Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State (The Earl A. Snyder Lecture in International Law)

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Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State

Jost Delbrück*

Introduction: The Background

Today it is widely accepted that the international system is undergoing rather dramatic changes—changes that have a strong impact on the status and role of the state as the once-sole political entity vested with the power to exercise sovereign public authority (Hoheitsgewalt). This unique status of the state, characteristic of the so-called classical period of the international system, began to be modified in the era of the international organization of states that gradually overlaid the classical international system in the late nineteenth and twentieth centuries. State independence increasingly gave way to interdependence and institutionalized cooperation. Interestingly though, the growth in the number of universal and regional international organizations during the first half of the twentieth century was not seen as beginning a process of federalizing the international system. Under the influence of state sovereignty—the leading paradigm of the classical period—federalism was not a matter of international

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2. See Structural Changes, supra note 1, at 6.
concern, either in state practice or among international lawyers. We shall have to come back to this later.

Particularly after World War II, the picture began to change. The recognition of international organizations as derivative, limited subjects of international law was established. With their increasing expertise in dealing with matters related to the "production of public goods" in practically all fields of political, economic, social, and cultural life, a process of diversification of the entities exercising public authority began—although still on a very limited scale—but with some inkling of federalization. At the regional level, however, the founding of supranational organizations introduced a new quality in the diversification of entities exercising public authority. Around the European Communities, and in our days the European Union, an intense debate was and still is under way regarding the nature of supranational organizations. However, with the process of globalization, the diversification of entities exercising public authority has reached another dimension: Under the impact of globalization,

3. See Robert C. Lane, Federalism in the International Community, 2 Encyclopedia of Public International Law 375–78 (Rudolf Bernhardt ed., 1995); see also Hartwig Bühl, Föderalismus als internationales Ordnungsprinzip [Federalism as a Principle of International Order], in 21 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 1, at 3–15 (1964); see also Böhmer, supra note 1, at 32–35. Both authors observe that in the early times, the federal state was considered the only genuine federal entity, with confederations, constituted by still fully sovereign states, being only of a transitory nature.


5. Edward McWhinney, Federal Constitution-making for a Multinational World 112 (1966) ("What lessons have the theory and practice of 'classical' federalism to offer for what is perhaps the most striking aspect of international law and relations of the present era of change—the movement (whether on a substantially regional basis or whether more generally transcending geographical, even hemispheric limits) for political, military, economic integration and association along some sort of supranational lines?"); see Bühl, supra note 3, at 1–38.

6. The European Union/European Community (EU/EC) neither strictly fits the criteria of a federal state nor those of a confederation of sovereign states. It is a close association of states sui generis which, on the one hand, shows traits of a federal state in that it can reach past the member states and bind corporate entities and individuals directly by legislation, administrative decisions or judicial decisions. On the other hand, the EU/EC—in terms of its functions and their broadening—depends on the authorization by the member states (i.e. by change of the founding instruments). See 2 Dahm et al., supra note 1, at 200–01.
understood as a process of denationalization (Entstaatlichung),\textsuperscript{7} not only has the “production of public goods” been shifted to international and supranational non-state actors, but non-governmental organizations (NGOs) have also become heavily involved in meeting various global challenges regarding the protection of human rights, the environment, and international security, i.e. in the provision of “public goods.”\textsuperscript{8} And, last but not least, transnational regulatory

\textsuperscript{7} Definitions of globalization are manifold, reflecting the complexity of this phenomenon. However, there appears to be widespread agreement that globalization is a set of processes, some of which are objective in nature (i.e. climate change, destruction of the ozone layer, underdevelopment, mass migration and massive human rights violations, global terrorism, and other similar challenges that are inherently beyond the problem-solving capacity of the territorial nation state and at the same time affect humankind as a whole, regardless of borders and territorial jurisdictions). Subjectively, globalization is a new perception of the political process that used to be state-centered but is now transforming into an understanding of politics as a multilayered process involving states, international, supranational, and non-governmental organizations as well as multinational enterprises. The ensuing pluralism of actors involved in the fulfillment of public tasks has led to a relative decline in the role of the state. The inherently global nature of the various challenges named above forced states to shift the “production of public goods” to the international and supranational level which, in turn, entailed an absolute reduction of the role of the state as the once-sole sovereign actor. This process of gradual decline in the role of states is referred to throughout as a process of “denationalization” or in German “Ent-Staatlichung” (“destatization”). For a comprehensive analysis of globalization and its impacts on state and society, see Global Transformations: Politics, Economics, and Culture chs. 1, 3-5 (David Held, et al. eds., 1999); see also Structural Changes, supra note 1, at 13-17. On the present dilemma facing the international community, with regard to establishing adequate instruments of global governance, see James N. Rosenau, Governance in a New Global Order, in Governing Globalization—Power, Authority and Global Governance 70–86 (David Held & Anthony McGrew eds., 2002).

\textsuperscript{8} See 2 Dahm et al., supra note 1, at 231–43 (explaining the history, present role, and legal status under international law of NGOs with further references); Michael Hempel, Die Völkerrechtssubjektivität internationaler nichtstaatlicher Organisationen [The International Legal Personality of International Non-Governmental Organizations], passim (1999). Other authors also recognize NGOs as limited subjects of international law. See, e.g., Ignaz Seidl-Hohenfelder & Gerhard Lohbl, Das Recht der Internationalen Organisationen [The Law of International Organizations] 84 (7th ed. 2000); Stephan Hobe, Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations, 5 Ind. J. Global Legal Stud. 191, 191–209 (1997); Non-State Actors as New Subjects of International Law passim (Rainer Hofmann ed., 1999); Karsten Nowrot, Legal Consequences of Globalization: The Status on Non-Governmental Organizations Under International Law, 6 Ind. J. Global Legal Stud. 579, 579–645 (1999).
regimes must be mentioned for their role in coping with the many global challenges we face in our time.\(^9\)

The present paper will therefore concentrate on the question whether the growing diversity of actors involved in the “production of public goods,” and the ensuing pluralism of institutions and actors on different levels beyond the state, can be structured and to some extent constitutionalized in a legal framework of a transnational federalism. Part I will address the diversification of actors exercising public authority or participating in its exercise. Part II will first analyze the concept of federalism, specifically whether it can be transferred to the transnational realm, and if so, whether and how the concept needs to be reconceptualized. This Part will then describe and critically review some model approaches, and will attempt to outline a concept of transnational federalism that is not state-centered and is thus more adequate to cope with the emerging pluralism of centers exercising public authority than traditional concepts of federalism.

I. THE DIVERSIFICATION OF ACTORS EXERCISING PUBLIC AUTHORITY OR PARTICIPATING IN ITS EXERCISE AND THE ALLOCATION OF PUBLIC AUTHORITY

As a first step, our analysis has to establish whether and to what extent the various actors mentioned exercise public authority or participate in its exercise. This analysis also requires a short explanation of what is meant by the notion of public authority. Let us begin with the latter.

According to traditional doctrine, public authority (Hoheitsgewalt) is solely vested in states. Public authority in this sense constitutes the power of the state to legally and legitimately impose its will upon the people residing within its territory, in the last resort by physical force. Public authority was seen as original, supreme (sovereign), singular, and indivisible.\(^10\) But state practice has never fully conformed to this doctrine. In some federal states public authority and sovereignty

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9. See Anthony McGrew, Liberal Internationalism: Between Realism and Cosmopolitanism, in Global Transformations, supra note 7, at 267–89 (giving a concise overview of the development of regime theory); see also Rosenau supra note 7, at 71–73 (describing briefly the role of regimes or rule-based systems).

were (and still are) shared by the federal government and the constituent member states. More importantly in the present context, after World War II states willingly transferred parts of their authority to international organizations. The prime example of a large scale transfer of public authority to non-state entities is the formation of the European Communities, culminating in the present EU/EC. Public authority proved to be divisible. Furthermore, the traditional doctrine argued against the possibility of establishing public authority beyond the state, reasoning that public authority proper must be able to enforce its acts—whether legislative, administrative, or judicial—by physical force if necessary. This argument is no longer fully valid. There is a clear trend in domestic administrative law away from hierarchical enforcement toward cooperative means of securing compliance with the law. Cooperative means of implementation are to complement the modes of traditional law enforcement, while not completely replacing the latter. It is also true that in domestic legal orders even constitutional norms are not always provided with sanctions. Public authority—a

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11. Cf. Ivan Bernier, International Legal Aspects of Federalism 17–33 (1973); Böhmer, supra note 1, at 180–94 (placing special emphasis on the phenomenon of a “divided” public authority not only in some federal states, but currently within the EU/EC).


14. Thus, Konrad Hesse — former Member of the German Federal Constitutional Court and Constitutional Law Professor Emeritus — observes: “Die Macht des Gerichts beruht nur auf seinem Ansehen und auf der Überzeugungskraft seiner Argumente” [The power of the Court solely rests upon its reputation and the strength of its arguments]. Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland [The Main Features of German Constitutional Law], para. 567 (20th rev. ed. 1995).
concept going back to the Latin word *auctoritas* (the ability to induce compliance *without* enforcement)—must not necessarily be defined as narrowly as traditional doctrine pretended. Public authority will therefore be used here in a broader meaning: it is the competence of states and other entities to perform public tasks (to produce public goods) and to achieve compliance by cooperative means or by sanctions including physical enforcement as a last resort.

Starting from this premise, we may now inquire into the allocation of public authority to entities beyond the state. In order to make this analysis as lucid but also as short as possible I shall divide it into three sections: 1) dealing with international governmental organizations, 2) dealing with supranational organizations, and 3) dealing with nongovernmental organizations (NGOs) and, just in passing, with international regimes.

**A. The Allocation of Public Authority to International Governmental Organizations**

Today, the vast majority of states is embedded in a dense network of international organizations whose number has risen to about 300 over the years. Most of these organizations are conceived in a traditional state-centered fashion as purely intergovernmental fora of cooperation. They also tend to have rather limited agendas. However, those organizations concerned with centrally important subject matters like international security, the economy, environmental protection, and telecommunications stick out from the rest not only because of their particularly important public tasks, but also because of their rather autonomous regulatory, administrative, and judicial areas of authority. Only especially instructive examples will be mentioned here.

The United Nations Security Council, charged with the primary responsibility for the maintenance of international peace and security, possesses the power to issue binding decisions. The character and scope of these decisions is

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16. The Universal Postal Union (UPU), the World Meteorological Organization (WMO), or the World Tourism Organization may be mentioned as examples of such organizations with limited agendas and also as indicators of the wide range of subjects dealt with by international organizations.

not expressly defined. For instance, in its early and rare practice, the Council directed binding decisions to individual states under Chapter VII, to stop acts of aggression or refrain from the threat of use of force. In more recent times the Council has interpreted its powers under Chapter VII more broadly to include decisions of a "legislative" character. This is clearly the case with regard to Resolution 1373 of September 28, 2001. It contains, at least in part, legislative provisions taken from the Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly but not yet in force at the time. One could argue that the determination of the Kuwait-Iraq border with *erga omnes* effect by Security Council Resolution 687 was also a legislative act.


Beyond these binding legislative decisions emanating from the United Nations, it must be remembered that the organization is involved in the elaboration and adoption of comprehensive treaties for signature and ratification by states, and more importantly for present purposes, the creation of "hard" and "soft" law. The United Nations makes hard law in the field of U.N. administrative law, and soft law in various areas of global concern (human rights, the environment, disarmament, etc.) by resolutions passed as solemn declarations or charters adopted unanimously or by consensus. One may view such soft lawmaking acts as irrelevant in terms of "real" law making. But I would answer that members of the United Nations are under a good faith obligation to seriously consider whether to comply with such resolutions, particularly if they have consented to them.\footnote{22. Art. 2(2) obliges the Member States to fulfill their obligations assumed under the Charter in good faith. This does not mean, of course, that the Member States must comply with recommendations (e.g. those issued by the General Assembly). However, it does mean that they are under an (non-sanctionable) obligation to seriously consider how they should react to the recommendation in question. See 2 Dahm et al., supra note 1, at 26-27; 1 Paul C. Szasz, General Law-Making Process, in United Nations Legal Order 35, 63-64 (Oscar Schachter & Christopher C. Joyner eds., 1995).}

Furthermore, such solemn declarations or charters are an expression of an almost universal \textit{opinio juris} and thus can promote the emergence of new international customary law.

In a similar vein, a great deal of international lawmaking occurs within other international organizations such as the World Trade Organization (WTO), the World Health Organization (WHO), the International Labour Organization (ILO), the Food and Agriculture Organization (FAO), and the International Civil Aviation Organization (ICAO). In the cases of the WHO and ICAO, binding norms can be issued, albeit with the proviso that members disagreeing can use "opting out" clauses.\footnote{23. See Christian Tietje, The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture, 42 German Y.B. Int'l L. 26, 51-52 (1999) (highlighting numerous examples of the doctrinal and legal policy aspects of opt-out clauses and procedures) [hereinafter Global Governance Architecture]; see also 1 Dahm et al., supra note 1, at 665.} But whether strictly binding or not, one may say that international law making, particularly by the organizations of the U.N. family that were established to serve as fora of cooperation among member states, has had a major impact on law making at the domestic level as well. An important example of this impact is seen in the strict conditions set by the International Monetary Fund for recipients of funds. Another good example is the
Republic of Korea in the wake of the “Asian crash;” it had to revamp large parts of its domestic legal order.\textsuperscript{24} To a considerable extent, Member States have complied with the “not strictly binding” norms proposed by these organizations by shaping their domestic laws accordingly.\textsuperscript{25} Recalling that the concept of public authority is not restricted to the exercise of enforcement powers, one can safely observe that, in the legislative area at least, some public authority has been allotted to international organizations. The same is true with regard to regional international organizations such as the Council of Europe.\textsuperscript{26}

Mention must also be made of administrative or executive functions given to international organizations. The WHO is once again an interesting example of the exercise of administrative functions on the international level. The organization can establish certain technical and scientific standards for the protection of health. The interesting aspect of this standard-setting is that it is achieved by intensive cooperation between international and national administrators.\textsuperscript{27} This amounts to a vertical integration of the international and the national administrations that would normally be expected only within the structure of supranational organizations. For the sake of brevity, I will confine myself to this one example of the executive functions exercised by international organizations, but a good case can be made in this regard for the FAO and others as well.\textsuperscript{28}


\textsuperscript{25} See Szasz, supra note 22, at 96–97.

\textsuperscript{26} See Statute of the Council of Europe, May 5, 1949, art. 1(b), 87 U.N.T.S. 103 (noting that it is one of the main functions of the Council of Europe to promote the harmonization of the domestic law of its Member States through elaborating treaties that the Member States then ratify and incorporate into their domestic legal orders, mostly at the level of statutory law).


\textsuperscript{28} See id. at n.27.
With regard to the exercise of judicial functions by international organizations, one may point to the well-established U.N. Administrative Tribunal, to the doctrinally controversial establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda by the Security Council—today generally seen to be effected under Chapter VII together with article 29 of the U.N. Charter—and the establishment of the International Criminal Court under the Rome Statute of 1998. Individuals have access or are subject to the jurisdiction of these international tribunals and courts. Reference should also be made to the WTO Dispute Settlement System, which provides for judicial panels of first and appellate instance. Their final decisions are strictly binding on the state parties and have, of course, major implications for the commercial transactions of private enterprises as well.

This necessarily sketchy survey of international organizations involved in the exercise of public authority would be incomplete if one failed to mention the


32. For a concise summary of the functions and powers of the World Trade Organization Dispute Settlement System, see Peter Tobias Stoll, World Trade, Dispute Settlement, in 4 Encyclopedia of Public International Law, supra note 3, at 1520–29.
large number of regional international organizations, particularly in the economic field. Much of what has been observed here with regard to international (universal) organizations applies to these regional institutions as well. As David Held, Anthony McGrew, and their co-authors have aptly stated: "the emergence of a new regionalism has introduced a new layer of governance."\(^3\)

In summary, even from the few examples mentioned thus far one may conclude that public authority has been allotted to international organizations to a degree that may not have been expected, given the purely intergovernmental approach to the founding of international organizations in the early years of the twentieth century and even later, when international organizations were perceived as supplementary instruments for the implementation of domestic public tasks.

**B. The Allocation of Public Authority to Supranational Organizations**

To prove that public authority has been transferred to supranational organizations—the prime example being the European Community or European Union—is much easier. The European Community Treaty (ECT) clearly establishes that the EC/EU has the authority to legislate, to execute administrative functions, and to adjudicate legal disputes through the European Court of Justice (ECJ).\(^3\)\(^4\) With regulations and decisions, the EC/EU can directly reach past the member governments to the citizens of the member states, whether natural persons or juridical corporate entities.\(^3\)\(^5\) Although the EC/EU's powers were once conceived of as limited or enumerated, today these powers cover a wide range of economic, social, political, and more recently, cultural areas. Part of the reason for

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33. Held et. al., *supra* note 7, at 74.
34. European Community Treaty, Mar. 25, 1957, available at http://www.hri.org/docs/Rome57/Protocols.htm. In order to fulfill their functions according to article 249 of the ECT, the European Parliament, the Council, and the Commission—in varying combinations—have the authority to legislate (i.e. to issue regulations and directives); the Commission, for example, exercises typically executive functions with regard to the enforcement of the ECT competition law (investigations, hearings, imposition of fines). *Id.* at arts. 85, 249. In articles 220–45, the ECT provides for an elaborate judicial system. *Id.* at arts. 220–45.
35. According to art. 249, regulations possessing general applicability are binding in their entirety, and are directly applicable in all Member States. European Community Treaty, *supra* note 34, at art. 249. Regulations confer rights and duties directly upon EC citizens, whether natural persons or corporate entities, and are ultimately enforceable by the ECJ. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 901 (4th ed. 1997).
the dynamic broadening of the EU/EC powers is that few transactions in modern societies do not have an economic, or more precisely a market, dimension. Thus, for instance, the European Court of Justice—like a constitutional court—early on ruled in a dynamic interpretation of the ECT that the lack of any explicit authority in cultural affairs did not mean that the EU/EC could not issue directives with regard to transborder television broadcasts. The Court recognized that at least in some member states, broadcasting was considered a cultural activity. But since broadcasting was also an economic transaction—a service in the sense of the ECT—the EU/EC had authority to legislate in this field.\textsuperscript{36}

Given these broad legislative, executive and judicial functions of the EU/EC, including regulations suspending and directives guiding the corresponding domestic legislative authority of each member state, the EU/EC shows a number of characteristics of a state rather than an international, intergovernmental organization. However, it is well accepted that the EU/EC is not yet a state, but is also more than a mere confederation of sovereign states.\textsuperscript{37} We shall come back to this shortly. In any event, it cannot be denied that the EU/EC has been allotted a wealth of public authority.

\begin{itemize}
\item[36.] See Case 155/73, Sacchi, 1974 E.C.R. 409 and Case 52/79, Du Roi v. Debaue, 1980 E.C.R. 833, 855. The question of the authority of the EC to legislate in the fields of transborder broadcasting and television led to an intense debate, particularly in Belgium, the Netherlands, and Germany, because of their delicately balanced broadcasting and television systems. In Germany, broadcasting and television were considered to be a cultural activity falling under the exclusive jurisdiction of the Länder (federal states); in the Netherlands, the established system took great care to attribute a fair share of access to the broadcasting facilities and programs for the large number of religious and political groups. See Case 352/85, Bond van Adverteerders, 1988 E.C.R. 2085.
\item[37.] The exact status of the EC/EU in conceptual terms is the subject of much doctrinal debate, particularly in Continental Europe. In Anglo-American literature, the question of the “true” legal nature of the EC/EU is usually answered by reference to the pronouncement of the ECJ in \textit{Van Gend en Loos v. Nederlandse Administratie der Belastingen}, 1963 ECR 1, 1963 CMLR 105, that the EC/EU “constitutes a new legal order of international law.” See, e.g., I Oppenheim, supra note 4, at 20, n.2; Shaw, supra note 35, at 901–02. In Continental European, and especially German, literature, much intellectual effort has been spent on how to conceptually capture the new phenomenon of the EC/EU, but with little success. Surely terms like “\textit{Staatenverbund}” (association of states) or state community \textit{sui generis} indicate that the EC/EU neither fits the traditional concepts of “confederation” or “federal state,” but that does not mean much more than the matter-of-fact observation that the EC/EU constitutes a “new legal order of international law.” Probably the most telling description of the EC/EU is that of Thomas Oppermann, who speaks of the EC/EU as a “\textit{Kategorie intensiver, staatsnaher} Verbindung zwischen ihren Mitgliedstaaten” [a category of intensive, state-like association between its members]. Thomas Oppermann, \textit{Europarecht} 74 (2nd. ed. 1999).
\end{itemize}
C. The Allocation of Public Authority to Nongovernmental Organizations

On first sight, it may appear to be quite an outlandish notion to speak of the allocation of public authority to nongovernmental organizations (NGOs). But a closer look reveals that domestic legal orders have long delegated public authority to private entities from time to time and, indeed, we have recently witnessed the same phenomenon on the international level. Historically in domestic law, the vesting of public authority in private entities has been more or less a matter of convenience (for instance, conferring some traffic regulation functions to road construction companies). Today, under the impact of globalization, the enlistment of private enterprises to implement public tasks has become a necessary strategy to make states leaner and more competitive. For the same reason, states have to some extent shifted the exercise of public authority to international and supranational organizations, and NGOs as well.

Today, NGOs have not only tremendously increased in numbers, but the larger NGOs in growing global networks have also played an important political role in international relations. This important role is now reflected in international law, categorical rejections of this observation by some authors notwithstanding. Within the United Nations system, NGOs are accorded a limited legal status under the secondary rules of the Charter system. Based on article 71 of the U.N. Charter, the Economic and Social Council has provided for procedures by which certain NGOs possess the status of observers, and have the right not only to attend open meetings of the Council and of its suborgans, but also to make written and oral contributions to the deliberations of the respective organs. Similar status is provided for NGOs by other U.N. family organizations and by the Council of Europe. In this respect one may speak of NGOs as

38. In German administrative law, conferring public authority to private entities is a well-known practice. It is called "Beleihung" [delegation].
39. See DAhM ET AL., supra note 1, at 231–43 (referring to the rich literature on the role and status of NGOs).
40. See id.; Structural Changes, supra note 1, at 23–26; Hobe, supra note 8; Nowrot, supra note 8.
41. See DAhM ET AL., supra note 1, at 231–43; Structural Changes, supra note 1, at 23–26; Hobe, supra note 8; Nowrot, supra note 8.
42. See, e.g., ILO Const., art. 12 § 3 (permitting the Organization to consult NGOs, including international employers' associations and trade unions and related associations). The Statute of the Council of Europe does not contain an explicit reference to NGOs, but under its organizational powers the Council provided for a consultative status for NGOs by a series of resolutions passed by the Committee of Ministers. For a detailed study of the relationship between Special-
limited derivative legal subjects under secondary rules of international law. The status accorded to NGOs allows them to participate in the exercise of public authority. The respective functions mainly relate to international law making. In exercising these functions, NGOs not only advise the organs of international organizations, but in some instances they have made major contributions to the process of drafting new conventions. Major universal conferences have followed the example of the U.N. organs and made use of the expertise of NGOs, which act as (in a sense self-appointed) advocates of the public interest of the international community.

In the field of the international protection of human rights, the status of NGOs has been developed even further. NGOs have rights directly under conventional human rights law, i.e. the primary rules of international law. Thus, they possess standing before international human rights courts and before human rights monitoring bodies, i.e. the Protocol Additional to the U.N. Covenant of Civil and Political Rights, and the European and American Human Rights Conventions. Thereby, they enjoy a derivative limited international legal personality and they partake in the enforcement of human rights. In order to fulfill this enforcement function they also perform an important general monitoring function. International tribunals, such as the Tribunal on
former Yugoslavia (Rule 74 of the Tribunal's rules of procedure) increasingly make use of the expertise relevant NGOs acquire in the course of their monitoring activities by inviting them to be *amici curiae*. Similar monitoring and implementation functions are accorded to NGOs in international environmental protection conventions. Examples include the so-called Ramsar Convention on Wetlands of International Importance, Especially as Waterfowl Habitat;\(^{49}\) the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora;\(^{50}\) and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification.\(^{51}\)

As a last aspect of their involvement in the exercise of public authority, NGOs' role in the evolution of so-called framework conventions, which have become a frequent regulatory instrument in international environmental law, is worthy of mention.\(^{52}\) These multilateral conventions determine only basic principles of intended state conduct. The concrete obligations of the parties and the detailed regulations are left to the later adoption of amending protocols or, in the case of highly technical regulations, are delegated to expert committees or technical institutions, which in some cases are NGOs.\(^{53}\) The reason for this procedure is that framework conventions of this kind require a high degree of expertise for the elaboration of the detailed regulations, and more often than not need to be frequently amended because of the rapidly changing scientific findings. Given the fact that the amending protocols in many cases enter into force through a simplified procedure, the regulatory input by the NGO experts is dominant. In short, NGOs supplement


53. See, for instance, the International Organization for Standardization (ISO), which—together with the Comité Européen de Normalisation (CEN) and the Deutsche Institut für Normung e.V. (DIN)—established the DIN EN ISO 14001 Standard for Environmental Management. See Tietje, supra note 27, at 410–11.
and sometimes even substitute for the implementation of public tasks incumbent on state parties to the respective conventions.⁵

In passing, let me mention that in recent decades international regimes—defined as more or less institutionalized clusters of principles, norms and rules⁵⁵—have received growing attention with regard to their conflict-resolving capacity. This includes the capacity to ensure compliance, particularly in cases of conflicting interests in the distribution and preservation of natural resources or other common goods.⁵⁶ This capacity appears to indicate that international regimes are also involved in exercising public functions and thereby constitute yet another seat of public authority beyond the state. But this issue needs closer analysis than time permits here.

In summary, the findings laid out justify the conclusion that we are facing a rather complex system of global, international, and national governance. From a vertical perspective, we see a multilayered structure of governance, the different layers being more or less closely interconnected and penetrating each other. Horizontally, we see a multiplicity of actors involved in the exercise of public authority in varying degrees of intensity. The horizontal multiplicity of actors and their vertical interconnectedness has made classical concepts of the structure of the international system obsolete; international relations as the exclusive domain of states and the clean separation of the domestic and the international realms are no longer valid concepts.⁵⁷ Furthermore, the partial shifting of the exercise of public authority away from states raises serious questions with regard to the legitimacy of the exercise of public authority by nonstate actors, and with regard to a clear localization of the responsibility and accountability of individual actors in the changed international system. In attempts to come to grips with these

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⁵⁴. See Global Governance Architecture, supra note 23, at 44–53 (giving examples in international, economic, and environmental law).


challenges, the question has been raised as to whether a federalism-based interpretation of the present structure of the international system could help us to understand this structure more clearly, and also normatively to introduce the needed coherence and transparency into the perceived "jungle."

II. TRANSNATIONAL FEDERALISM—AN ADEQUATE CONCEPT FOR THE STRUCTURE OF THE PRESENT INTERNATIONAL SYSTEM?

A. Federalism: A Concept Applicable to the Transnational Realm?

Answering this question requires a short examination of the methodological problem of applying the traditionally state-centered concepts of federalism to the transnational realm. The debate over the meaning of the concept, or rather concepts, of federalism has a long history that cannot be traced here. Suffice it to say that federalism as a constitutional framework for individual states and as a form of international institutionalized cooperation of states, could not exist prior to the emergence of the modern sovereign territorial state. Because of the strong influence of the principle of sovereignty on political theory, particularly in continental Europe, federated states (i.e., states formed by sovereign states under the roof of a federal government) were the subject of sharp doctrinal controversy. Some authors argued that the very idea of sovereign states subjecting themselves to the central rule of a federal government was self-contradictory—a debate that, for instance, accompanied the founding of the German Reich of 1871. Such an arrangement could only be understood as a transitory stage to


59. See Böhmer, supra note 1, at 25–32, 98–112 (summarizing the main positions in this debate).

the final creation of a unitary state. The only acceptable form of a federal state entity compatible with the principle of sovereignty was the confederation of sovereign states.\(^6\)

On the other hand, other voices argued that sovereignty was not an essential element of statehood and therefore the concept of a federal state with a federal government, possessing the supreme authority to dispose of the right to allocate or assume authority, was a valid form of constitutional order within a state, as distinguished from the mere confederation on the one hand and the unitary state on the other hand.\(^6\) All the authors involved in this debate agreed on one aspect: They all based their preferences on a state-centered view of federalism, which if still accepted would preclude us from applying the concept of federalism to the international level. However, with the emergence of institutionalized cooperation in international relations, i.e. the founding of international organizations, and more importantly, with the advent of supranational organizations after World War II, the concept of federalism was increasingly stripped of its state-centeredness. The debate over the status of states and their sovereignty as members of these new organizations is still rampant,\(^6\) but it no longer dominates the scene. Rather, the focus of interest has shifted to the interpretation of federalism as an international and national formative principle, as a functional-organizational and structural principle.\(^6\) Today, there appears to be no principal methodological or doctrinal objection to applying the concept of federalism to the levels beyond the state. In fact, there are increasing attempts to use the concept of federalism in developing models of transnational governance by which the exercise of public authority beyond the state could be made more transparent, more rule-of-law based, and even more democratically legitimate. In the next section, I summarize and critically review some of these models before undertaking the adventure of clarifying the concept of transnational federalism.

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61. See Bück, supra note 3; Böhmer, supra note 1.
62. See Bück, supra note 3, at 12–14; see Böhmer, supra note 1, at 30–32.
63. See Helmut Steinberger, Sovereignty, in 4 Encyclopedia of Public International Law, supra note 3, at 500, 511–13, 516–17 (giving an overview of the present state of the debate, particularly with regard to sovereignty and EU/EC membership); see also Bénier, supra note 11, 17–33; Böhmer, supra note 1, at 25–35, 187–94; Peters, supra note 12, at 125–48.
64. See Bück, supra note 3, at 2, 34–38, 55; see also Ernst B. Haas, Functionalism and International Organization (1964).
B. Approaches to World Federalism Models

In early writings on federalism on the international level a clear state-centered view prevailed. Thus, Joseph Kunz observed in 1952 that the realization of the federal ideal, "if made on a universal scale, must lead to a world state, and, if made on a regional level, to a federal state." But by 1966, a considerably different view was voiced by Edward McWhinney, who asked:

What lessons have the theory and practice of "classical" federalism to offer for what is perhaps the most striking aspect of international law and relations of the present era of change - [i.e.] the movement (whether on a substantially regional basis or whether more generally transcending geographical, even hemispheric limits) for political, military, economic integration and association along some sort of supranational lines?  

In this era of globalization, however, most models for structuring the present pluralism of entities exercising public authority are primarily concerned with strengthening the legitimacy of the transnational exercise of public authority through democracy or its equivalents. This approach, in turn, has led some authors to deal with federalism only incidentally, rather than explicitly as a conceptual issue in and of itself. Yet, since democracy is widely held to be intrinsically linked to the state, the models for a democratically constituted transnational order tend to be conceived in terms of a "World State" or "World Republic," preferably constituted as a "Federal World Republic." A prominent example is the model developed by the well-known German political philosopher Otfried Höffe. Strongly influenced by Kant, he advances a model which he calls a "subsidiary Federal World Republic." The constituent entities of this federal structure are, in

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67. See generally Bernier, supra note 11, at 202–20 (giving a concise account of earlier proposals or projects for federalism as a model for international integration); Weltstaat oder Staatengemeinschaft: Für und wider die Idee einer Weltrepublik [World State or a World of States: the pros and cons of the Idea of a World Republic] (James Bohman & Matthias Luiz-Bachmann eds., 2002) (setting forth a collection of papers discussing the pros and cons of a World Republic or World State).
this order, states, intermediate regional organizations such as the EU, and universal international organizations such as the United Nations. Interestingly, private nonstate actors are not listed. NGOs are solely seen as a part of civil society, in which they are accorded a prominent role in fostering democratic participation of the people and in the development of a "World." The individual persons are envisaged gradually to acquire a dual citizenship, as citizens of their home nations and as world citizens. The federally bonded entities are to be governed by public international and supranational law, civil society by a private world law (the Kantian Weltbürgerrecht). Basic legal, one should say, constitutional principles underpinning the public law are the rule of law, social justice, and democracy. The purpose of the "Federal World Republic" is to deal only with those global problems with which states or other lower level entities cannot adequately cope. It is to supplement state and regional public authorities as a subsidiary means of implementing public tasks.

From these necessarily sketchy observations, it becomes quite evident that federalist approaches to defining the present international system or the political goals to be achieved are primarily state-centered. Applied to the regionally limited integration process—particularly of the 1950s and early 1960s—the state-centered perspective may have had some basis in the political reality of Western Europe. Applied to the international system, including the European scenery in this era of globalization, the state-centered approach appears not to be in line with the actual transformations of the role of states, the growing role of nonstate actors, and the resultant transformations of international law. If the federalism paradigm


69. Höffe, Globalität, supra note 68, at 10.

70. Id. at 31.

71. Id. at 25-26. Other authors—not explicitly conceiving transnational governances in federalism terms—also emphasize that in the emerging complex system of public authorities, states will continue to play an important role in the implementation of those public tasks that can best be dealt with on the state level—some kind of a subsidiarity principle seems to be present in these writings, as well. See, e.g., Keohane, supra note 55, at 248-49; Held, supra note 57, at 422-25.
is to have relevance for the aim of structuring the present pluralism of actors exercising public authority on different levels and in different sectors, it needs to be re-conceptualized from a perspective that is not state-centered, without losing those valuable elements of a republican federalism that are not inherently state-related: unity in diversity, functional division of powers (vertical and horizontal), and a common constitutional framework based on the rule of law, human rights, and social justice.

C. Transnational Federalism

From a realist or neo-realist point of view, in a world of sovereign states there is no room for any form of federalism beyond the state. However, as we have seen in the foregoing examination of the international system, the facts no longer support such an assessment of the status of states. Rather we are confronted with a multilayered, but at the same time horizontally structured, system of governance.\(^2\) True, this system does not fulfill the criteria of either a federal state or a traditional confederation of sovereign states. But conceiving the present system, under the conditions of globalization, as an emerging transnational federal order, may provide us with the necessary means to cope with at least some of the problems that are the primary concern of globalization critics: the seemingly isolated exercise of public authority on different levels, the ensuing inability to curb an un fettered neo-capitalism, and the legitimacy deficit, whether in terms of democracy or a lack of accountability and transparency.\(^3\) A concept of transnational federalism that is not state-centered could serve as a structural-functional framework and in legal terms as a constitutional basis for the vertical and horizontal cooperation of the various actors exercising public authority beyond the states for the common good. Going into more detail, I shall take up relevant elements of federalism in turn.

1. Transnational Federalism as a Means to Promote Unity in Diversity

As the starting point, I take up the notion of a multilayered system of governance, mentioned above, as it suggests an element of federalism in the present

\(^{72}\) See discussion infra Part I.

\(^{73}\) See Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 Ind. J. Global Legal Stud. 29 (2003) (discussing the problem of providing legitimacy to the exercise of public authority beyond the state).
international system. The notion of "multilayered governance" appears to indicate that public authority is exercised on different levels that are put on top of each other like layers of a cake. But actually that is not quite true. As previously shown, these layers of public authorities are not only layers put on top of each other but they are also vertically interconnected. In the area of law making, international organizations significantly impact regional actors and domestic legal orders to an even greater degree. On the other hand, actors from the lower levels participate in the law-making process within international and supranational organizations. We have also seen that international, regional and domestic administrations are vertically integrated in their day-to-day transactions. This interconnectedness is more intense in the case of supranational organizations than it is in the case of international organizations. The increased interconnectedness of states and supranational organizations is clearly illustrated by the fact that the constitutions of supranational organizations and their member states mutually supplement each other—the constitution of one is part of the constitution of the other. This vertical interconnectedness of the different entities exercising public authority structurally binds them together. Horizontally, the public authorities are to a large extent bound together by mutual obligations to cooperate—like the international organizations of the U.N. family. Likewise, NGOs are also integrated into the transnational exercise of public authority through their consultative, monitoring, and implementing functions within the framework of international and regional organizations. However, neither the vertical nor the horizontal bonds existing between the various actors restrict

74. See discussion infra pp. 36-41.
75. See Peters, supra note 12, at 207-15; see also Böhmer, supra note 1, at 148-57.
76. The obligations of states to cooperate with international organizations are set forth in the latter's constitutions, as in articles 1(3), 2(2), 25, 55, and 56 of the U.N. Charter. See, e.g., Karl Doehring, Self-Determination, in 1 The Charter of the United Nations—A Commentary, supra note 17, at 47, para.31. In some cases, obligations to cooperate also exist among international organizations as, for instance, among the Specialized Organizations of the U.N. family with the United Nations Organization and between international governmental organizations and NGOs. See, e.g., U.N. Charter art. 57-58, 71. Similar obligations are provided in the constitutions of other international organizations. See 2 Dahm et al., supra note 1, at 238; see generally International Law of Cooperation and State Sovereignty—Proceedings of an International Symposium of the Kiel Walther-Schücking Institute of International Law (Jost Delbrück ed., 2002) (discussing the question of a general duty and specific obligations of states to cooperate in areas such as human rights, economics, and dispute settlement) [hereinafter International Law of Cooperation].
their identities. Thus, structural unity in diversity, adapted to the conditions of the transnational realm, is being established—as is typical for a federal system.

2. Division of Powers

It can hardly be contested that there exists a division of powers, vertically and horizontally, within the federalizing international system. In contrast to federal states or confederations, there is no comprehensive legal act regulating the distribution or allocation of functions and powers. Only within regional supranational organizations is the distribution of powers between the supranational and the domestic level constitutionally regulated by the principle of enumerated powers.77 Only those functions expressly or implicitly conferred to the supranational organization may be exercised by it. The vertical distribution of powers, in the international system in general, appears to be guided by the principle of subsidiarity, that is, powers are allocated to the level of public authority where the respective tasks can be dealt with most effectively. Thus, the maintenance of international peace and security is the primary responsibility of the United Nations and, under certain circumstances, regional collective security systems. Individual states retain the power to use military force only as an exception to the general prohibition of the use of force (i.e. in cases of self-defense). The enforcement of human rights, normally the obligation of states, has been elevated to a common concern of humankind. Accordingly, judicial enforcement and conciliatory compliance mechanisms have been established on the transnational level.78 Recently, the public or common interest in human rights protection beyond states has been strongly emphasized by the establishment of the International Criminal Court (ICC), which under certain conditions is empowered to sanction severe human rights violations committed by

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77. According to the "principle of enumerated powers," the European Parliament, the Council, the Commission, and the Court of Justice exercise their functions only in accordance with the provisions of the Treaties conferring the respective powers upon them. See Treaty on European Union, Feb. 7, 1992, art. 5; see also European Community Treaty, supra note 34, at art. 5(1).

78. On the international level, the International Court of Justice (one of the six main organs of the United Nations), the International Tribunal of the Law of the Sea, and the Permanent Court of Arbitration may be mentioned as prime examples of this trend, but one has to remember that beyond these courts, international law provides for various other fora and mechanisms for the peaceful settlement of disputes. See, e.g., Anne Peters, Cooperation in International Dispute Settlement, in INTERNATIONAL LAW OF COOPERATION, supra note 76, at 107–62.
individuals. Looking at the present distribution of powers among the various public authorities, one has to realize that while such distribution exists, it is not yet the result of a coherent strategy. That is not to say, though, that such a strategy is a priori infeasible, as the examples of a deliberate transfer of public authority to specific transnational entities show.

It may be added at this point that, as within states, the division and distribution of powers on the transnational level also serves as an instrument of mutual control of the different actors. It is in this context that NGOs integrated in the exercise of public authority can play an important role as entities that promote the transparency of the transnational decision-making processes and thereby strengthen the accountability of the different public authorities. This is no substitute for democratic legitimation, but is a realistic surrogate.

3. Transnational Federalism as a Constitutional Framework

According to the traditional view, there is no room for constitutions on the transnational level, since only states may have constitutions. International practice proves, however, that such a state-centered concept of the constitution is no longer valid. International and supranational organizations are clearly based on constitutions containing not only organizational provisions but also value-based norms. Of course, at present we are far from being able to set up a comprehensive constitution for the emerging transnational federal system. However, there is a growing consensus in international legal doctrine and in parts of the international community that international law—not to speak of the special case of the law of supranational organizations—is undergoing a process of

79. See supra text accompanying note 31.
81. The provisions of the U.N. Charter on the maintenance of international peace and security, the protection of human rights, and the promotion of economic and social welfare are clear examples of value-based norms in the constitutive instrument of an international organization. Similar kinds of norms can be found in the constitutions of the other U.N. family organizations such as the ILO, UNESCO, FAO, WHO, and WTO. International and surpanational organizations, such as the Organization of American States, the Council of Europe, and the Organization of African Unity, show a great number of value based norms on the regional level as well.
The now firmly established concept of jus cogens, (i.e. recognition of fundamental norms that are essential to the general welfare and cannot be abrogated except by norms of equal rank) and the increasingly accepted notion of law-making treaties with erga omnes effect whose observance is owed to the international community as a whole, are a clear indication of this constitutionalizing process. The acceptance of such fundamental norms with erga omnes effect opens the avenue for developing a legal framework that could serve as a value-oriented constitutional order for a transnational federal system. As we have also seen in the foregoing analysis, international law is presently opening up to private entities as partial derivative subjects of itself. This would mean that the constitutional order of the transnational federal system would also extend to private nonstate actors participating in the exercise of public authority beyond the state, thus strengthening the rule of law on the transnational level.

In summary, the foregoing analysis suggests that the present international system has several elements of federalism in common with state-centered federal systems. The decisive difference between the two is, that transnational federalism is a process, not a predetermined, fixed, and territorialized form of a political community. Transnational federalism is an open-ended structural and functional way of governance commensurate to the challenges posed by the equally dynamic process of globalization.

82. See Jochen A. Frowein, Konstitutionalisierung des Völkerrechts [Constitutionalization of International Law], 39 Berichte der Deutschen Gesellschaft für Völkerrecht 427–45 (2000); see also Dahm et al., supra note 1, at 780–781; see also Structural Changes, supra note 1, at 34–35.

83. See 3 Dahm et al., supra note 1, at 619–32; see also Christian Tomuschat, Obligations Arising for States Without or Against Their Will, 241 Recueil des Cours [R.D.C.] 209–369 (1993); see also B. Simma, From Bilateralism to Community Interest in International Law, 250 R.D.C. 229–376 (1994).
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