by security concerns is the ECHR decision rejecting a claim by Prince Hans Adam II of Liechtenstein. The property of the Prince's father was expropriated by the Czechoslovak Government in 1945 under the Benes Decrees, and the Prince now objected that Germany was allowing this property to be

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<sup>68</sup> The Court emphasized the roles of political parties and of all kinds of associations in the realization of democracy and pluralism, and noted that 'freedom of association is of particular importance for persons belonging to minorities.' (para 93.) But the Court was not prepared to condemn the structure of the Polish legal arrangements, even though they entailed non-recognition of a plausible group. In essence, the Court accepted that the state's actions (taken through the Polish courts) were to prevent disorder and 'to protect the existing democratic institutions and procedures in Poland.'

<sup>69</sup> *Refah Partisi (The Welfare Party) v. Turkey* (41340/98) [2003] ECHR 87 (13 February 2003). The language and reasoning of parts of this Judgment have very problematic aspects, discussed at the conference "The Turkish Welfare Party Case: Implications for Human Rights in Europe," Central European University, Budapest, June 12-15, 2003, proceedings forthcoming.]

<sup>70</sup> *Mathieu-Mohin and Clerfayt v. Belgium* (9267/81) [1987] ECHR 1 (2 March 1987).

<sup>71</sup> E.g. the resistance of the European Court of Human Rights to judging the legal merits of the military actions by various NATO states against Yugoslavia taken in 1999, *Bankovic v Belgium* (2001) 11 BHRC 435; or the ECHR holding that a cross-border abduction of an accused person by one state with the connivance of the state from which the abduction occurs is not itself a breach of the human rights of the abductee, *Öcalan v Turkey* (2003) 37 EHRR 238.

treated as ‘German’ property instead of helping him to recover it.<sup>72</sup> In particular, when a painting from the expropriated collection was sent from Czechoslovakia to an exhibition in Cologne, German courts refused to allow the Prince to claim it, on the grounds that German’s 1952-54 treaties put an end to Germany’s rights to make WWII-related claims about German property. The ECHR accepted that the exclusion of his claim by German courts did not violate his human rights, broadly on the ground that the public law of the post-WWII settlement ought not to be unraveled by the ECHR.

3. As between international institutions, a comparable approach to public law is particularly evident in attitudes toward the UN Security Council. International courts are generally reluctant to engage in real judicial review of its actions on core security issues,<sup>73</sup> and the limitations to its areas of competence under Chapter VII of the UN Charter have not been closely controlled by judicial bodies. There is indeed a general tendency in international law to allow institutions established by inter-governmental agreement to determine the bounds of their own competence (the power often called *Kompetenz-Kompetenz*), constrained mainly by political pressures from individual governments or from inter-governmental political bodies who often control the budget and some appointments.

#### F. Alternatives to the ‘Publicness of Law’ Approach

Some alternative scholarly approach imply that the approach I have just sketched, with its focus on building a tempered requirement of publicness in international law, is much too modest. Contending positions hold (by implication, albeit not explicitly) that the publicness of international law is just an incidental feature in the project of building a global constitution. I turn now to consider alternatives to the ‘publicness of law’ approach sketched here, beginning with consideration of current approaches to global constitutionalism.

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<sup>72</sup> Prince Hans-Adam II of Liechtenstein V. Germany (42527/98) [2001] ECHR 463 (12 July 2001).

<sup>73</sup> Bernd Martenczuk, ‘The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?’, EJIL 10 (1999), 517-48.

Perhaps the major alternative to the ‘publicness of law’ approach taken here is that of the multifaceted Habermasian school. One line of thought in this school begins the quest for public law not with the relationship of governors and governed, but with the idea of a public, and in particular with the distinction between a weak public and a strong public. As Hauke Brunkhorst puts it, a weak public has communicative power but does not have legally-organized access to administrative power—basic rights are respected so it can deliberate, but it lacks constitutional authority to take legally enforceable decisions.<sup>74</sup> By contrast, a strong public exists where protection of basic rights and constitutional arrangements together make a strong coupling between public deliberation and legally effective decision. A weak public emerges where basic rights are protected (whether in hard law or merely in the practice of soft law), and there exist the mass media, political associations, political culture etc necessary for common deliberation. A strong public needs these ingredients plus a constitution which organizes the public power legally to take and enforce decisions. This concept of the public draws on Dewey’s problem-solving approach to the formation of a political public, and on Arendt’s ideas about joint action. It celebrates the ‘people power’ of revolutionary publics, in the Philippines after Marcos, in South Africa and Central Europe in 1989, etc. On this view, transborder weak publics, or even a global weak public, already exist, within the scope of the general patterns of rights protection now prevalent. The deliberative powers of these publics are only very loosely coupled to any decisional power, but this coupling might be strengthened by the realization of various kinds of global constitutionalism.<sup>75</sup> These global constitutional proposals often involve the elaboration on a global scale of ideas developed to meet the constitutional challenges of European integration. One line of these proposals is promising in that it avoids the familiar traps of simply wishing into being a global public created by communicative action, or of relying on the charters and institutions of global organizations such as the UN or WTO to get constitutionalism going. This proposal seeks to build, around the increasingly dense structure of European institutions and rules,

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<sup>74</sup> Hauke Brunkhorst, ‘Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism’, *Millennium* 31 (2002), 675-90.

<sup>75</sup> For a social solidarity approach see Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Jeffrey Flynn transl, Cambridge, MA: MIT Press, 2005); and for a systems-theoretic approach, Andreas Fischer-Lescano, ‘Die Emergenz der Globalverfassung’, *ZaöRV* 63 (2003), 717.

a thick constitutional patriotism, in which the citizens of an emerging European polity embrace and interpret the common values of European constitutionalism not in a uniform manner but in ways that reflect different national politico-legal histories, different ethical commitments, and different politics.<sup>76</sup> Commitments to particular ideas on the purposes and limits of government, individual rights, rule of law, and even democracy are all thus placed at the core of European allegiance even while given detailed meaning in different ways in different national contexts. Even assuming that such an approach can succeed in Europe—a contested assumption—it is doubtful that international law on a global scale can proceed this way. It is very unlikely that any global constitutional-type instruments could soon command the type of allegiance and shared identification from a wide section of humanity that might get any sort of world polity going, even one accommodating considerable variation in interpretations and appropriations depending on variations in national traditions, ethics, and politics. In sum, I think the Deweyan problem-solving too soft and expert-oriented, the Arendtian joint action too limited and erratic, and the strong coupling of a global public with constitutionalist institutions too improbable, for this cluster of Habermasian approaches to be a likely platform for public law on a global basis in the near future, however helpful these ideas may be in world sociology.

Another important alternative to the approach to public law defended here is one that begins not with government and governmentality, nor with any claim for the autonomy of the political, but instead begins with spontaneous orderings in the private sector. Important work on contemporary juridification—the scholarship associated with Niklas Luhmann, Gunther Teubner, Christian Joerges and others—can be understood as beginning with private ordering and advancing towards a conception of the public and of public law. This work anticipates that private orderings and official regulation will proceed not independently, but interdependently. Even if the rate of technological and market change is so quick that official regulation cannot keep pace, still a demand for elements of public regulation accompanies the more and more complex administration of matters affecting a wide public, particularly issues about risk. This kind of

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<sup>76</sup> Jürgen Habermas, *Der Gespalterte Westen* (2004); Matthias Kumm, *The Idea of Thick Constitutional Patriotism and its Implications for the Role and Structure of European Legal History* 6 *German Law Journal* (February 2005).

administration is celebrated the more it moves away from rigidified Weberian bureaucracy, and toward the open and flexible models of European Union comitology, the EU's Open Method of Coordination, or perhaps the evolving governance of cyberspace. But even if the form of administration is not particularly Weberian, the new forms are still subject to Weber's insight about administration necessitating the deformation of law. This approach to transnational juridification thus casts doubt upon the place for public law in any traditional sense. One response has been to revive a sources-based definition of private law, and of public law, then to call for a dialectical relationship between them.<sup>77</sup> I doubt, however, that a traditional sources-based account is adequate. My understanding of public law focuses on practice and principles as well as sources theory. It expects variation depending on the nature of the issues addressed as well as functional and value dimensions, and is not reducible to a sources-based definition of public or private law. I conclude that the transnational juridification approach, while illuminating for legal theory and generative of an important research agenda, is unlikely at present to provide a way to frame scope conditions for a re-theorized public international law.

### **III. The Inter-Public Quality of International Law**

#### **A. Law Between Public Entities**

The idea that international law is made by entities that are themselves public—operating under their own public law, and oriented toward publicness as a requirement of law—has implications for how we think about international law. Instead of international law simply as agreements between juridical units, it points to the possibility of understanding public international law as law meeting publicness requirements that is made between

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<sup>77</sup> See e.g. Christoph Moellers, 'Transnational Governance without a Public Law?', in Christian Joerges, Inger-Johanne Sand and Gunther Teubner eds, *Transnational Governance and Constitutionalism* (2004), 329, 337: 'The discussion on transnational constitutionalism can be reconstructed by a distinction between two forms of laws. A private law framework defines law as the result of spontaneous co-ordination efforts. A public law framework defines law as the result of a political process, which is not autonomous, but is intentionally steered... But an adequate theory of law needs a dialectical synthesis of both approaches.'

entities whose public nature qualifies them as having jurisgenerative capacity. This is, in short, the possibility of understanding international law as inter-public law rather than simply as *jus inter gentes*. The most important of these public entities are likely to be states. They are accustomed to the operation of the principles of public law of the kind in the indicative list sketched earlier. They are each equipped with a raft of institutions operating in a public law environment, and which will be involved in the international law process. Associations and citizens' groups within the state bring similar public values to their participation in international law. However, there is no strong reason to limit the category of public law entities—and of participants in inter-public law—to states. As transborder interactions among all such public entities increase, situations where they bump up against each other multiply, generating conflicts of laws arrangements in the public law sphere.

A conceptual shift of this sort, if accepted, would be fundamental, even though its practical consequences might be felt only very slowly.

Such a shift would probably be operationalized primarily by specification of the relevant (types of) public *entities*, rather than by routine international law specification of *publics*. In relation to any particular entity (and especially states), the meaning of 'public' for international law purposes would routinely be described in terms of a *renvoi* to the relevant entity's legal and political arrangements, much as the ICJ in the Barcelona Traction case (1970) concluded that the identity and core governance rules of a 'corporation' depend simply on the national law of the corporation, which international law recognizes and follows but does not tinker with. Thus one state may have a corporatist system, with political groups organized and represented by profession or industry or university, while another state has a mixed system of ethnic and territorial groupings and representation, and an industry governance association may have only regional peak groups as its members, but international law will simply accept the heterogeneity of forms and categories.<sup>78</sup> Efforts will be made to limit this tolerance. But they are unlikely

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<sup>78</sup> Consider the slowness of international law, and indeed of many national public law systems, to deal in a sophisticated way with political parties.

to entail the robust commitment to political equality that has been embraced in most democracies for many decades; any prescription of equality would probably operate only to rule out egregious exclusions and abuses. Political equality would be at best a regulative ideal; and inter-region equity would be something less than that. Participation rules would also be loose. As is at present the case in global governance, some of the public entities might be virtually self-appointed.<sup>79</sup>

Operationalization in terms of entities rather than publics is likely to be juridically much more practicable (much in the way that self-determination in international law has generally been applied to juridical units such as colonially-defined territories with arbitrary borders, rather than to ethno-linguistic peoples). In practice, public entities and publics will often go together. But situations in which the public entity is not an adequate representative of the relevant public are common. For example, a public entity with governing power may decide an issue, with full participation of its public under a deliberative model, and careful framing of arguments and reasons so as genuinely to encompass all of those who spoke; yet the decision may be taken by an entity whose public is not the public truly affected.

#### B. The Inter-Public Conception Illustrated: Global Administrative Law

I will offer here one example of this inter-public law in operation: the emerging field of global administrative law. A legal commonality is introduced to the innumerable permutations of contemporary global governance forms, through the idea that the various mechanisms for accountability, for participation, and for the strengthening or eroding of legitimacy in these different governance structures, are evolving not simply in parallel but in increasingly interconnected ways. This loose unity may be described as an emerging global administrative law, by which is meant the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality,

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<sup>79</sup> Thanks to Jeremy Waldron for discussion of these issues.

and legality, and by providing effective review of the rules and decisions these bodies make.<sup>80</sup> It is practiced at multiple sites, with some hierarchy, some inter-site precedent and borrowing of principles, but considerable contextual variation. Thus the World Trade Organization Appellate Body now requires (e.g. in the Shrimp-Turtle case, mentioned above) member states to follow certain administrative procedures before excluding imports, the Basle Committee of central bankers now puts out drafts of its proposals on capital adequacy for wide comment before adopting them, the UN Security Council has adopted a limited review mechanism to make it possible for people listed as terrorist financiers to be delisted, the World Bank operates a notice and comment process before adopting policies and has an Inspection Panel to hear complaints that it has breached its policies, the International Olympic Committee follows an elaborate procedure for athletes suspected of doping and has a review process culminating in arbitration at the International Court of Arbitration for Sport. This body of practice is normative, and cross-referential. It is influenced by treaties and fundamental customary international law rules, but it goes much beyond these sources and in places moves away from them. It is a prime example of the inter-public international law of the era of global governance.

### C. Implications of the Inter-Public Approach to International Law

Three implications of adopting such an inter-public approach to international law may be noted.

First, the inter-public approach may provide a way of encompassing jurisgenerative activity of market actors -- activity that was placed largely outside the emerging *jus inter gentes* model as states (public) and markets (private) came to be separated in liberal theory. The inter-public approach may provide a basis, without great disruption of entrenched liberal positions, for addressing market actors as public actors when they

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<sup>80</sup> The Global Administrative Law Project of NYU Law School's Institute for International Law and Justice ([www.iilj.org](http://www.iilj.org)) focuses on the extent to which there are, or should be, principles and rules common to this diverse regulatory practice. See e.g. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law", 68 *Law & Contemporary Problems* 15 (Summer-Autumn 2005).



exercise governing power (ie when they regulate), and for defining the relevant public in terms of those they govern.

A second implication of the approach sketched here is that some things should be non-public. This will entail fundamental normative argument about where lines between public and non-public should be drawn, and what their consequences should be. Some will defend the non-public (not necessarily the same as the private) as a zone of freedom, and of voluntarism; others will criticize it as a zone of oppression and evasion. To give one example of the cashing out of this in practical international law doctrines, it has been argued that the standard for review by a national court of a private international commercial arbitration award should not be the same as the standard of judicial review of public acts of a state.<sup>81</sup>

Third, an attribute of the inter-public approach is that it challenges a relatively untheorized but highly influential functional approach to transnational and international governance. In this functionalist view, there is nothing intrinsically (merely contingently) important about the state, nor even about an articulate conception of the public, as a basic unit in governance. This view favors any way in which governance can best be organized in terms of criteria such as efficiency, effectiveness, aggregate welfare maximization, and political viability. If in practice this means that some strong states do most of the governing, and other states are eclipsed in many spheres by markets or by specialized international institutions or by private governance actors, nothing of great value is lost. If this counsels for particular attention to states at risk of failing, and to supplanting their institutions in order to protect basic human needs or suppress terrorism or drug trafficking, so be it. I believe that one of the costs of this approach is that it misses the intrinsic value for people of the public sphere—the value of performing, and debating, and updating public values—activities that coexist comfortably with markets and private associations but are not reducible to these. States often provide important elements for a public sphere; but some states barely do this, and public spheres are also

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<sup>81</sup> Gus van Harten makes this normative argument in forthcoming work on national court review of NAFTA investor-state arbitral awards.

being built in other forms under conditions of globalization. The inter-public approach expects that states and state institutions will feature prominently, and indeed provides normative and functional reasons for expecting them typically to be the primary jurisgenerative actors, but it emphasizes that public values and public orientation should also be features of other forms of governance.

#### D. Does Gunther Teubner's Global Legal Pluralism Offer an Alternative?

Gunther Teubner, wrestling with the problem of identifying law in 21<sup>st</sup> century practices called *lex mercatoria* or the law of cyberspace, produces a concept of law that is more radically unmoored from the state.<sup>82</sup> However, the test of validity he proposes for this kind of governance is simply one of social coding: legal pluralism is “a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.” This is a formal view, that has the great merit of not reducing law merely to function (I return to this issue below). As he points out, law cannot simply be any arrangement of norms that perform such functions as social control, conflict resolution, coordination of behavior, shaping expectations, accumulation of power, private regulation, or disciplining and punishing bodies and souls. However, rejection of the relevance of such functional criteria limits the bases on which any content criteria for valid law might be generated. This is a major problem in the absence of any system of authoritative sources, an absence that is probably unavoidable given his assumption of pluralism of normative discourse and networks. Teubner recognizes that the ability of diffuse global governance sub-systems to identify legal norms, or authoritative deciders, is weak. His idea is that such norms emerge in relatively autonomous cross-border social sub-systems, and are in effect self-validated through practices in these sub-systems that stretch the law over time, operate internal hierarchies, and externalize from the parties to arbitration bodies, professional and business associations, etc.

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<sup>82</sup> Gunther Teubner, *Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?*, in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization* (2004), pp. 71-87; Teubner (ed.), *Global Law Without a State* (1997).

Teubner's account of extra-civil law has not overcome the basic problems of system and proof faced by theorists of international law from Grotius onward. Teubner tries to deal with the problem through anti-foundationalist analysis of discourses and social practices. Teubner's strategy is to shift practice out of domains of morality, or ordinary politics, and into sub-specialized communities of interest and expertise that are barely accessible to civil society or even to most of the educated elite. I do not accept this as a normatively defensible strategy for international law under modern democratic conditions. Instead, I believe it is normatively important to emphasise and build the (tempered) requirements of publicness in law, and I argue that the adoption of an inter-public approach to international law provides the conditions for this to be effectively pursued.

#### **IV. What About Democracy?**

The idea that publicness is necessary to international law and to law in general is not in itself democratic, but it raises the question whether someone normatively committed to this quality of publicness should necessarily be interested in giving a normative priority in international law to democracy. The idea that international law has, and should have, inter-public features may well seem also to be a waypoint on the path leading to a commitment to democracy in international law. The possibility that these ideas of publicness in law and inter-public international law aggregate into a democratic commitment raises many challenges I cannot explore here. But several basic problems about the relations between these ideas and democracy should be noted.

The incentives for someone whose highest priority is assuring the flourishing of her own national democracy will not necessarily lead her to support building and maintaining other robust and independent national democracies. The usual view is that each democracy is better off if there are more other democracies, because of the reduced risk of aggressive war between democracies, and because of democratic contagion and inter-democratic buttressing. But these gains may be outweighed by the realpolitik gains of having a pliant leadership installed in other countries of importance (for example, a

dependent dictator may do a much better job of supplying oil abroad than does a precarious new democracy.)<sup>83</sup> To have the government of a foreign state on the payroll of one's own state dramatically changes the structure of relations with it from the normal posture of international relations, particularly between states with sharply diverging security and resource interests.<sup>84</sup> These gains from pliant leadership may also filter into the political structure of the democracy, enabling its politicians to deliver more benefits to the constituencies to whom they are accountable. Thus in powerful democratic states, in particular, it cannot be taken for granted that pro-democratic commitments nationally translate into genuinely pro-democratic commitments with regard to all other countries. If this is correct, it is to be expected that democratic leaders involved in making international law will vary in the degree to which they seek to make international law genuinely pro-democratic. Those leaders who have been elected by democratic processes in fragile democracies are likely to try to use international law and institutions to lock in their current democratic institutions and raise the costs for coup plotters or foreign invaders.<sup>85</sup> Leaders of strong states with well-entrenched democracies will seek an international law that is not incompatible with their own national systems and those of their allies, and are very likely to favor an international law that advocates electoral processes as a means of legitimating fragile governments elsewhere which they have helped to constitute. But they are also likely to want international law to allow some play for pursuit of their political interests while impeding pursuit of the conflicting political interests of others.

If those committed to national democracy in the national society cannot uniformly be relied upon to seek to promote genuine democracy in all other countries, or to favor an international law system which gives high priority to this, can they nevertheless be expected to favor democratic-type mechanisms and principles in transnational or inter-governmental governance? (I use the phrase 'democratic-type mechanisms' here because I do not think there is any realistic scheme for international democracy on a global scale

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<sup>83</sup> Bruce Bueno de Mesquita et al, *The Logic of Political Survival* (2003).

<sup>84</sup> Stephen Krasner, *Sovereignty: Organized Hypocrisy* (1999).

<sup>85</sup> Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization* 54 (2000), 217-52.

that is remotely comparable to the idea of democracy as understood nationally. So as a practical matter it is necessary to consider not an international analog of national democracy, but the application in international governance of some of the mechanisms and principles which currently help in the realization and operation of democracy nationally.) The starting point is that those who are committed to their own national democracy are right to see that globalization is potentially a threat to the realization of this commitment in its current form. It is true that globalization is in many respects operating to empower the state, and to increase aggregate wealth and welfare even if heightening intra-state inequalities as well as global inequality. But it remains the case that the people of state X are increasingly affected by, but unable to influence, decisions by policymakers of state Y or of intergovernmental or transnational networks: their votes do not elect these policymakers, their legislature often cannot legislate over them, their courts usually cannot judicially review them, and their power of the purse is seldom effectively exercisable to control them.<sup>86</sup> Given that isolationism is impractical or impossibly costly for most, the obvious response is to build stronger non-national systems of accountability in global governance, and to strengthen participation rules within transnational bodies. Paradoxically, in transnational governance this response is likely to intensify a particular kind of rule by technocratic experts, buttressed by other experts financed by industry or a few sophisticated NGOs with stakes in the issue—experts who are subject to forms of accountability related to professional reputation or to institutional financing, but who are largely beyond the reach of any general democratic politics. In so far as the oversight and checking of expert rule nationally has been a sustaining task of judicial review, and of small local groups organizing politicians and news media to intervene on an issue, the transfer of governance processes beyond their reach, to transnational expert groups, makes it more difficult for such vibrant national systems to thrive.<sup>87</sup> This may be a double loss—less and less governance is within

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<sup>86</sup> Martin Loughlin, 'The Impact of Globalization on the Grammar of Public Law', paper presented at NYU-Oxford Workshop on Global Administrative Law, October 2004.

<sup>87</sup> This point has been incisively made in the work of Martin Shapiro. See e.g. Shapiro, "'Deliberative', 'Independent' Technocracy v. Democratic Politics: Will the Global Echo the EU?," IILJ Working Paper 2004/5 ([www.iilj.org](http://www.iilj.org)). See also Janet McLean, 'Divergent Legal Conceptions of the State: Implications for Global Administrative Law', IILJ Working Paper 2005/2 ([www.iilj.org](http://www.iilj.org)).

democratic control, and the performative civic experience of enacting democracy may be felt less widely if such institutions wilt from diminished significance.

So while those whose highest normative priority is national democracy may also be unreserved advocates of an international law system that promotes democracy elsewhere, and that builds democratic-type mechanisms and principles in international governance, there are strong reasons why these agendas do not uniformly march together. Therefore, I do not think the inquiry into the value of the quality of 'publicness' in international law can have as its normative starting point the commitment to national democracy. The Habermasians go along with all of this, but then assert that it is now wrong to have as one's highest normative priority the maintenance of national democracy, because we now live in the era of the post-national constellation, and democratic normative projects must address this in framing ideas of international law. There is much to sympathize with in this approach. But with regard to the subject of the present paper, my view is that, since I do not think there is any imminent prospect of a true international democracy (in global terms, I leave aside the EU and any similar regional projects), I do not see the inquiry into the quality of publicness in international law as being in itself part of the quest for a democratic jurisprudence, even though the agendas overlap.

If cosmopolitan democracy is not presently viable, what of the traditional attraction of the current states system, namely that it is possible, and indeed normal, for the states all to assemble and deliberate? Assemblies continue to be held regularly among all of the states of the world (in the UN General Assembly, or in the vast range of conferences on great issues such as environment, development, habitat, equality of women, etc), or all of the states interested in a particular topic (the diplomatic conference to draft and debate the Statute of the International Criminal Court, for instance) or which have agreed on a framework instrument for it (the Conferences of the Parties under many major treaties). The more the states are understood as primordial actors, rather than merely functional institutions among many others, the more it is possible to sustain the image of the assembly as one of primal participation rather than legislative representation. But once

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the state ceases to be coherently univocal, and once states cease to be monopolists, the image of the Athenian assembly breaks down. This breakdown is by no means complete—but the topics in which it has occurred least, such as military security, are also those in which the assemblies have been least effective. In fields where the assemblies might work well, they cannot simply be redefined as representative legislatures, as they do not include all of the key actors and cannot generally assume the exclusive or preemptive hierarchical competence in the international lawmaking process that national legislatures typically claim.

The considerations just mentioned lead me to bracket the possibilities that a requirement of publicness in international law, or an inter-public approach to international law, or the two in combination, are intrinsically democratic. Democracy is an important aspiration, but I myself am only able to formulate the analytic implications of the two ideas discussed here much more cautiously.

## **V. Conclusion: Inter-Public International Law as Pluralism-in-Unity**

The approach to international law outlined in this paper, if coherent, holds at least three conceptual attractions. First, it provides a structure for theorizing the pursuit and actualization through law of distinctly public values, responsibility for which falls on the society and its public actors rather than on individual law-subjects. Second, it provides one of the elements needed in the important theoretical enterprise of distinguishing law from the morass of approaches to governance into which it threatens to disappear. Finally, and perhaps most importantly, it provides an organized way to connect law to democratic state politics and to the politics of governance institutions other than states.

The argument of this paper represents an aspiration for international law as a kind of pluralism-in-unity. The argument for a requirement of publicness provides a basis for an international law that accommodates separate publics and their values but within the unity of a solidarism of public values; in so doing it overcomes the voluntarist

contractualism that informs an international law based on bilaterality alone. The argument for an inter-public conception of international law, with multiple sites that are separately constituted but normatively linked and with some inter-site accountability, makes space for a practical and institutional pluralism within a shared global project. These arguments come together to build an international law that makes space for working democracy, but is not in itself democratic—rather, it is an international law of engaged pluralism, unified by a shared, if modest, requirement of publicness in international law.