

Augenstein, Daniel

Working Paper

To whom it may concern: International human rights law and global public goods

WZB Discussion Paper, No. SP IV 2015-809

Provided in Cooperation with:

WZB Berlin Social Science Center

Suggested Citation: Augenstein, Daniel (2015) : To whom it may concern: International human rights law and global public goods, WZB Discussion Paper, No. SP IV 2015-809, Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin

This Version is available at:

<https://hdl.handle.net/10419/121486>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

WZB

Berlin Social Science Center



Daniel Augenstein

**To Whom It May Concern:
International Human Rights Law
and Global Public Goods**

Discussion Paper

SP IV 2015–809

October 2015

Center for Global
Constitutionalism

WZB 

WZB Berlin Social Science Center

WZB Berlin Social Science Center
Reichpietschufer 50
10785 Berlin
Germany
www.wzb.eu

Copyright remains with the author(s).

Discussion papers of the WZB serve to disseminate the research results of work in progress prior to publication to encourage the exchange of ideas and academic debate. Inclusion of a paper in the discussion paper series does not constitute publication and should not limit publication in any other venue. The discussion papers published by the WZB represent the views of the respective author(s) and not of the institute as a whole.

Wissenschaftszentrum Berlin für Sozialforschung (2015)

Daniel Augenstein

To Whom It May Concern: International Human Rights Law and Global Public Goods

Discussion Paper SP IV 2015–809

Affiliation of the authors other than WZB:

Daniel Augenstein

Associate Professor, Tilburg Law School, Warandelaan 25037 AB Tilburg, The Netherlands

Abstract

To Whom It May Concern: International Human Rights Law and Global Public Goods

by Daniel Augenstein

Public goods and human rights are sometimes treated as intimately related, if not interchangeable, strategies to address matters of common global concern. The aim of the present contribution is to disentangle the two notions to shed some critical light on their respective potential to attend to contemporary problems of globalization. I distinguish the standard economic approach to public goods as a supposedly value-neutral technique to coordinate economic activity between states and markets from a political conception of human rights law that empowers individuals to partake in the definition of *the* public good. On this basis, I contend that framing global public goods and universal human rights in terms of interests and values that 'we all' hold in common tends to conceal or evade conflicts about their proper interpretation and implementation. This raises important normative questions with regard to the political and legal accountability of global ordering in both domains. The public goods approach has responded to this problem through extending the scope of political jurisdiction over public goods to encompass all those 'affected' by their costs and benefits. This finds its counterpart in attempts in the human rights debate to legally account for the global human rights impacts of public goods through extending human rights jurisdiction beyond state territory. By way of conclusion I contend that both approaches are indicative of a 'horizontal' transformation of statehood under conditions of globalization aimed at recovering *the* public good beyond the international order of states.

Keywords: human rights, public goods, globalization, jurisdiction, extraterritorial

I. INTRODUCTION

Public goods and human rights are sometimes treated as intimately related, if not interchangeable, strategies to address contemporary problems of globalization. In a UNGP sponsored study to make public goods fit for development, Inge Kaul and her collaborators treat respect for human rights and international human rights law as a 'global public good' because 'its benefits extend to all countries, people, and generations'.¹ Others have argued that what ties the two notions together is their 'universal, indivisible and mutually interdependent' nature, founded on 'the principle that goods as well as human rights must be accessible to all'.² Thus, it would appear that what global public goods and universal human rights share in common is that they are of common concern to the whole of humanity. This common concern is expressed in, respectively, global interdependencies in the production and consumption of public goods and universal membership in the human family of rights-bearing subjects. Conversely, much of the appeal of global public goods and universal human rights lies in their purported ability to transcend the compartmentalization of the globe into territorial state entities that are increasingly found wanting in governing the world. De-centering public goods and human rights from the international order of states thus represents an important attempt to redress the imbalance between the transboundary impacts of economic globalization and state territory-based forms of legal and political rule. One of my concerns in this contribution is to disentangle the notions of public goods and human rights to shed some critical light on their respective potential to address matters of common global concern. I distinguish the standard economic approach to public goods as a supposedly value-neutral technique to coordinate economic activity between states and markets from a political conception of human rights law that empowers individuals to partake in the definition of *the* public good. This distinction plays off the economic and political understandings of 'public good' as, respectively, the good whose production requires state intervention to prevent market failures and the good as a normative standard to evaluate the justice of legal arrangements

¹ Inge Kaul & Ronald Mendoza, Advancing the Concept of Public Goods, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 78, 95, 98 (Inge Kaul et al. eds., 2003).

² Birgit Lindsnaes, The global and the regional outlook: How can global public goods be advanced from a human rights perspective?, in TOWARDS NEW GLOBAL STRATEGIES: PUBLIC GOODS AND HUMAN RIGHTS 71, 73 (Birgit Lindsnaes and Erik André Andersen eds., 2007).

that make up the state polity.³ On this basis, I contend that while economic decisions concerning the production, distribution and alignment of public goods are an expression of the public good, human rights play a constitutive role in its political definition.

The different ways in which public goods and human rights relate to *the* public good traditionally vested in the nation-state translate into distinctive challenges to their capacity to address matters of common global concern. On the one hand, the globalization of public goods absent *a* global public good is marked by their functional differentiation. On the other hand, the constitutive role of human rights in the political definition of *the* public good remains confined to the territorial state legal order. This leads me to my second concern, namely that positing interests and values that 'we all' hold in common is insufficient to account for public goods and human rights at the global level. To be sure, the language of global public goods and universal human rights signals that many challenges bound up with globalization (be it the mitigation of global climate change or the alleviation of world poverty) exceed the traditional state-based distinctions between domestic and foreign politics, and between constitutional and international law. Yet at the same time, framing public goods and human rights in terms of common interests and values tends to conceal or evade conflicts about their proper interpretation and implementation that persist in the international order of states. This raises important normative questions with regard to the political and legal accountability of global ordering in both domains. The public goods approach has responded to this problem through extending the scope of political jurisdiction over public goods to encompass all those 'affected' by their costs and benefits. This finds its counterpart in attempts in the human rights debate to legally account for the global human rights impacts of public goods through extending human rights jurisdiction beyond state territory. Taken together, these approaches suggest a 'horizontal' transformation of statehood under conditions of globalization aimed at recovering *the* public good beyond the international order of states.

³ In a similar way, Malcolm Langford distinguishes a 'positivistic' approach to public goods that he associates with Anglo-American welfare economics from a 'constructivist' understanding of public goods as a matter of social construction and social contestation, see Malcolm Langford, Keeping Up with the Fashion: Human Rights and Global Public Goods, 16 INTERNATIONAL JOURNAL OF MINORITY AND GROUP RIGHTS 165, 171-175 (2009).

II. PUBLIC GOODS WITHOUT *THE* PUBLIC GOOD?

Under the standard economic approach, goods are considered public if they are non-rival in consumption and have non-excludable benefits.⁴ Non-rivalness means that one person can consume the good without diminishing its availability to others; non-excludability means that people cannot be excluded from the benefits of the good irrespective of whether they contributed to its production. A commonly used example of a 'pure' public good is clean air, because it is not depleted by breathing (non-rivalness in consumption) and cannot be appropriated by a few (non-excludability of benefits).⁵ The distinguishing feature of public goods (as opposed to private goods) is that while their provision is considered to be in the common interest, the market creates insufficient incentives to produce them because they cannot be effectively priced and allocated through market transactions.⁶ The non-excludability of benefits leads to an under-production of public goods since it creates incentives to free ride on the efforts of others. At the same time, their non-rivalness entails that public goods can be consumed at no marginal cost, which makes it inefficient to encourage their production by enhancing their scarcity value. Against this background, the core concern behind the standard economic approach is to identify those goods whose production requires public (state) intervention to ensure sufficient supply and prevent market failures. The criteria of (non-) excludability and (non-) rivalness determine whether a good is 'public' or 'private' and whether, accordingly, it should be provided by the state or the market. This entails that the very distinction between 'public' and 'private' goods is drawn with a view to coordinating economic

⁴ The development of the economic theory of public goods is commonly associated with Paul Samuelson's discussion of 'collective consumption goods'; see Paul Samuelson, *The Pure Theory of Public Expenditure*, 36(4) *THE REVIEW OF ECONOMICS AND STATISTICS* 387 (1954). It found its way into political science with Mancur Olson's work on free-rider problems associated with the production of public goods in large-scale democracies; see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

⁵ Different from 'pure' public goods, 'club goods' are non-rivalrous but excludable, while 'common pool resources' are non-excludable but rivalrous.

⁶ The problems bound up with the production of public goods can vary depending on the nature of the good in question. In this vein, Bodansky distinguishes between 'aggregate effort' problems where the total supply of the good depends on the aggregate efforts of all actors involved (as in the case of climate change mitigation); 'weakest-link' problems where the efforts of the vast majority of actors can be undone by a small group that fails to do its part (for example, hamstringing terrorist financing); and 'single-best effort' problems, such as medical discoveries, where the production of the good only depends on the effort of an individual or a small group of actors, see Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 (3) *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 651, 658-666 (2012).

activity (production and consumption) which renders the *public-as-political* a residual category, parasitic on the logic of market efficiency. The standard economic approach to public goods thus yields the conclusion

[t]hat a good with potentially rival and excludable properties is – or ought to be – private and that its provision ought to be left to the market. This means that the decision about which goods to make private and which public is seen largely as a technical rather than a political matter. The state’s role becomes one of providing ‘market rejects’ – non-rival and non-excludable goods that do not fit the conditions of market transactions.⁷

That Inge Kaul and her collaborators alternate between a posited (‘is’) and a normative (‘ought to’) approach to public goods is indicative of the inconclusiveness of the criteria of non-excludability and non-rivalness in establishing a bright-line distinction between ‘public’ and ‘private’. To return to the above example, the ‘public’ good of clean air has under modern conditions of large-scale industrial production and pollution become rivalrous in many parts of the world. By the same token, regulation aimed at curbing pollution (be it in the form of prohibitions or permits) excludes certain actors from the benefits of using clean air in particular ways without, however, turning it into a ‘private’ good. That a good may have *some* rival and excludable properties does not appear decisive for its categorization as ‘public’ or ‘private’. Moreover, whether or not a good does have rival and excludable properties is often not a natural state of affairs but the result of human intervention. As Kaul and Mendoza say, ‘before goods appear in the market or in the portfolio of state agents, policy choices have been made or norms established to make the goods private in the sense of being exclusive or public in the sense of being non-exclusive’.⁸ A related problem poses itself with regard to the distinction between public ‘goods’ and public ‘bads’. Imagine that the air pollution in our example is a by-product of oil extraction (so-called gas flaring) in a developing country that has detrimental health impacts on the local oil-producing community. It may appear common sense that the state should intervene to protect the public good of clean air by curbing the pollution-intensive production. The problem with this line of argument, however, is that the criteria of non-rivalry and non-excludability do not lend themselves to such normative evaluation, with

⁷ Inge Kaul et al., How to Improve the Provision of Global Public Goods, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 21, 22 (Inge Kaul et al. eds., 2003).

⁸ Kaul & Mendoza, *supra* note 1, 78, 86.

the consequence that the standard economic approach has to presuppose that the production of any given good/bad is desirable/undesirable. Yet people (*in casu*: the oil industry and the oil-producing community; members of the community employed by the oil industry and those whose crops are damaged by the carbon fallouts; etc.) will disagree about what should count as a public 'good' and how it should be produced given limited resources. Once again, the basic point is that the production of public goods involves political choices that cannot be gauged through a technical economic optimization exercise.

A related political blind spot of the standard economic approach is that its preoccupation with the market-efficient production of public goods marginalizes the problem of their equitable distribution. The oil production in our local community may constitute the developing country's main source of foreign investment and tax revenue, a significant part of which is used to maintain the public health system. Instead of a simple conflict between a public 'good' (clean air) and a public 'bad' (air pollution) this scenario presents a more complex challenge that involves competing public goods (economic development and public health) the provision of which may appear of overriding importance especially to those living in other parts of the country. At the same time, financing the public health system through oil revenues imposes disproportionate costs on people in the oil-producing community, who may in turn request a greater share in the benefits to offset the pollution-induced externalities. At issue here are political conflicts between actors with different interests over the distribution of the costs and benefits involved in the production and consumption of public goods. Economists usually rely on the market to allocate goods between citizens via a cost-benefit analysis geared towards wealth maximization. Whatever the merits of such an approach with regard to 'private' goods, it cannot work in relation to 'public' goods that require government intervention precisely in order to avert market *failures*. This poses the problem of how to reveal and aggregate individuals' preferences concerning the equitable distribution of public goods – a problem that the standard economic approach can only address either by presupposing that public goods were in fact non-rival and non-excludable and therefore distribution-neutral,⁹ or by falling back on the political process vested in state-type democracies.¹⁰

⁹ Meghnad Desai, Public Goods: A Historical Perspective, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 63, 71-72 (Inge Kaul et al. eds., 2003).

In sum, the standard economic approach proves unsatisfactory because although it needs to concede that in reality most public goods (and in any case all those pertinent to an economic analysis) are 'impure' (i.e., have excludable and/or rival properties), it denies the constitutive role of politics in decisions concerning their production, distribution and alignment. Its ostensibly technical and value-neutral definition of public goods on grounds of market efficiency conceals that the distinction between (what ought to be) public and (what ought to be) private is itself a public and political decision. Relatedly, allocating the costs and benefits of public goods on the basis of individual preference aggregation presupposes, rather than justifies, a distributive scheme grounded in the shared commitments of the members of a political collective. As Loader and Walker say, by relying on purely instrumental reasons to overcome the short-term self-interest and information deficiency of the market model, the standard economic approach to public goods 'assume[s] the very collective commitment to put things in common in this rather than any other group that it [needs to] demonstrate'.¹¹ A political conception of public goods, by contrast, must be 'predicated upon a set of actual or projected ends which vindicate the very value of conceiving and pursuing ends as common ends'.¹² The way in which a political collective comes to conceive and pursue ends as common ends, finally, elucidates the political role of *the* public good in framing decisions, and resolving conflicts, about the production, distribution and alignment of public goods. If the latter concerns the allocation of goods in matters of public interest, the former concerns the way in which a political collective relates to its own publicness. *The* public good as the 'common wealth' or the 'common good' is a representation of the general interest that all members of a political collective hold in common.¹³ Accordingly, economic decisions concerning particular public goods are but an expression of *the* public good as a political relationship aimed at establishing, institutionalizing and accounting for the general interest of the polity. Or, conflicts about public goods are resolved in the light of *the* public good through which a

¹⁰ Gregory Shaffer, International Law and Global Public Goods in a Legal Pluralist World, 23 (3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 669, 683 (2012).

¹¹ IAN LOADER & NEIL WALKER, CIVILIZING SECURITY 162-163 (2007).

¹² Id. at 163.

¹³ For a historical account of the evolution of the public good as the common good from the Roman notion of 'res publica' to a modern republican understanding that emerged in the context of the Great Revolutions see Peter Wivel, Natural law as a public good, in TOWARDS NEW GLOBAL STRATEGIES: PUBLIC GOODS AND HUMAN RIGHTS 3 (Birgit Lindsnaes and Erik André Andersen eds., 2007).

collection of individuals come to identify themselves as members of a polity endowed with a common purpose.

III. ACCOUNTING FOR GLOBAL PUBLIC GOODS

The reason I set out to discuss the relationship between public goods and *the* public good in the context of the nation-state is that it provides a fruitful starting point for examining the *problematique* of global public goods. International law in its classical form has compartmentalized this relationship within and between territorial state entities. On the one hand, the public good is confined to the national political community bounded by the territorial state legal order. This reflects the central role of the national democratic process in organizing the domestic economy and resolving conflicts about public goods. On the other hand, the lack of a global political community that could render decisions about public goods legitimate in the light of a global public good is compensated for by imposing a consent requirement on states in international law. The consensual structure of the international legal order is meant to ensure that states re-present the collective political will of their citizenries when resolving conflicts about public goods in their international dealings with each other. This state-centered approach has increasingly come under attack for its incapacity to address the transboundary challenges involved in the production, distribution and alignment of public goods under conditions of globalization. The requirement of state consent is seen as an impediment to the effective solution of global collective action problems, with commentators urging reform to enhance international law's problem-solving capacity in matters of common global concern.¹⁴ At the same time, the confinement of *the* public good to the territorially bounded national political community fails to explain why states should take the political interests of outsiders into account. While the economic costs and benefits of state-based decisions concerning public goods are increasingly felt globally, political accountability for such decisions stops short at national borders.¹⁵ Along the lines of these critiques, two prongs of the global approach to public goods may be distinguished. The first attempts to transcend the international order of states from 'above' by foregrounding public interests of common global concern.

¹⁴ For a critical appraisal see Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 (1) *AMERICAN JOURNAL OF INTERNATIONAL LAW* 1, 3-6 (2014).

¹⁵ See, for example, David Held, *Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective*, *GOVERNMENT AND OPPOSITION* 364 (2004).

The second prong tries to recover political accountability from 'below' by extending the scope of stakeholders in public goods to encompass all those affected by their costs and benefits. Both prongs, or so I contend, suffer from similar shortcomings as the standard economic approach in that they presuppose, rather than justify, the political terms and conditions under which public goods are produced, distributed and aligned at the global level.

As noted at the outset, one defining feature of global public goods is that they are said to confer 'global benefits' that 'extend to all countries, people, and generations'.¹⁶ Indeed, much of the appeal of global public goods lies in their purported ability to reach beyond the international order of states in addressing matters of common global concern. However, positing interests and values that 'we all' hold in common at a sufficiently abstract level to command general consent tends to conceal or evade political conflicts about their proper interpretation and implementation. Neil Walker aptly depicts this problem in terms of a discrepancy between the global ambitions of political morality and the localization of political authority.¹⁷ The global public goods approach may be seen as sidestepping the problem of political authority through the apparent self-evidence of its objectives at the level of political morality. Yet any effective solution at the level of global political morality is likely to be undermined by de-centralized (state-centered) structures of political authority. Consider by way of illustration one more time the example of 'clean air'. It is not difficult to see why the oil production in our developing country confers benefits and produces costs that transcend state borders. Not only does it generate significant financial revenues for those (Western) countries whose ('multi-national') corporations are in charge of the local production process and does it cater to the energy needs of their domestic economies. Moreover, the gas flared in the course of the oil extraction constitutes a major source of carbon-dioxide emissions that accelerate global warming. Viewed from a global perspective, the most cost-effective way to curb carbon emissions for the benefit of all concerned may be to re-insert the gas into the earth crust or to use it for local energy production – both options that involve significant costs for our developing state. In response, the state may either prioritize national economic

¹⁶ Kaul & Mendoza, *supra* note 1, 95.

¹⁷ Neil Walker, *Human Rights and Global Public Goods: The sound of one hand clapping?*, 23(1) *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES* (2016), forthcoming.

development over global environmental protection or try to reclaim the costs from the industrialized world, be it in view of their historical record of carbon emissions or as a contribution to preventing future climate change. In the latter vein, some developing countries have proposed to forego a further exploitation of their natural resources in exchange for financial compensation by other states (a practice sometimes pejoratively referred to as ‘environmental blackmailing’).¹⁸ One reason why such initiatives have been remarkably unsuccessful arguably harks back to the problem that the public good of clean air and the public bad of air pollution cannot be effectively regulated through market transactions but instead require state intervention. Another reason is that states will take conflicting views about the allocation of public responsibilities for preventing global market failures bound up with the under-production and over-consumption of clean air. Such political conflicts cannot be resolved by mere appeal to the global public benefits of reducing air pollution because, as we have seen, what is at stake is a whole bundle of interconnected public ‘goods’ and ‘bads’ whose benefits and costs are distributed unevenly across the international order of states. In this vein, foregrounding interests and values of global common concern fails to account for the fact that states’ failure to resolve collective action problems bound up with the production, distribution and alignment of global public goods is also the expression of conflicting political loyalties they owe to their own citizenries.

The second prong of the global approach to public goods attempts to address this problem by way of enhancing political accountability for their transboundary impacts. Here, the emphasis is less on commonality than on disjuncture that arises from what David Held has termed a ‘breakdown’ of the symmetry and congruence between decision-makers and decision-takers under conditions of globalization:

Traditionally, the tension between the sphere of decision-makers and the sphere of decision-takers has been resolved by the idea of political community – the bounded,

¹⁸ For example, in June 2007 Ecuadorian President Rafael Correa offered to forego oil exploitation in the Amazonian Yasuni Park for the global environmental benefit in exchange for financial contributions from other states, to be paid into a fund jointly administered by Ecuador and UNDP: ‘Ecuador doesn’t ask for charity, but does ask that the international community share in the sacrifice and compensates us with at least half of what our country would receive, in recognition of the environmental benefits that would be generated by keeping this oil underground’, as cited in Ecuador: pay us not to develop Amazon’s oil reserves, MONGABAY.COM, 27 April 2007, http://news.mongabay.com/2007/0427-ecuador_oil.html. In August 2013, the initiative was abandoned due to insufficient contributions from the international state community.

territorially delimited community in which decision-makers and decision-takers create processes and institutions to resolve the problem of accountability. ... Globalization, global governance and global challenges raise issues concerning the proper scope of democracy and of a democracy's jurisdiction, given that the relation between decision-makers and decision-takers is not necessarily symmetrical or congruent with respect to territory.¹⁹

To redress the ensuing political accountability gap for global public goods, Kaul and Mendoza have proposed a principle of 'equivalence of publicness' (derived from the notion of fiscal equivalence) that requires 'matching the circle of stakeholders in a particular public good with the circle of participants in negotiations on its provision'.²⁰ This is to be achieved by virtue of expanding decision-making 'across fiscal and political jurisdictions to encompass all stakeholders for the good in question'.²¹ Kaul and Mendoza's approach proceeds from circumscribing the 'scale' of the public good in question (i.e., whether it confers local, national, regional, or global benefits) to identifying those affected by its provision, 'independent of the subjective evaluation which individuals attach to the objective benefits derived from the good'.²² While extending political jurisdiction over public goods across national-territorial borders, this approach still falls short of recovering *the* public good at the global level.

Absent a global conception of political authority that could anchor public goods in the general interest of the cosmopolitan polity, the identification of 'all affected' will center on political stakes of individuals in *particular* global public goods (promoting economic development, ensuring environmental sustainability, etc.). This entails that political participation in decisions about global public goods is not intended to account for the general interest of the polity but is rather organized around functionally delimited goals shared among those regulated by a particular process.²³ Accordingly, the asymmetry and incongruence between decision-makers and decision-takers that stems from the confinement of *the* public good to the territorial state is resolved by way of a global

¹⁹ Held, *supra* note 15, 372.

²⁰ Kaul & Mendoza, *supra* n 1, 91.

²¹ *Id.*

²² *Id.*

²³ On the democratic shortcomings of the functional approach to global ordering see further Grainne de Burca, *Developing Democracy Beyond the State*, 46 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 221, 242-243, 254 (2008).

functional differentiation of public goods. Yet such functional differentiation creates new global asymmetries and incongruence between those with conflicting political stakes in different public goods that, as we have seen, will often act at cross-purpose with each other.²⁴ Moreover, Kaul and Mendoza's proposal to specify affectedness on the basis of an objectified account of 'benefits' raises similar concerns about de-politicization as the standard economic approach. The determination of 'all affected' on socio-empirical grounds conceals that identifying the relevant stakeholders in any particular global public good is itself a political question. As Nancy Fraser points out, demarcating those kinds and levels of affectedness that are deemed sufficient to confer political standing on the individual 'requires complex political judgments ... weighting the relative merits of alternative interpretations of the all-affected principle, which generate alternative accounts of the "who"'.²⁵ Seen in this light, the extension of political jurisdiction across national-territorial borders insulates normative judgments about 'affectedness' from political contestation by identifying *in advance* of the political process those with a relevant stake in decisions about global public goods. Finally, these difficulties with framing political accountability in the transnational realm elucidate that the political challenge faced by the global public goods approach is not simply one of 'scale' (from local to global) but also one of 'kind' that concerns the transformation of a purely instrumental into a normative conception of public goods absent a global public good that 'we all' hold in common.²⁶

IV. HUMAN RIGHTS AND *THE* PUBLIC GOOD

As with the global approach to public goods, positing interests and values of common global concern does not suffice to politically and legally account for human rights at the global level – regardless of whether one assimilates human rights to global public goods or places them at the heart of a 'global citizenship' that 'underwrites the autonomy of each and every human being, and recognizes their capacity for self-governance at all levels of

²⁴ A problem very visible in Kaul and Mendoza's scheme of global public goods that lists 'respect for human rights' next to 'respect for state sovereignty' and 'multilateral trade agreements', see Kaul & Mendoza, *supra* note 1, 98.

²⁵ Nancy Fraser, Two Dogmas of Egalitarianism, in *SCALES OF JUSTICE* 30, 40 (2010).

²⁶ I borrow this distinction between 'scale' and 'kind' from Loader & Walker, *supra* note 11, 239-245.

human affairs'.²⁷ True, the universality of human rights is sometimes treated as a truism. Human rights are universal because they belong to all human beings by virtue of their being human; or put the other way around, unless they are universal rights they cannot be human rights:

Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). They are also *inalienable* rights: one cannot stop being human, no matter how badly one behaves or how barbarously one is treated. And they are *universal* rights, in the sense that today we consider all members of the species *Homo sapiens* 'human beings', and thus holders of human rights.²⁸

In spite of their proclaimed universal normativity, human rights are a scarce resource with benefits distributed very unevenly across the globe. Geography plays a decisive role in the global birth lottery and most Northerners happen to live a freer and less unequal life than people in the 'Global South'. Moreover, the criteria for membership in the human family are far from settled, with prospective candidates having ranged from slaves, black people, women, Jews, and homosexuals to corporations that claim their 'human' rights to privacy, property, and so on against the rest of 'us'. This inclusion/exclusion dilemma is rooted in the well-known difficulty of 'mapping' humanity's universality-by-abstraction onto concrete rights-bearing subjects that come with a nationality, gender, age, race, class, and so on. Finally, people tend to disagree about their concrete due in human rights. Under conditions of political pluralism, any account of rights will 'face disagreements about the interests it identifies as rights, and the terms in which it identifies them. Those disagreements will in turn be vehicles for controversies about the proper balance to be struck between some individual interest and some countervailing social considerations'.²⁹ Not only do these rival and conflictive properties of human rights betray any easy attempt to assimilate them to (the standard economic approach to) public goods. Furthermore, an assessment from the vantage point of their purported non-rivalness and non-excludability misses out on the political thrust of claiming human rights as correlative to public duties to respect, protect, and fulfill them – duties that are not subservient to imperatives of

²⁷ Held, *supra* note 15, 387.

²⁸ JACK DONNELLY, *UNIVERSAL RIGHTS IN THEORY & PRACTICE* 10 (2d ed. 2003).

²⁹ Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13(1) *OXFORD JOURNAL OF LEGAL STUDIES* 18, 30 (1993).

economic efficiency.³⁰ While ownership of the land from which the oil in our example is extracted may be considered a 'private' good (because land is treated as a rival commodity of exclusionary use to its owner), the question of who (if anyone) is entitled to lay claim to this land as a matter of (private property) right is a public and political question.³¹

The latter distinction between land ownership as a private good and the public allocation of rights to private property sheds light on the internal relationship between human rights protection and democratic self-legislation. Far from 'pre-political' individual entitlements, rights-based claims to private property require an authoritative determination by and for a political community as a whole. Human rights become determinate (in the face of abstraction) and authoritative (in the face of conflict) through their emplacement in political relationships individuated in the state legal order. Human rights are those rights that human beings must accord to each other as members of a polity to legitimately regulate their common affairs under positive law. By empowering those subjected to the state's legal commands to also view themselves as their authors, human rights enable individuals to consider state power not merely in terms of factual constraints on their freedom but also as the legitimate expression of collective political will-formation.³² As Habermas puts it, 'popular sovereignty and human rights provide the two normative perspectives from which an enacted, changeable law is supposed to be legitimated as a means to secure both the private and civic [public] autonomy of the individual'.³³ On the one hand (as in the traditional liberal view), human rights erect legitimate barriers to the encroachment of public authorities on the private autonomy of individual legal subjects. Yet on the other hand, the protective role of human rights in relation to individual freedom cannot be imposed on popular sovereignty in the form of external constraints. Those benefiting from human rights as private individuals must also

³⁰ In this vein, Lindsnaes considers human rights 'complementary' to the standard economic approach to public goods because they counteract the latter's 'strategic' rationality, see Lindsnaes, *supra* note 2, 74.

³¹ This distinction is in principle commensurable with considering the right to private property a global public good because it averts the 'tragedy of the commons'. Yet it should also be noted that the latter view is premised on certain empirical assumptions about the beneficial relationship between the institutionalization of private property regimes and the exploitation of natural resources for which at least the members of our local community suffering from oil-induced environmental degradation will have little patience.

³² Jürgen Habermas, Remarks on the Legitimation through Human Rights, in *THE POSTNATIONAL CONSTELLATION* 113, 114-115 (2001).

³³ *Id.* at 116.

be able to understand themselves as their authors in the exercise of their public autonomy through democratic self-legislation:

For, in the final analysis, private legal subjects cannot enjoy even equal individual liberties if they themselves do not jointly exercise their civic [public] autonomy in order to specify clearly which interests and standards are justified, and to agree on the relevant respects that determine when like cases should be treated alike and different cases differently.³⁴

At the same time, the substantive content of legal human rights cannot be derived from a pre-determined ethical self-understanding of national community. Rather, a political collective that commits to protecting human rights empowers individuals to invoke humanity against the polity. Hence, neither do human rights entail legal entitlements that human beings possess in advance of democratic self-legislation, nor are they simply the product of collective will-formation among citizens. Rather, the tension between human rights' universal normativity and their institutionalization in particular legal orders is resolved, in an ever-provisional way, through a reflexive political process in which members of the polity recognize each other both as legal subjects and as individual human beings.³⁵

Finally, the internal relationship between human rights protection and democratic self-legislation explains the constitutive role of human rights in relation to *the* public good vested in the nation-state. By according legal protection to human rights, a political collective empowers individuals to stake a political claim in the definition of *the* public good that establishes, institutionalizes and accounts for the general interest of the polity. Take the example of the human right to a 'general satisfactory environment' that is invoked by members of our oil-producing community against the state and, indirectly, the oil industry itself.³⁶ An individual's claim that her rights were violated by oil-induced

³⁴ Jürgen Habermas, On the internal relation between Democracy and the Rule of Law, in *THE INCLUSION OF THE OTHER* 253, 264 (1999).

³⁵ Habermas himself conceives of this tension in terms of the 'Janus-faced' nature of human rights, looking both to the open-ended and transformative discourse of universal morality and to their ethical-political institutionalization in particular legal orders, see Habermas, *supra* note 32, 118.

³⁶ For an illustration of the multi-faceted human rights challenges raised by this example see the famous 'Ogoniland decision' of the African Commission on Human and Peoples Rights, *THE SOCIAL AND ECONOMIC RIGHTS ACTION CENTER AND THE CENTER FOR ECONOMIC AND SOCIAL RIGHTS v. NIGERIA*, Communication No. 155/96 (2001). The right to a general satisfactory environment is protected by Article 24 of the *AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS*.

environmental damages is judged in relation to the general interest of a political community, as reflected in its embedded understanding of, say, 'the rights of others' and 'the common interest'.³⁷ If such a claim is successful, it transforms the very boundaries of the polity and translates into a new self-understanding of what the political community takes the human right to a satisfactory environment to be about. That the concrete content of the right is determined in relation to the polity's 'common interest' illustrates how the rights-based protection of particular individuals and groups is at the same time of common concern to the political collective as a whole.³⁸ For the same reason, human rights cannot be conceived as a functionally differentiated policy domain geared towards the realization of particular interests. The scope of protection of human rights is not contingent on the nature of the interfering policy measure but determined in relation to the general interest of the polity. That is to say, it is immaterial for the assessment of the ambit of the human right to a generally satisfactory environment whether this right is interfered with in the state's pursuit of national energy production, economic development, and so on. Inasmuch as human rights are of concern to all sectors of government activity, they mandate legal protection that cuts across functional differentiations.³⁹ In sum, the constitutive role of human rights in relation to *the* public good consists in their contribution to the legitimation of state power by re-presenting the general interest of the polity that is not reducible to the aggregated economic self-interest of 'isolated' liberal individuals or the provision of functionally differentiated public goods.

³⁷ Article 27(2) AFRICAN CHARTER, *supra* note 36. Other regional and international human rights conventions contain similarly worded limitation clauses.

³⁸ For a related argument from domain of ethics that shows how human rights are rendered determinate by virtue of the 'formal and material constraints' imposed upon them see JAMES GRIFFIN, *ON HUMAN RIGHTS* 174 (2008).

³⁹ Perhaps unsurprisingly, this 'cross-sectoral balancing' role of human rights has received particular attention in debates concerning human rights protection in the functionally differentiated European Union polity, see Neil Walker, *Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism*, in *SKEPTICAL ESSAYS ON HUMAN RIGHTS* 119, 136 (Tom Campbell, Keith Ewing & Adam Tomkins eds., 2001); Philip Alston & Joseph Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, in *THE EUROPEAN UNION AND HUMAN RIGHTS* 3, 23 (Philip Alston with Mara Bustelo & James Heenan eds., 1999).

V. DE-CENTERING HUMAN RIGHTS FROM THE INTERNATIONAL ORDER OF STATES

If the globalization of public goods is marked by their functional differentiation, international law has traditionally confined the constitutive political role of human rights in relation to *the* public good to the territorial state legal order. Human rights' universal aspirations constantly run up against the territorial limitations inherent in the state-centered architecture of international law. To be sure, there is argument to the effect that human rights treaties have a distinctive status in the body of general public international law, be it because they embody 'universal' values of the international state community, because they operate as an international *ordre publique*, or because the fulfillment of a state's international human rights obligations is not conditional upon reciprocity by other states.⁴⁰ This notwithstanding, international law has traditionally not given rise to individual entitlements to claim protection of their human rights by everyone and everywhere but instead confines them to a territorially circumscribed relationship between public authorities and private individuals. Accordingly, and at least as a default rule, each state has a singular legal obligation and prerogative (to the exclusion of other states) to respect, protect and fulfill the human rights of individuals located on its own territory in relation to acts of its own public authorities. This territorial compartmentalization of human rights in the international order of states, in turn, bears out the political division of labor between constitutional and international law.⁴¹ As I suggested in the previous section, human rights in their constitutional form contribute to the transformation of state power into legitimate forms of legal authority by empowering individuals to partake in the political definition of *the* public good individuated in the territorial state legal order. At the international level, by contrast, human rights take the form of political agreements between states that oblige each state to respect, protect and fulfill the rights of individuals within the territorial confines of its own legal order. As a consequence, the human rights impacts of state decisions concerning the production,

⁴⁰ See, for example, Matthew Craven, Legal differentiation and the concept of the human rights treaty in international law, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 489 (2000); Bruno Simma, International Human Rights and General International Law: A Comparative Analysis, IV (2) COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153 (1995).

⁴¹ On the distinction between the constitutional and international dimensions of human rights law see further Gerald Neuman, Human Rights and Constitutional Rights: Harmony and Dissonance, 55 STANFORD LAW REVIEW 1863 (2003).

distribution and alignment of global public goods on individuals in other states are traditionally not mitigated by corresponding extra-territorial human rights obligations.

Kaul and Mendoza's proposal to extend political jurisdiction over global public goods to encompass all those 'affected' by their costs and benefits finds a correlation in attempts in the human rights debate to ensure legal accountability for extraterritorial human rights violations by extending human rights jurisdiction beyond state territory. In general public international law, jurisdiction fulfils 'the function of regulating and delimiting the respective competences of states' to lawfully rule over 'conduct in matters not exclusively of domestic concern'.⁴² It circumscribes the conditions under which a state can prescribe and enforce its laws on the territory of another state, in accordance with an internationally recognized basis of jurisdiction and subject to a reasonableness test.⁴³ International law thus delimits a state's legal authority over individuals outside its borders by virtue of the rights that other states wield over their territory and people therein. As a consequence, and although international law does not explicitly tie human rights jurisdiction to state territory,⁴⁴ their compartmentalization in the international order of states appears to warrant a 'primarily territorial' interpretation that renders extraterritorial human rights protection 'exceptional' and in need of special justification.⁴⁵ However, the question whether states are obliged to protect the human rights of individuals outside their borders is not reducible to the question whether they are entitled to do so pursuant to an internationally recognized basis of jurisdiction. Otherwise, a state could circumvent its obligations under international human rights treaties by exceeding

⁴² Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 9, 15 (1964).

⁴³ See further JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 456-486 (8th ed., 2012).

⁴⁴ Article 1 of the EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS simply provides that states shall 'secure' human rights 'to everyone within their jurisdiction'. Article 2(1) of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS tasks each state party to respect and ensure human rights 'to all individuals within its territory and subject to its jurisdiction'. Other international human rights treaties, including the INTERNATIONAL COVENANT ON SOCIAL, ECONOMIC AND CULTURAL RIGHTS do not contain a jurisdiction clause at all.

⁴⁵ E. Ct. H. R. (Grand Chamber), *BANKOVIC AND OTHERS v. BELGIUM AND OTHERS* para. 59 (Admissibility Decision of 12 December 2001). While the bulk of *BANKOVIC* has meanwhile been overruled, the Court continues to hold fast to the view that extraterritorial human rights protection is exceptional and in need of special justification in the light of the sovereign territorial rights of other states, see E. Ct. H. R. (Grand Chamber), *AL-SKEINI AND OTHERS v. UNITED KINGDOM* para. 131 (Judgment of 7 July 2011).

its competences under general public international law.⁴⁶ The conditions under which an individual comes under the human rights jurisdiction of a state are thus different from those pertaining to the legality of state action under the general international law of jurisdiction. Whereas the latter regulates the state's *legal authority* over conduct not exclusively of domestic concern, the former regulates the state's obligations when exercising *de facto power and control* over an area or individual outside its borders.

In this vein, the UN Human Rights Committee considers that 'a State party must respect and ensure the rights laid down in the [International Covenant on Civil and Political Rights] to anyone within [its] power or effective control ..., even if not situated within the territory of the State Party ... and regardless of the circumstances in which such power or effective control was obtained'.⁴⁷ Or, the European Court of Human Rights has held that the decisive factor for establishing human rights jurisdiction is the state's 'exercise of physical power and control', whether lawful or unlawful, over the individual in question.⁴⁸ The allocation of human rights obligations to states is thus not predicated on citizenship or territory but on state power and control over the individual rights holder. As *per* the Inter-American Commission of Human Rights, 'the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the state observed the rights of a person subject to its authority and control'.⁴⁹ Similar views have been espoused by the other UN Treaty Bodies, including the Committee tasked with the interpretation of the International Covenant on Social, Economic and Cultural Rights,⁵⁰ and the International Court of Justice.⁵¹ Importantly, the

⁴⁶ On this distinction see further Daniel Augenstein & David Kinley, When human rights "responsibilities" become "duties": the extra-territorial obligations of states that bind corporations, in OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271 (Surya Deva & David Bilchitz eds., 2013).

⁴⁷ H. R. C., GENERAL COMMENT NO 31: THE NATURE OF THE GENERAL LEGAL OBLIGATION IMPOSED ON STATES PARTIES TO THE COVENANT para. 10, CCPR/C/21/Rev.1/Add.13 (2004).

⁴⁸ AL-SKEINI, *supra* note 45, para 136.

⁴⁹ INTER-AM.. C. H. R., COARD ET AL v. THE UNITED STATES, para 37, Report No. 109/99 (1999).

⁵⁰ For an overview of the relevant Treaty Body commentary see the MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2011), published with extensive commentary in 34 HUMAN RIGHTS QUARTERLY 1084 (2012); and more recently THE GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, HUMAN RIGHTS LAW SOURCES: UN PRONOUNCEMENTS ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS (2015), <http://globalinitiative-escr.org/working-paper-human-rights-law-sources-un-pronouncements-on-extra-territorial-obligations/>

extraterritorial application of human rights treaties is not confined to situations in which state agents operate on foreign soil but also comprises actions performed on the state's territory that infringe the rights of individuals outside its borders. Both the European Court of Human Rights and the Inter-American Commission on Human Rights have recognized that 'acts and omissions' of state agents that merely 'produce effects' outside the state's territory can bring an individual under that state's human rights jurisdiction.⁵² For some of the UN Treaty Bodies, this entails that states have extraterritorial obligations to 'prevent their own citizens and national entities' from violating human rights in other countries.⁵³ Similarly, the Maastricht Principles define extraterritorial human rights obligations as 'relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside its borders'.⁵⁴

There is a lively doctrinal discussion about the feasibility and desirability of extending international human rights obligations beyond state borders that concerns, among others, the precise requirements of (effective) state power and control, the distinction between jurisdiction and state responsibility, the role of attribution in relation to both, and the problem of causation.⁵⁵ While these debates are undoubtedly important in spelling out more concretely the conditions for an extraterritorial application of international human

⁵¹ In its advisory opinion on the legality of the wall in occupied Palestinian territory, for example, the International Court of Justice endorsed the view of the Committee on Economic, Social and Cultural Rights that 'the state party's obligations under the Covenant apply to all territories and populations under its effective control'. On this basis, the Court held that the construction of the wall impeded, inter alia, 'the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child'; see I. C. J., LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY para. 112, ICJ Reports 136 (2004), with reference to C. E. S. C. R., CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ISRAEL para. 15, 31, E/C.12/1/Add.90 (2003).

⁵² AL-SKEINI, supra note 45, para 133; INTER-AM. C. H. R., SALDANO v. ARGENTINA para. 17, Report No. 38/99, OEA/Ser.L/V/11.95 Doc. 7 rev. (1999).

⁵³ See, for example, C. E. S. C. R., GENERAL COMMENT 19: THE RIGHT TO SOCIAL SECURITY para. 54, E/C.12/GC/19 (2008).

⁵⁴ MAASTRICHT PRINCIPLES, supra note 50, Principle 8(a).

⁵⁵ See, for example, GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford, Wouter Vandenhoe & Willem van Genugten eds., 2013); MARCO MILANOVIC, EXTRATERRITORIAL APPLICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY (2011); MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES; SIGRUN SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION (2009); and the contributions to EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004).

rights treaties, they should not distract from the underlying normative concerns. That is to say, doctrinal arguments about the conditions under which a state can be held legally accountable for extraterritorial human rights violations reflect normative judgments about the appropriate role of human rights in construing an agency relationship between that state and an individual located outside its borders. Human rights jurisdiction thus circumscribes a rights-based '*relationship* between the individual and the State in relation to violations [of human rights] *wherever they occurred*'.⁵⁶ In the previous section I argued that by empowering individuals to partake in the definition of the public good, human rights enable them to consider state power not merely as a factual constraint on their freedom but also as the legitimate expression of collective political will-formation. On the one hand, disentangling human rights jurisdiction from state territory yields an extension of rights-based entitlements to all individuals under the state's power and control wherever located. This ensures legal accountability for the global human rights impacts of state-based decisions concerning the production, distribution and alignment of public goods. Yet on the other hand, it severs the internal relationship between human rights protection and democratic self-legislation traditionally vested in the territorial state legal order. Instead, it confronts the state polity with the human rights claims of individuals outside its borders to be concerned by, and to therefore have a legitimate say in, the political definition of that state's public good as a representation of the general interest that all of its members hold in common. Seen in this light, and similarly to the global public goods approach, extending human rights jurisdiction beyond state territory does not give rise to a global conception of political authority that could render decisions about public goods legitimate in the light of a global public good. It merely de-centers the constitutive role of human rights in the definition of *the* public good from the nation-state to contribute to the transformation of the facticity of state power into legitimate legal authority beyond state borders.

⁵⁶ H. R. C., DELIA SALIDES DE LOPEZ v. URUGUAY para 12.2, CCPR/C/OP/1 (1981), my emphasis.

VI. PUBLIC GOODS, HUMAN RIGHTS AND THE TRANSFORMATION OF STATEHOOD

Attempts to account for global public goods are marked by a tension between economic concerns with their efficient production, distribution and alignment in and for a global market and the localization of political and legal authority in the international order of states. At the same time, global interdependencies in the production and consumption of public goods challenge the nation-state as blueprint for a territorially confined political community in which collective action problems are resolved in the light of *the* public good. This challenge, or so I have argued, cannot be satisfactorily addressed by positing interests and values of common global concern – be it in terms of global costs and benefits associated with public goods or in terms of universal membership in the human family of rights-bearing subjects. Rather, it requires us to revisit our state-centered assumptions about the nature and operation of law and politics under conditions of globalization. In this vein, scholars of political cosmopolitanism and global constitutionalism have advanced arguments in favor of a further ‘vertical’ integration of the international order of states that accounts for the cross-functional and transboundary impacts of public goods on human wealth and well-being. Political cosmopolitans envisage the creation of a democratic world political system that for many should take the form of a suitably reformed United Nation. David Held, for example, imagines a ‘global assembly’ that brings together all states and agencies to authoritatively rule over a world citizenry endowed with equal rights and duties. This ‘posits the idea of a global political order in which people can enjoy an equality of status with respect to the fundamental processes and institutions which govern their life expectancy and life chances’.⁵⁷ In a similar vein, Jürgen Habermas sees a world once dominated by nation-states in transition toward a ‘postnational constellation of a global society’ that governs itself through a ‘global domestic politics without world government ..., embedded within the framework of a world organization with the power to impose peace and implement human rights’.⁵⁸ If political cosmopolitanism aims at enhancing the global democratic legitimacy of public goods, scholars of global constitutionalism call for a further integration of international law to ensure legal accountability for their global human rights impacts. Here, the functional differentiation of global politics finds its counterpart in an increasing fragmentation of

⁵⁷ Held, *supra* note 15, 386.

⁵⁸ Jürgen Habermas, Does the Constitutionalization of International Law Still Have a Chance?, in *THE DIVIDED WEST* 115, 136 (2006).

international law: If 'globalization generates pressures for greater numbers of international rules in more areas of international life', the 'greater density of international norms in greater numbers of functionally separate international regimes heightens the dangers associated with the fragmentation of international law'.⁵⁹ Moreover, the transboundary impacts of global public goods require a more robust account of international law's procedural and substantive legitimacy that compensates for the global shortcomings, and redresses the methodological nationalism, of constitutionalism's state-centered heritage.⁶⁰ In this vein, global constitutionalism views national constitutional law and international public law as bound together by a set of common constitutional principles that govern the globe in matters of general public concern. Within this broader framework, the global constitutionalization of human rights subjects international politics to a public reason constraint that requires states to take the legitimate concerns of 'outsiders' into account.⁶¹

What I have dubbed the 'vertical' integration of the international order of states remains parasitic on a notion of statehood as a political collective individuated in the territorial state legal order – whether, as with political cosmopolitanism, its form is integrated into a democratic world political system or, as with global constitutionalism, its substance is adjusted in the light of a set of global constitutional principles. By contrast, the approaches discussed in this contribution – the extension of political jurisdiction over decisions concerning global public goods and the extension of legal jurisdiction over their global human rights impacts – point toward a 'horizontal' transformation of statehood across national-territorial borders that transcends the state-based distinctions between domestic and foreign politics, and between constitutional and international law. Both approaches come with problems of their own. The extension of political jurisdiction over public goods to encompass all those 'affected' by their costs and benefits is bought at the price of their global functional differentiation geared towards the realization of particular

⁵⁹ Jeffrey L. Dunoff & Joel P. Trachtman, A Functional Approach to International Constitutionalization, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 3, 9 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

⁶⁰ Anne Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, 19 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 579 (2006).

⁶¹ Mattias Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 258 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

interests. The extension of human rights jurisdiction beyond state territory, in turn, severs the internal relationship between human rights and democratic self-legislation in accounting for the general interest of the state polity. Yet taken together, they may be seen as an incremental attempt to recover *the* public good beyond the international order of states. To the extent that global interdependencies in the production and consumption of public goods have blurred the state-based distinction between domestic and foreign politics, the global public goods approach provides presumptive justifications for state intervention to prevent 'market failures' in matters of common global concern. To be legitimate, such global assertions of state power must be accompanied by the recognition of the rights-based claims of those concerned to be affected by, and to therefore have a legitimate say in, the definition of the state's public good. This, finally, entails a political reading of the 'all affected' principle that settles conflicts about global public goods in the light of normative judgments about the appropriate role of human rights in mediating the tension between state power and legitimate legal authority beyond the state-based constitutional/international law divide.

Discussion Papers of the Center for Global Constitutionalism 2015

Ester Herlin-Karnell and Poul F. Kjaer Dimensions of Justice & Justification in EU and Transnational Contexts	SP IV 2015-801
Jan Pieter Beetz and Enzo Rossi EU Legitimacy in a Realist Key	SP IV 2015-802
Ben Crum From Public Reason to Multi-Layered Justice	SP IV 2015-803
Sionaidh Douglas-Scott Human Rights as a Basis for Justice in the European Union	SP IV 2015-804
Ester Herlin-Karnell Justice and Justification in Europe's "Area of Freedom, Security and Justice"	SP IV 2015-805
Lyn K.L. Tjon Soei-Len The Moral Limits of EU Internal Market Exchange Equal Respect and Capabilities	SP IV 2015-806
Sivan Shlomo-Agon Noncompliance, Renegotiation, and Justice in International Adjudication: A WTO-EU Perspective	SP IV 2015-807
Poul F. Kjaer The Function of Justification in Transnational Governance	SP IV 2015-808
Daniel Augenstein To Whom It May Concern: International Human Rights Law and Global Public Goods	SP IV 2015-809

All discussion papers are downloadable:

<https://www.wzb.eu/en/publications/discussion-papers/trans-sectoral-research>