

MAKING TRANSNATIONAL
LAW WORK IN THE GLOBAL
ECONOMY

Essays in Honour of Detlev Vagts

Edited by
PIETER H. F. BEKKER,
RUDOLF DOLZER
and
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Introduction: a *Festschrift* to celebrate Detlev Vagts' contributions to transnational law 1

PIETER H. F. BEKKER, RUDOLF DOLZER AND
MICHAEL WAIBEL

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Transnational law comprises constitutional, administrative, criminal and quasi-private law

ANNE PETERS

Introduction: transnational law oversteps traditional categories

In their book *Transnational Legal Problems*, first published in 1968, Detlev Vagts and Henry Steiner espoused Philip Jessup's term 'transnational law' as 'more than congenial' to them.¹ 'Transnational law' was meant by Jessup 'to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories'.² In their seminal book, Steiner and Vagts sought to give principal attention to problems that were 'relevant not only to governments but also to the private participants – individual or corporate – in transnational life'.³ They defied 'rigid compartments', and instead dealt with all kinds of legal issues, including foreign investment and multinational enterprises (MNEs), 'on a spectrum between the extremes of "national" and "international" law, or on one between "private" and "public" law'.⁴

With that approach, Detlev Vagts contributed to overcoming the public-private split in international law. That catchword denotes the distinction between a public and a private realm of life, and goes hand in hand with the distinction between State and society, or between State and market. The blurring of these spheres seems particularly obvious with regard to economic law, and has been reinforced by the phenomenon which became generally known as globalisation in the 1990s. But although the erosion of the public-private split can usefully be captured with the

¹ H. J. Steiner and D. F. Vagts, *Transnational Legal Problems*, 2nd edn. (Westbury, NY: The Foundation Press, 1976), xv.

² P. C. Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956), 2.

³ Steiner and Vagts, *Transnational Legal Problems*, *supra* n. 1, xvi. ⁴ *Ibid.*, xvii.

notion 'transnational', conceptual ambiguities and potential misunderstandings with regard to the key terms remain. After describing traditional international law as private law 'writ large', this chapter addresses these ambiguities. The chapter then argues – and this its thesis – that international (or transnational or global) law has started to go through a process of *structural* differentiation which complements the differentiation along issue-areas. It concludes by discussing the problems and merits of the suggested new structural order of international law.

The old international law as private law 'writ large'

Traditional international law (being mainly interstate law) has long been conceived as 'private law writ large'.⁵ Hersch Lauterpacht famously stated that 'formally, international public law belongs to the *genus* private law'.⁶ The roots of this conception lie in the infancy of the discipline of *ius naturae et gentium*, where States were viewed as analogous to human beings in the State of nature.⁷ *Ius gentium* was the law of

⁵ T. Holland, *Studies in International Law* (Oxford: Clarendon, 1898), 152. Montesquieu described international law as 'le droit civil de l'univers dans le sens que chaque peuple est un citoyen'. (Charles de Secondat Montesquieu, *De l'esprit des lois* (Geneva: Barrillot & Fils, 1748), livre vingt-sixième. Des lois dans le rapport qu'elles doivent avoir avec l'ordre des choses sur lesquelles elles statuent; chapitre premier – idée de ce livre).

⁶ H. Lauterpacht, *Private Law Sources and Analogies in International Law* (London: Longmans, Green & Co, 1927), 81.

⁷ See on the analogy between States and individuals as one of the most decisive features of the teachings of Hugo Grotius, seminally, H. Lauterpacht, 'The Grotian Tradition of International Law', first published in *BYBIL*, 23 (1946), 1–53, here as published in E. Lauterpacht (ed.), *International Law. Being the Collected Papers of Hersch Lauterpacht*, vol. 2 (Cambridge University Press, 1970–8), 307–65, e.g. 336. See, for a nuanced treatment, C. Wolff, *Ius Gentium Methodo Scientifica pertractatum*, vol. II, trans. J. H. Drake (Frankfurt, 1764), in J. B. Scott (ed.), *The Classics of International Law* (Oxford: Clarendon, 1934), preface (p. 5 of the translation) and §§2–3 (9); E. De Vattel, *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*, vol. I (London, 1758), in J. B. Scott (ed.), *The Classics of International Law, supra, passim* (e.g. préliminaires, para. 18; book II, chap. III (285); J.-J. Rousseau, *Du contrat social* (Paris: Garnier, 1954 (orig. 1762)), livre I, chap. VII (245): 'à l'égard de l'étranger, il [the state] devient un être simple, un individu.' Draft of *Abbé Grégoire* for a declaration of the rights of peoples of 23 April 1793: '2. Les peuples sont respectivement indépendants et souverains, quel que soit le nombre d'individus qui les composent et l'étendue du territoire qu'ils occupent. Cette souveraineté est inaliénable. 3. Un peuple doit agir à l'égard des autres comme il désire qu'on agisse à son égard; ce qu'un homme doit à un homme, un peuple le doit aux autres', in W. G. Grewe (ed.), *Fontes Historiae Iuris Gentium. Sources Relating to the History of the Law of Nations*, Bd. 2 (Berlin: de Gruyter, 1988), 660 (emphasis added).

nature, applied to States. The personification of the State through the monarch, and the romantic view of States as living organisms, added underpinnings to this picture of the State as a super-person.

The roots of sovereignty in the institution of property reflect another strand of 'privatism'. In the feudal system preceding the emergence of the State as an institution, the Lord's *dominium* over the land (and by extension over its inhabitants) had been conceived as private property.⁸ Only Hugo Grotius and contemporaries re-discovered the ancient Roman law distinction between *dominium* (the power over things and unfree persons) and *imperium* (the more limited and what we would now call 'political' power of magistrates over persons), and began to analyse the State's authority as *imperium* rather than *dominium*.⁹ But even in 1867, Carl Victor Fricker found it necessary to discuss at length and to combat the idea of territory as the State's property, because 'doubtlessly the private law view has not yet been overcome in this context'.¹⁰

Moreover, international law has a horizontal structure which corresponds to the ideal-typical private law-like structure. Because States as the principal international legal subjects are equally sovereign, they must be imagined as sitting on a horizontal plane without any hierarchy among them. This image is aptly captured in the old-fashioned German term '*genossenschaftliches Recht*' for international law.¹¹

In private law, the typical form of legal interaction is the 'horizontal' conclusion of contracts as opposed to the 'top-down' enactment of laws. International treaties are in many ways analogous to private law contracts.¹² Along that line, the WTO Appellate Body described the WTO Agreement of 1994 as follows: "The WTO Agreement is a treaty – the

⁸ F. Kratochwil, 'Sovereignty as *Dominium*. Is there a Right of Humanitarian Intervention?', in M. Mastanduno and G.M. Lyons (eds.), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD and London: Johns Hopkins University Press, 1995), 21–42, esp. 25–33. Cf. also N. Jansen and R. Michaels, 'Private Law and the State', *RabelsZ*, 71 (2007), 345–97, repr. in N. Jansen and R. Michaels (eds.), *Beyond the State. Rethinking Private Law* (Tübingen: Mohr Siebeck, 2008), 15–67, 60.

⁹ H. Grotius, *De Jure Belli ac Pacis libri Tres*, chap. III, sec. IV, vol. II, trans. F. W. Kesley et al. (Oxford: Clarendon, London: Humphrey Milford, 1925).

¹⁰ C. V. Fricker, *Gebiet und Gebietshoheit, Anhang. Vom Staatsgebiet* (Tübingen: Laupp, 1901 (orig. 1867)), 100–12, quote on 100, trans. by the author.

¹¹ F. Berber, *Lehrbuch des Völkerrechts, I. Band, Allgemeines Friedensrecht*, 2nd edn. (Munich: Beck, 1975), 16–19.

¹² This analogy was notably exploited in the heyday of German private law scholarship in the second half of the nineteenth century. See C. F. Gerber, *Über öffentliche Rechte* (Tübingen: Laupp & Siebeck, 1852), 40: 'With regard to inter-state treaties, the legal form is private law, despite the political contents. The various contracting States oppose

international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitment they have made in the WTO Agreement.¹³ Also the 1969 Vienna Convention on the Law of Treaties (VCLT) draws heavily on legal institutions ultimately derived from (Roman) private law, such as full powers, voidability, or denunciation. Before international law prohibited the use of force, the possibility of pressuring another State into concluding an international treaty under threat or use of military force was the most important difference compared to private contracts, consent to which is vitiated by duress.¹⁴ This crucial difference has been tempered by the VCLT provision that a treaty is void if it has been procured by the threat or use of military force (Art. 52 VCLT), but has not fully disappeared. There is still no prohibition of duress against States in all forms (beyond the threat of military force). The exercise of economic and political pressure in order to force a treaty upon a weaker State is still a common practice in international relations.

The best-known examples are the Bilateral Immunity Agreements (BIAs) concluded by the United States with some 100 mostly indigent countries. These agreements seek to shield US citizens from the jurisdiction of the International Criminal Court (ICC) by providing that US government officials, military and other personnel, and US nationals, would not be transferred to the ICC by the contracting party. Countries were pressured into concluding the agreements by the threat of reduction of US Military Education and Training and Military Financing. Numerous States lost all US aid in the fiscal years 2004 and 2005 after refusing to

each other as right-holding single individuals. In the law of nations, a State is treated in the same way as an individual, as in private law the human being' (trans. by the author).

¹³ Cf. WTO Appellate Body, *Japan – Taxes on Alcoholic Beverages* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 15.

¹⁴ H. Kelsen, *Principles of International Law*, 2nd edn. (New York: Holt, 1962), 464. See for the interwar period under the reign of the League of Nations' limitations on resort to war and the contractual prohibition of war by the 1928 Kellogg–Briand Pact, L. Oppenheim, *International Law*, 5th edn, vol. I (London: Longmans, Green & Co, 1937), 702–3 (\$499)). Here Oppenheim relates that prior international law 'disregarded the effect of coercion in the conclusion of a treaty imposed by the victor upon the vanquished States', and that for States not bound by the contractual instruments 'there is room for the continuance of the traditional rule disregarding the vitiating effect of physical coercion exercised against a State'.

sign such an agreement.¹⁵ US aid for States such as Benin and Lesotho was completely cut back, but was granted after these States signed the respective BIA.¹⁶ The exercise of economic pressure such as with regard to the conclusion of the BIAs does not render any treaty resulting from it void.¹⁷

The international law of State responsibility has also been characterised as private-law like.¹⁸ It serves to protect the rights of one State against infringements by others. So the concern of this body of rules is more the protection of 'subjective' individual rights and not of an 'objective' legality which would encapsulate a general public interest. In that respect, the law of international responsibility shares a dominant feature of private law, and is not like public law.

Publication or privatisation of international law?

Against the background of this traditional image of international law, two antagonistic legal trends can be discerned. On the one hand, international law is being publified, on the other hand, it seems to be moving ever more in the direction of private law.

Publification

Both the emergence of new public-law like features of the international legal order, and new readings of pre-existing structures have contributed to the perception of an ongoing publification of international law. And this publification is mostly welcomed as creating a *normativité renforcée* of that order.

One example for such a reconstruction is the feminist one. The feminist claim is that international law rests on and reproduces the dichotomy between the private and the public sphere because matters 'private' to States are considered to be within domestic jurisdiction, whereas matters of international 'public' concern are seen to be regulated by

¹⁵ Overall, the US policy resulted in cut-back of development aid of an estimated \$10 billion in 2005.

¹⁶ All information on the BIAs is available at www.iccnw.org/?mod=bia.

¹⁷ The 'Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties', Annex 1 of the Final Act of the Conference on the Law of Treaties (*ILM*, 8 (1969), 733) does not foresee the nullity of a treaty concluded under non-military coercion.

¹⁸ A. Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility', *Indiana Journal of Global Legal Studies*, 16 (2009), 535–63, 542–3.

international law.¹⁹ This approach actually reverses the traditional private law image of international law by proclaiming this body of law to be 'public' law *par excellence* and by questioning the distinction as such.

Beyond this reconstruction, a first tangible aspect of the publification of international law lies in the emergence and acknowledgement of hierarchy. The relations between international bodies (organisations, treaty bodies, agencies, courts, tribunals) and States are 'vertical' ones. These bodies are empowered to render reports, views, decisions and judgments which are in some instances legally binding, and in any case exert a serious compliance pull. Many of these legal texts are adopted in majoritarian proceedings and to that extent escape the consensual 'private law' paradigm. The novel types of international law-making, especially the practice of the global conferences of the 1990s, have therefore been characterised as 'law-making in the public interest'.²⁰

A second and related aspect is the acknowledgement of *ius cogens* norms. Orakhelashvili (among others) asserts that 'one of the effects of the introduction of preemptory norms in the international legal system is that it partly transforms international law – a horizontal and consensual legal order – into a vertical system of law'.²¹ Others, on the contrary, argue that *ius cogens* norms 'may not sweep everything away' and that these norms should not necessarily take formal precedence over other international rules, but should (only) function as interpretative guidelines.²² But both views accept *ius cogens* as an expression of underlying values, or an international *ordre public*.

A third strand of publification lies in the distinction between bilateral treaties (including multilateral treaties of a bilateral type, consisting of a bundle of bilateral obligations) and collective treaties which cannot be divided into bilateral obligations. Assuming such a distinction, only the truly bilateral treaties are analogous to (private law) contracts. In contrast, collective treaties, such as human rights treaties, are concluded in the pursuit of a collective interest which transcends the individual

¹⁹ H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law', *AJIL*, 85 (1991), 613–45, 625.

²⁰ J. Delbrück (ed.), *New Trends in International Lawmaking – International 'Legislation', The Public Interest* (Berlin: Duncker & Humblot, 1997). See also S. Peter, *The Idea of Public Interest in International Law* (PhD, Basel, 2009).

²¹ A. Orakhelashvili, *Preemptory Norms in International Law* (Oxford University Press, 2006), 9. In that sense see also D. Shelton, 'Normative Hierarchy in International Law', *AJIL*, 100 (2006), 291–323.

²² A. Bianchi, 'Human Rights and the Magic of Jus Cogens', *EJIL*, 19 (2008), 491–508, 503–5.

interests of the parties. They are therefore comparable to constitutions (public law) rather than to contracts (private law).

A fourth strand of 'publification' (or even 'constitutionalisation') concerns the traditional 'private-like' bilateral law of international responsibility as described above. This body of law has been publified most of all by eliminating the requirement of a legal injury as a condition for responsibility. According to the 2001 Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts,²³ international State responsibility can arise regardless of legal injury of any particular State, but out of 'objective' breaches of international law. Moreover, the acknowledgement of the rights of all States to invoke responsibility in case of breaches of norms protecting the collective interest (Art. 42 lit. b) and Art. 48(1) lit. b) ILC Articles), and the imposition of obligations on all States to respond to a serious breach of peremptory norms (Art. 41 ILC Articles) have added a stronger 'public law' dimension to the law of responsibility.²⁴

Finally, the work of international organisations and courts has been opened for scrutiny by the public, mostly in response to civil society's pressure for transparency. Publicity is being achieved through the publication of working documents and through the admission of the interested public to certain meetings and court sessions. To a limited extent, the traditionally secret mode of negotiating diplomacy has been substituted by an open mode of deliberative governance. Overall, international law is becoming 'public' law in the dual sense of the word: a law not only in the global public interest, but also open to the public.

Privatisation

The contrary trend is the privatisation of international law. But the term 'privatisation' is in the international sphere as imprecise as in national law. It is used to designate four quite different things.

First, privatisation means the resort to private law instruments by public authorities, such as entering into contracts with citizens, creating corporations in order to deliver services and so on. In this weak variant of privatisation, public authorities remain public in substance, and merely rely on or make use of a private form.

²³ UN Doc. A/63/10.

²⁴ Nollkaemper, 'International Responsibility', *supra* n. 18, 545–9 (qualifying this evolution even as 'constitutionalization').

Second, 'privatisation' is used as a short-hand for the increase of (political) power of private actors. In that sense, globalisation is a gigantic privatisation, because it shifts power from States to markets. This power shift is most obvious where private actors take over formerly public functions, such as patrolling streets, controlling traffic, or running jails. This variant of privatisation is deep, because here the State and public authorities withdraw from activities that have traditionally been regarded as incumbent on the State. More and more often, privatisation in this sense is at the same time a transnational phenomenon, transgressing the boundaries between domestic and international. The most salient example are the private military and security contractors which support national armies abroad.²⁵

On the international level, a specific variant of the rise to power of non-State actors is their recognition as at least partial subjects of international law. This means that these actors become the direct addressees and beneficiaries of international rules, ranging from human rights to investment protection.

Of course the public-private categories are fluid here as well. For instance, international investment law displays public law and private law features. An element of privatisation is present in the conclusion of so-called 'State contracts' between private investors and States.²⁶ These contracts are to some extent denationalised through their reference to and incorporation of international legal principles, and by the fact that they are enforceable by private actors before international investment tribunals. But investment arbitration is distinct from traditional commercial (private) arbitration, because the core of investment disputes are the State's powers to regulate investment, which the State claims to exercise in the national public interest.²⁷ The International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) also differs from commercial arbitration, where two private parties agree freely on arbitrators because, in ICISD, the

²⁵ See on this issue the international code regulating the activities of private military and security companies, the Montreux Document of 17 September 2008, Annex to UN Doc. A/63/467-S/2008/636 (2008). See from the literature P. W. Singer, *Corporate Warriors. The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003).

²⁶ Steiner and Vagts, *Transnational Legal Problems*, *supra* n. 1, 495–513; U. Kischel, *State Contracts* (Stuttgart: Boorberg, 1992).

²⁷ G. van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), esp. 95–6.

State's consent is prospective, and because the arbitration can be triggered only by the investor.

Third, privatisation also can mean that private actors increasingly enact law in the form of general rules with effect for third parties.²⁸ Law-making in that sense is distinct from concluding contracts by which the contracting parties only bind themselves. The creation of such (general) norms is arguably a typically public function which from the traditional perspective is reserved for public authorities, precisely because it has effects on bystanders.

On the international plane, that third type of privatisation means that non-State actors participate in the creation of international law in various forms. Non-governmental organisations (NGOs) are observers and partly active participants in international conferences, organisations, and bodies, and thereby become, at least informally, co-law-makers. Transnational business actors adopt corporate codes of conduct. Representatives of entire industries elaborate technical, financial and book-keeping standards, often in collaboration with civil society representatives and governments.

Fourth, the term 'privatisation' is sometimes associated with the question whether a legal order contains different sub-fields called 'public law' and 'private law'. In those domestic orders which acknowledge the distinction, the rules called 'private law' are State-made, and come in the form of codes such as the French *Code Civil* or the German *Bürgerliches Gesetzbuch*. These private law codes provide the framework for private actors to conclude contracts, and thereby allow them to regulate their own affairs in an autonomous fashion. In contrast, private law generally does not allow those private actors to impose standards on others in the style of a legislator. Private autonomy, which is a fundamental element of the citizens' freedom, legitimises private contracting.

On the international plane, privatisation is mostly of the second and third type. The analytical questions arising here are which legal status private (economic or civil society) actors have and their effects on law-making. The normative question is whether they are legitimately entitled to make and to enforce international law. From the traditional

²⁸ For an interdisciplinary study on this issue, see A. Peters, L. Koechlin, T. Förster and G. Fenner Zinkernagel (eds.), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009); from a private law perspective, see G. Bachmann, *Grundlagen ziviler Regelungsetzung* (Tübingen: Mohr Siebeck, 2006).

perspective, private rule-making and enforcement can only be explained and justified as delegation by the State, whereas a legal pluralist approach considers non-State actors as original law-producers.

New structures within international law

It is the thesis of this chapter that international (or transnational or global) law has started to go through a process of *structural* differentiation. Structural as opposed to issue-specific differentiation means the emergence of transnational constitutional, administrative, private and criminal law.

The acknowledgement of these four structural branches provides a useful grid for refining the traditional, issue area-wise description of international law, ranging from the law of the sea and diplomatic relations over human rights law to international environmental and climate law. These issue-areas have been much expanding, have developed at unequal speed and have shaped different legal institutions. These dynamics, taken together with the establishment of specialised courts and tribunals, have even given rise to the fear of a fragmentation of international law²⁹ – a fear which might be alleviated by the insight that there is some order in the apparent chaos after all.

Constitutional law

Since the beginning of the twentieth century, scholars have suggested that there is something like an international constitution.³⁰ Seen from a less static and more dynamic perspective, one might say that, within international law, a special category of constitutional law is emerging.³¹ However, it is difficult to exactly delineate and define this evolving special category.

²⁹ Raising the spectre of fragmentation, see G. Guillaume, 'The Future of International Judicial Institutions', *ICLQ*, 44 (1995), 848–62; but see for an optimistic assessment R. Higgins, 'A Babel of Judicial Voices', *ICLQ*, 55 (2006), 791–805.

³⁰ A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: Julius Springer, 1926), preface; G. Scelle, *Précis de droit des gens. Principes et systématique, Deuxième Partie: Droit constitutionnel international* (Paris: Recueil Sirey, 1934), esp. 4, 9–11; H. Waldock, 'General Course on Public International Law', *RdC*, 106 (1962–II), 5, 7.

³¹ J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009).

Relying on the classic notion of the State constitution as formulated by Emer de Vattel,³² I submit that international constitutional law is a sub-set of fundamental international rules and principles which regulate the political activity and relationships in the global polity. Because of their material importance, these norms deserve the label 'constitutional'. They are not codified in one single document, but are dispersed in various treaties, 'soft' law texts and customary law. In particular, the UN Charter is not the World Constitution. The absence of a constitutional document means that international constitutional law cannot be easily identified through formal criteria. The distinction between constitutional law and other international law therefore hinges merely on the rules' substance and importance and is necessarily fuzzy. But this problem is well known from the British and other unwritten State constitutions.

Whether the international norms (rules and principles) of potential constitutional quality are superior to ordinary international norms, whether they are created by States or by other actors as well, whether they are always 'hard' legal norms, whether they embody a specific set of material principles, and whether they are 'constitutional' only to the extent that they are enforceable by some form of judicial review, warrants further reflection and debate.

Administrative law

Recent scholarship has identified a special branch of international (or transnational, or global) administrative law.³³ This branch of law has been defined 'as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the

³² '[L]e règlement fondamental qui détermine la manière dont l'Autorité Publique doit être exercée est ce qui forme la Constitution de l'Etat.' E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires de Nations et des Souverains* (London, 1758, repr. Washington, DC: Carnegie Institution, 1916), livre I, chap. III, §27 (in vol. 3, Engl. trans. p. 17). However, a global or transnational constitution cannot be gained by simply zoning up a typical State constitution. We must be aware of the problems of translation. This is one reason why the term 'constitutional law' is preferable to 'constitution'.

³³ See C. Tietje, *Internationalisiertes Verwaltungshandeln* (Berlin: Duncker & Humblot, 2001); S. Cassese, 'Administrative Law without the State? The Challenge of Global Regulation', *New York University Journal of International Law and Politics*, 37 (2005), 663–94; B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, 69 (2005), 15–61; E. Schmidt-Aßmann, 'Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen', *Der Staat*, 45 (2006), 315–38.

accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make'.³⁴ Transnational administrative law is said to resemble domestic administrative law to the extent that there are organisations vested with authoritative powers and adopting administrative decisions, and that there are judges empowered to settle disputes.³⁵

But even the proponents of transnational administrative law do not draw a watertight line between the transnational public and the private realm. Sabino Cassese has particularly emphasised that the 'line between public and private is hardly clear at the global level'.³⁶ And Benedict Kingsbury and his collaborators count among the 'global administrative bodies' also 'hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance'.³⁷

Moreover, core principles such as due process, proportionality, legality and transparency have a dual administrative and constitutional nature. Any administration should also generally be informed by constitutional values. It is therefore difficult to sharply distinguish global administrative law from global constitutional law.

Criminal law

International (or transnational) criminal law is concerned with the criminal responsibility of individuals flowing from international custom or treaty law. International conventions and even custom have defined certain crimes for centuries, but have remained more or less virtual and inconsequential until recently. Only with the establishment of international criminal tribunals and the International Criminal Court (ICC), and through more active prosecution by domestic courts, has international criminal law become a specific structural branch of international law. This branch does not exist in clinical isolation but depends on the sources and processes of general international law, and on the

³⁴ Kingsbury, Krisch and Stewart, 'Global Administrative Law', *supra* n. 33, 17. The authors define as 'global administrative action' rule-making, adjudication, and decision-making that is neither treaty-making nor simple dispute settlement.

³⁵ Cassese, 'Administrative Law without the State?', *supra* n. 33, 668. ³⁶ *Ibid.*, 669.

³⁷ Kingsbury, Krisch and Stewart, 'Global Administrative Law', *supra* n. 33, 17.

domestic criminal law of States.³⁸ In addition, international criminal law simultaneously derives from and continuously draws upon both international humanitarian law (IHL) and human rights law. Moreover, the enforcement of international criminal law depends first of all on domestic courts, acting as agents of the international community (the principle of complementarity). Therefore, most customary rules of transnational criminal law have primarily evolved from municipal case-law relating to international crimes, chiefly war crimes. Here the courts have derived numerous elements, notably the mental components of crimes, from the criminal laws of the nation-States. Antonio Cassese has therefore concluded that international criminal law 'is an essentially hybrid branch of law: it is public international law impregnated with notions, principles, and legal constructs derived from national criminal law, IHL as well as human rights law'.³⁹

The emergence of international criminal law is another aspect of the publication of the old interstate law not mentioned so far. Formally, the establishment of criminal courts and tribunals introduces a strong element of hierarchy into international law. In substance, criminal law foresees the prosecution of crimes by a public prosecutor in the public interest, and punishment in order to achieve certain social objectives such as the prevention of crimes and the re-integration of perpetrators into society.

Antonio Cassese even perceives a major tension between traditional international law (what I call here transnational quasi-private law) and international criminal law, resulting from conflicting philosophies.⁴⁰ While interstate law is primarily concerned with reconciling the conflicting entities of sovereign entities, criminal law aims to punish individuals transgressing legal standards while at the same time safeguarding the rights of accused or suspect persons from arbitrary prosecution and punishment. In order to fulfil its purpose, interstate law needs quite a lot of flexibility, whereas criminal law, quite to the contrary, requires very detailed, clear and unambiguous rules, given that the fundamental rights of suspects are at stake. Consequently, the inherent requirements underlying transnational criminal law collide with the traditional characteristics of international law in its old form of 'private law writ large'.

³⁸ I. Bantekas and S. Nash, *International Criminal Law*, 3rd edn. (London: Routledge-Cavendish, 2007), 1–2. See on the 'transnational reach of criminal legislation', Steiner and Vagts, *Transnational Legal Problems*, *supra* n. 1, 854–931.

³⁹ A. Cassese, *International Criminal Law*, 2nd edn. (Oxford University Press, 2008), 7.

⁴⁰ *Ibid.*, 8–9.

The remainder of international quasi-private law

Which areas of international law remain private law-like? These are all fields where international law regulates interstate relations, such as the international rules of boundaries and on territorial status, the international law of treaties, and most of the international law of State responsibility. Along that line, Joseph Weiler has characterised bilateral treaties – for example, the classic friendship and navigation treaties – as 'private bilateral arrangements'.⁴¹

However, the private law character even of bilateral treaties is ambiguous. Friendship and navigation treaties, free trade area agreements, or bilateral investment treaties, are 'microscopically ... indeed, bilateral private contracts among States. But telescopically, taken in aggregate they define a multilateral regime'.⁴²

Crucially, is the private law analogy in interstate relations not fundamentally flawed if we take into account that, ideal-typically, private law intends to further private autonomy, whereas public law is intended to serve the general welfare? The flaw arises from the fact that States are – contrary to the individualistic metaphor pervading the discipline of international law – not individuals. States are – unlike natural persons – no end in themselves. They do not enjoy private autonomy in order to further their personal interests, but are moral persons established to facilitate and further the well-being of human beings. So States should act as representatives of their people, and are to that extent not 'private' actors.

However, this liberal conception of the State is not (yet) the one underlying international law. Although international organisations such as the United Nations, the OSCE and the OAS currently pursue a clear democratisation policy, non-democratic States are still accepted as international legal subjects, as treaty partners and as bearers of international legal responsibility.⁴³ The private law analogy therefore still corresponds to the structure of international law as it stands in all sub-fields where States act as unitary actors, meet on an equal footing, and are subjects of attribution, and where their rights and interests as moral persons are at stake.

⁴¹ J. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', *ZaöRV*, 64 (2004), 547–62, 553, 554 (emphasis added).

⁴² *Ibid.*, 554. See also S. W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

⁴³ Cf. J. d'Asprémont, *L'Etat non démocratique en droit international* (Paris: Pedone, 2008).

Critique of the new structural order

The re-ordering of international (or transnational) law into constitutional, administrative, criminal and quasi-private law faces objections. The first one is that the sub-division of the body of international law into constitutional, administrative, private and criminal is false, because international law is neither public nor private but 'simply "international"'.⁴⁴ Although there is merit in the warnings against false domestic analogies, this does not compel international lawyers to refrain from differentiations. The ongoing development and expansion of international law has transformed its rudimentary and oft-stated 'primitive' character. This development and refinement requires adequate conceptualisations. There is no need to invent new categories if existing ones help map the field. If the problem of translation is kept in mind, no harm is done.

The second important objection is that the categories suggested here are historically and geographically contingent.⁴⁵ Most famously, the Common law has been very reluctant to espouse a public law – private law distinction. The notion of English public law is specially contested, as if there were something un-English about public law.⁴⁶ One historical explanation for this reluctance is that the reception (or rather re-invention) of the ancient Roman distinction between *ius publicum* and *ius privatum* had not taken place on the British Isles in the same way as it had on the European continent.⁴⁷ Second, Albert Dicey, in his influential constitutional treatise, opposed the idea of an English public law and somewhat overstated the difference between English (Common) law and the French *droit administratif*.⁴⁸

In that tradition, some administrative lawyers have argued against the need for a distinction between public and private law in the English legal

⁴⁴ A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', *EJIL*, 10 (1999), 425–34, 433.

⁴⁵ Seminally on the contingency of the public law–private law distinction, see M. Bullinger, *Öffentliches Recht und Privatrecht* (Stuttgart: Kohlhammer, 1968).

⁴⁶ M. Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law', in J.-B. Auby and M. Freedland (eds.), *La Distinction du droit public et du droit privé. Regards français et britanniques* (Paris: éditions Panthéon-Assas, 2004), 101–20, 103.

⁴⁷ See on this re-invention, M. Stolleis, 'Öffentliches Recht und Privatrecht im Prozeß der Entstehung des modernen Staates', in W. Hoffmann-Riehm and E. Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnung* (Baden-Baden: Nomos, 1996), 41–61, 45–51.

⁴⁸ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959; repr. Indianapolis, IN: Liberty Fund, 1982), chapter XII 'Rule of law compared with *droit administratif*', 213–73.

system.⁴⁹ In contrast, other English authors maintain and defend the distinction.⁵⁰ Given that controversy, it cannot be said that the distinction between private law and public law is unknown in the Common law in order to use this as an argument against the viability of the distinction on the international plane.

The third objection is that especially the distinction between administrative and private law is notoriously problematic because the employed criteria (such as public interest versus private interests, or hierarchy versus horizontality) do not give rise to unequivocal results. For instance, in probably all modern codifications of private law, many public interests are endorsed, ranging from the protection of consumer and tenants to antidiscrimination. And private international law, formally adopted and developed by national law-makers, has the (global) 'public' function of regulatory ordering by effecting a regulatory system of distributed 'peer governance', whose objective is to reduce conflicts.⁵¹ It is therefore unsurprising that some areas of domestic law – such as competition law, public procurement law, or intellectual property law – do not clearly fit into one of the categories, and are therefore treated either as a part of public law or as a part of private law in different jurisdictions.

A related aspect is that the current trends of liberalisation and privatisation mentioned above have further undermined the already fuzzy distinction between public and private law. Governments and bureaucracies increasingly make use of private law instruments and tools, ranging from new public management over benchmarking to auctions. All these considerations counsel against insisting on a clear-cut distinction between public and private law.

A fourth objection is that the erection of a new public–private split in transnational relations is backward-looking, runs counter to the modern trend and risks reduplicating artificial barriers that have already been overcome in domestic law. In that sense, the 'public/private classification'

⁴⁹ C. Harlow, 'Public and Private Law. Definition without Distinction', *Modern Law Review*, 43 (1980), 241–65. See further for an argument against the distinction between public and private law in English law, O. Dawn, *Common Values and the Public–Private Divide* (London: Butterworths, 1999). The author argues that both fields of law are about the control of power, are concerned to uphold authority and to protect the interests of good administration, and have to balance conflicting considerations (11). See also chapter 11 (248–66): 'There is no public–private divide.'

⁵⁰ Freedland, 'The Evolving Approach', *supra* n. 46, 115. Still, Freedland perceives an unduly deep split both at the practical or positive law and at the theoretical or doctrinal level.

⁵¹ A. Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009), esp. 299, 308.

has been condemned as being 'wholly irrelevant to the organization of modern society', and as 'nothing more than an attempt by the judiciary to shield from public criticism some highly executive-minded decisions'.⁵²

The final objection is the one to be expected by authors like Detlev Vagts, namely that the line between public and private law is especially fuzzy at the global level, and that this is exactly what the term 'transnational' seeks to signify.⁵³

However, as demonstrated on pp. 160–3, the so-called erosion of the public and the private sphere is a complex issue which encompasses very different strands, especially on the global plane. It was right and important to call into question the existence of a bright and clear distinction. Moreover, the lasting analytical contribution of the concept of transnational law has been that it encompasses all kinds of law *not made* by States, and that it shifts the focus from the creators of legal rules to those rules' functioning and real effects. But the ongoing process of sophistication of international law now requires a fresh look. Generally speaking, the public law – private law distinction has not proven epistemically worthless and normatively undesirable, and should not be abandoned lightly. The fundamental reason is that this distinction reflects the difference between *iustitia distributiva* (to be realised through distributive policies) and *iustitia compensativa* (as realised in the private sphere and through the market).⁵⁴ It is therefore unsurprising that, in structural terms, differences between both areas of law concerning the regulatory objectives, the structure of interests involved, the steering conceptions and steering modes, the sanctions and the culture of implementation do persist in important jurisdictions.⁵⁵ The conclusion is that it might be worth considering keeping both fields of law distinct while legal techniques should be employed to facilitate their adequate interaction

⁵² Harlow, 'Public and Private Law', *supra* n. 49, 256, 265.

⁵³ But note that the erosion of the public–private distinction is *not* mentioned as a characteristic feature of transnational economic law by C. Tietje and K. Nowrot, 'Laying Conceptual Ghosts of the Past to Rest. The Rise of Philip Jessup's "Transnational Law" in the Regulatory Governance of the International Economic System', in C. Tietje, A. Brouder and K. Nowrot (eds.), *Philip Jessup's Transnational Law Revisited. On the Occasion of the 50th Anniversary of its Publication* (Halle and Saale, Beiträge zum Transnationalen Wirtschaftsrecht 50, February 2006), 17–43, 28–9.

⁵⁴ Jansen and Michaels, 'Private Law and the State', *supra* n. 8, 62.

⁵⁵ See, for German law, W. Hoffmann-Riehm, 'Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen – Systematisierung und Entwicklungsperspektiven', in W. Hoffmann-Riehm and E. Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnung* (Baden-Baden: Nomos, 1996), 261–337.

and mutual complementation. I submit that this should be the research programme for international (or transnational) law as well.

Conclusion: towards a new structural order

What is the epistemological and practical use of introducing or transplanting the categories of constitutional, administrative and criminal law into the international sphere? First, the acknowledgement of different structural branches of transnational (or international) law helps to identify the appropriate types of legal instruments and institutions for the different branches. For instance, international criminal law requires a public prosecutor, and arguably international climate law, forming part of international administrative law, requires a similar institution. In contrast, the enforcement of a bilateral visa regime can be left to the involved States.

Second, it is in this perspective conceivable that different principles apply in the different structural branches. For example, formality is not important in quasi-private interstate relations. In contrast, international criminal law must observe strict legality and formality, whereas this is somewhat less important in international administrative law (although not entirely negligible, because formality safeguards the accountability of the international administrative bodies). For this reason, it would be important to qualify the freezing of assets of individuals on the basis of UN Security Council antiterrorism resolutions either as a measure of criminal law or as administrative action. Depending on that qualification, a different set of rights accrues to the affected individual, and the presumption of innocence applies, or does not.

The reconstruction proposed here implies that international constitutional law furnishes the overarching principles which should serve as a guideline for the interpretation of all other international rules. But it also provides an argument against the overconstitutionalisation of international law. It leads to the insight that not all fields of international law suffer from similar legitimacy deficits and that not all fields equally need democratisation.

Third, the structural ordering acknowledges that, although the human being is the ultimate subject of all law, including international law,⁵⁶ individual interests are not equally affected in all areas of international

⁵⁶ G. Scelle, *Précis de Droit des Gens, Principes et Systématique*, vol. I, Introduction, le milieu intersocial (Paris: Sirey, 1932), 42: 'Les individus seuls sont sujets de droit en droit international public.' See also H. Kelsen, 'Les Rapports de Système entre le Droit Interne

law and by all types of international and transnational governance. International law also protects and should protect the national interest of States (which act ideally, but not always in reality as representatives of their citizens). Finally, international law protects and should even more strongly protect the (global) public interest which cannot in all situations be simply deduced from the sum of individual well-being, but which necessarily transcends individual preferences to some extent.⁵⁷

This also means that sovereignty plays a different role depending on the structural branch of international law in question. In the private law-like areas, State sovereignty indeed plays a role akin to property.⁵⁸ Seen as analogous to private property, sovereignty allows States to exclude others from their territory, and to use and convey their territories (and those territories' inhabitants) at will. Sovereignty-as-property guarantees States a manoeuvring space and shields them against foreign interference. Crucially, sovereignty-as-property also shields the sovereign-owner from moral considerations, because a property right entitles the owner even to do immoral things, as long as she remains within her territorially limited domain. In contrast, in the more administrative law-like areas of transnational law, sovereignty must be conceived of as popular sovereignty, with the State acting as an agent or trustee. And this leads to the idea of sovereignty as engendering a responsibility to protect.

In the law of treaties, the distinction between private law-like treaties and public law-like treaties has important practical effects concerning the responses to breaches of treaties through adjudication or countermeasures.⁵⁹ One consequence is that with regard to multilateral treaties which only contain a bundle of parallel bilateral obligations (private law-like treaties), individual parties should be allowed to renegotiate their 'contract' as long as they do not affect the individual rights of other parties to that treaty. A defaulting State should be allowed to pay compensation instead of being forced to comply with the treaty if this engenders welfare

et le Droit International Public', *RdC*, 14 (1926/IV), 231–329, 281: 'L'idée qu'il y aurait entre l'État et les individus, et par suite d'État à État, des rapports qui ne seraient pas des rapports entre individus est une simple illusion, qui ne s'explique que par l'inadmissible hypostase de l'État en un surhomme.' J. L. Brierly, 'Règles Générales du Droit de la Paix', *RdC*, 58 (1936/IV), 5–237, 47: 'en dernière analyse, seuls les individus sont susceptibles d'être sujets de ce droit-là [i.e. international law].'

⁵⁷ This is the case notably with regard to the preservation of global commons, ranging from world peace over the climate and tropical forests to the humane genome.

⁵⁸ See the text accompanying nn. 8 and 9.

⁵⁹ For an excellent discussion, see J. Pauwelyn, 'A Typology of Multilateral Treaty Obligations. Are WTO Obligations Bilateral or Collective in Nature?', *EJIL*, 14 (2003), 907–52.

gains for the involved parties (the idea of an 'efficient breach'). In contrast, in the event of a breach of a genuinely collective (public law-like) treaty, a party breaching the contract should not be allowed to buy itself out of compliance through paying compensation, just as a perpetrator and a victim cannot settle on a crime because of the public interest in not having that breach or crime committed in the first place.

Overall, the account of emerging international constitutional, administrative, private and criminal law allows us to better understand the differences between some sub-areas, but also highlights commonalities between others. It helps to order the apparent chaos and thereby it is apt to alleviate the fear that the normative power of international law might be weakened by conflicting rules and contradictory judgments and decisions issued by the multiple international courts and bodies. The insights gained by the identification of different structural branches help us to appraise the current developments as normal and potentially even benign processes of differentiation rather than as malignant dispersion and as a source of conflict and confusion.

Most importantly, the reconstruction – or, rather, re-ordering – of international law suggested here enables legal analysts to resolve the current puzzle presented by the simultaneous existence of seemingly contradictory trends such as the erosion of sovereignty on the one hand *and* the unwavering importance of statehood on the other hand, and of 'privatisation' on the one side, *and* 'publicisation' on the other. These seemingly contradictory trends show a process of differentiation. The structural order proposed here might have some explanatory power and offers a normative guideline in that regard.