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# **The Exercise of Public Authority by International Institutions**

Advancing International Institutional Law



**Springer**

the language of science

ISSN 0172-4770

ISBN 978-3-642-04530-1

e-ISBN 978-3-642-04531-8

DOI 10.1007/978-3-642-04531-8

Springer Heidelberg Dordrecht London New York

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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Einbandentwurf: WMXDesign GmbH, Heidelberg

Gedruckt auf säurefreiem Papier

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## Preface

The concept of global governance, which first emerged in the social sciences, has triggered different responses in the discipline of law. This volume contains our proposal. It approaches global governance from a public law perspective which is centered around the concept of international public authority and relies on international institutional law for the legal conceptualization of global governance phenomena.

This proposal results from a larger project which started in 2007. The project is a collaborative effort of the directors of the Max Planck Institute for Comparative Public Law and International Law, research fellows and friends of the Institute, as well as eminent members of the Law Faculty of the University of Heidelberg. Most of the materials contained in this volume were first published in the November 2008 issue of the German Law Journal (<http://www.germanlawjournal.com>). We would like to express our sincere gratitude to the journal's editors in chief, Professors Russell Miller (Washington and Lee University School of Law) and Peer Zumbansen (Osgoode Hall Law School, York University, Toronto), for the opportunity to publish our papers as a special issue of their journal. The 2008-2009 University of Idaho College of Law German Law Journal student editors deserve special recognition for their hard and diligent work during the publication process. At the Institute, Eva Richter, Michael Riegner and the editorial staff of this publication series were instrumental in bringing this publication to fruition.

The comments on some of the contributions in this volume reflect the discussions at an international workshop held at the Max Planck Institute in April 2008. We are grateful to all discussants for their valuable input. Two articles at the end of the book develop contrasting conceptualizations of the same phenomena.

This volume mirrors the authors' current views within a longer process of reflection on contemporary governance at the international level. As

a matter of course, those views are not entirely homogeneous, but comprise diverging and critical voices. The discussion continues.

Heidelberg, January 2009

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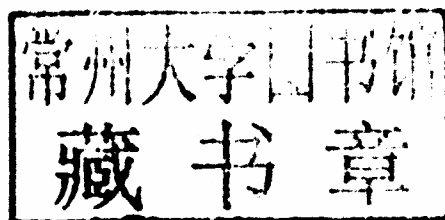
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## I. Concept





# Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities

*By Armin von Bogdandy, Philipp Dann & Matthias Goldmann\**

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\* The authors are grateful to Eyal Benvenisti, Giacinto della Cananea, Sabino Cassese, Stephan Leibfried, Erika de Wet, Jan Klabbers, Stefan Kadelbach, Nico Krisch, Ute Mager, Christoph Möllers, Christian Tietje, Christian Walter, as well as the members of the Max Planck Institute for Comparative Public Law and International Law participating in this project for comments on an earlier version, and to Lewis Enim for language review.

## A. Introduction: The Project in a Nutshell

The research project which this article introduces, proposes a distinctly public law approach to the deep transformation in the conduct of public affairs epitomized by the term global governance. We were intrigued to find in many policy fields an increasing number of international institutions playing an active and often crucial role in decision-making and policy implementation, sometimes even affecting individuals. Thus, a private real estate sale in Berlin is blocked by a decision of the UN Security Council Al-Qaida and Taliban Sanctions Committee;<sup>1</sup> the construction of a bridge in Dresden is legally challenged because the affected part of the Elbe river valley had been included on UNESCO's list of World Heritage;<sup>2</sup> or educational policies most relevant to our children are profoundly reformed due to the OECD Pisa rankings.<sup>3</sup> These examples illustrate that governance activities of international institutions may have a strong legal or factual impact on domestic issues. This calls upon scholars of public law to lay open the legal setting of such governance activities, to find out how, and by whom, they are controlled, and to develop legal standards for ensuring that they satisfy contemporary expectations for legitimacy.

This article sketches out the objective, argument and approach of our project and proceeds in three steps: a first step specifies the object of analysis (B.); a second step discusses how the phenomena thus identified should be approached in a legal perspective (C.); in a third and final step, we explain the concrete methodology of our project (D.).

In the first step, we argue that the discourse on global governance provides important new perspectives on phenomena of international cooperation (B.I.); but it is deficient from a public law perspective as the concept of global governance does not allow for the identification of what the focus of a *legal* discourse should be, i.e. those acts by which unilateral authority is exercised. Such unilateral authority is the greatest

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<sup>1</sup> ECJ, Case C-117/06, *Möllandorf*, 2007 ECR I-8361. On the Al-Qaida and Taliban Sanctions Committee see Clemens Feinäugle, in this volume.

<sup>2</sup> Sächsisches Oberverwaltungsgericht, Case 4 BS 216/06, decision of 9 March 2007, published in 60 DIE ÖFFENTLICHE VERWALTUNG 564 (2007); see Diana Zacharias, in this volume.

<sup>3</sup> Armin von Bogdandy & Matthias Goldmann, *The Exercise of International Public Authority through National Policy Assessments. The OECD's PISA Policy as a Paradigm for a New Standard Instrument*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW 241 (2008).

challenge to the basic principle of individual freedom. Public law, at least in a liberal and democratic tradition, concerns the tension between unilateral authority and individual freedom, and is a necessary requirement for the legitimacy of public authority, which is both constituted and limited by public law (B.II.). In order to provide a basis for legal analysis and to identify phenomena that need justification, we propose focusing on *the exercise of international public authority*. We argue that any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority *if* it determines individuals, private associations, enterprises, states, or other public institutions. We believe that this concept enables the identification of all those governance phenomena which public lawyers should study (B.III.). Proposing this concept means complementing the concept of global governance with a concept more appropriate for legal analysis and the development of legal standards for legitimate governance. On a more general level, this concept should contribute to a deeper understanding of the historic transformation underlying the concept of global governance.<sup>4</sup>

In the second step, we develop a public law approach to the exercise of international public authority on the basis of international institutional law (C.). We share the aim to better understand and develop the law relating to international governance activities with recent streams of legal research such as the Global Administrative Law movement,<sup>5</sup> the research on an emerging international administrative law,<sup>6</sup> as well as the

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<sup>4</sup> For different interpretations of this transformation see e.g. JÜRGEN HABERMAS, *DIE POSTNATIONALE KONSTELLATION* (1998); MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2002); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). From a domestic viewpoint see e.g. *TRANSFORMING THE GOLDEN-AGE NATION STATE* (Achim Hurrelmann, et al. eds., 2005).

<sup>5</sup> Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW AND CONTEMPORARY PROBLEMS* 15 (2005); Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 *NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS* 663 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE LAW JOURNAL* 1490 (2006).

<sup>6</sup> Eberhard Schmidt-Aßmann, in this volume; German original published under the title *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 *DER STAAT* 315 (2006).

debate surrounding the constitutionalization of international law.<sup>7</sup> We hold that a *synthesis* of these approaches is best suited to provide a meaningful framework for analysis and critique. The legal framework of governance activities of international institutions should be conceived of as international institutional law, and enriched by a public law perspective, i.e. with constitutional sensibility and openness for comparative insights from administrative legal thinking.

Finally, we outline how the research project was conducted, i.e. specifying the selection of thematic studies (D.I.), recapitulating the aim of and questionnaire guiding these studies (D.II.), and explaining the scope and intention of the cross-cutting analyses (D.III). We conclude by rephrasing the normative intention and underlying international ethos of this project (E.).

As was to be expected in such a new field of research, we went through an intense learning process. In this paper we lay down how we think these phenomena should now be approached. It should be stressed though that the authors of this research project do not form a monolithic block. Not every aspect of this framework is shared by all other contributions, nor do the cross-cutting studies or the thematic studies simply aim at providing evidence for the research agenda set out here. They stand on their own and display the possible diversity within the public law approach to international law. Yet, the ensuing thoughts will aid the understanding of the overall thrust of this research project. Moreover, we firmly believe that further research on the “publicness” of public international law along the lines of this paper will provide a better understanding and legal framing of global governance activities.

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<sup>7</sup> Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts*, in 39 BE-  
RICHTER DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, 427 (Klaus Dicke  
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Kadelbach & Thomas Kleinlein, *Überstaatliches Verfassungsrecht*, 44 ARCHIV  
DES VÖLKERRECHTS 235 (2006); Matthias Kumm, *The Legitimacy of  
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and Potential of Fundamental International Norms and Structures*, 19 LEIDEN  
JOURNAL OF INTERNATIONAL LAW 579 (2006).



## B. From Global Governance to Public Authority: A Focus for Legal Research

### I. Global Governance: Strengths and Weaknesses of the Dominant Approach

This research project is motivated by our experience of strengths and weaknesses of the concept of global governance for legal research.<sup>8</sup> Since the mid-1990s, this concept has become a widely used analytical perspective for describing the conduct of world affairs in many disciplines.<sup>9</sup> Four characteristic traits of this concept are of relevance in this context. First, the global governance concept recognizes the importance of international institutions, but highlights the relevance of actors and instruments which are of a private or hybrid nature, as well as of individuals – governance is not only an affair of public actors. Second, global governance marks the emergence of an increased recourse to informality: many institutions, procedures and instruments escape the grasp of established legal concepts. Third, thinking in terms of global governance means shifting weight from actors to structures and procedures. Last but not least, as is obvious from the use of the term “global” rather than “international,” global governance emphasizes the multi-level character of governance activities: it tends to overcome the division between international, supranational and national phenomena.

As becomes visible from these four characteristic traits, the concept of global governance has the merit of providing a forward looking alternative to a so-called “realist,” i.e. a state-centric and power oriented world

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<sup>8</sup> The origins of the term global governance can be traced back to James N. Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT 1 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); Jan Kooiman, *Findings, Recommendations and Speculations*, in MODERN GOVERNANCE: NEW GOVERNMENT-SOCIETY INTERACTIONS 249 (Jan Kooiman ed., 1993). The concept of “governance” was borrowed from economics. See Oliver E. Williamson, *The Economics of Governance: Framework and Implications*, 140 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 195 (1984).

<sup>9</sup> Martin Hewson & Timothy Sinclair, *The Emergence of Global Governance Theory*, in GLOBAL GOVERNANCE THEORY 3 (Martin Hewson & Timothy J. Sinclair eds., 1999); Renate Mayntz, *Governance Theory als fortentwickelte Steuerungstheorie?*, in GOVERNANCE-FORSCHUNG 11 (Gunnar F. Schuppert ed., 2006); Arthur Benz, *Governance – Modebegriff oder nützliches sozialwissenschaftliches Konzept?*, in GOVERNANCE – REGIEREN IN KOMPLEXEN REGELSYSTEMEN 11 (Arthur Benz ed., 2004).