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THE 'EMERGENCE' OF
GLOBAL ADMINISTRATIVE LAW?



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* This paper is a presentation and development of ideas formulated in two longer (as yet unpublished) papers, both written in 2007, dealing with a similar subject matter: “GAL, Constitutionalism, Democracy: A Common Project?” and “Constitutionalising the Globe? The Rhetorical Construction of Community in International Legal Scholarship”. I’m grateful to Benedict Kingsbury, Richard Stewart and Lorenzo Casini for extremely helpful discussions on the thoughts expressed here; the usual disclaimer, of course, applies. All comments on and criticisms of this paper (or, indeed the earlier ones) are most welcome (macdonalde@exchange.law.nyu.edu).

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I. INTRODUCTION

Global Administrative Law doesn't exist. Nor, I think, is this a particularly controversial statement; indeed, it seems to be inescapably implicit in the claim – common to much of the central scholarship within the field to date – that we are currently witnessing (and encouraging) the *emergence* of global administrative law.¹ It is important to stress, in this regard, that the metaphor of “emergence” in this context cannot be understood in a manner strictly analogous to, say, that of the “emergence” of a landmass from beyond the horizon. In the latter case, the object emerging already exists; it is only that we were previously unable to perceive it, to recognise it for *what it is*. In the realm of the “ontologically subjective”,² however (to which law undeniably belongs), to acknowledge an object as “emerging” is to acknowledge that it is not (yet) in existence. The act of naming such an object is to express the expectation (and possibly the hope) that, when fully emerged, it will take a particular form; a form that is necessarily contingent, in part recognisable (given the fact that our choice of signifier will almost certainly – if it is to be at all plausible – be grounded in similarities to other, already existing objects), in part fundamentally *new*.³ Unlike the former claim, then, which is purely empirical in

¹ The prime example of this, of course, is the central text by Kingsbury, Krisch and Stewart, that both launched and framed the GAL project, the title of which is recalled in the title of the present paper. See Kingsbury, Krisch and Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* (2005) 15; see also Kingsbury, ‘Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law’, 104 *Journal of International Law and Diplomacy* (2005) 98; Eleanor D. Kinney, “The Emerging Field of International Administrative Law: It's Content and Potential”, 54 *Administrative Law Review* (2002) 415;

² I have borrowed this slightly grandiose terminology from the work of John Searle; see Searle, *The Construction of Social Reality* (New York: Free Press, 1995) pp. 8-12. Put simply, that which is “ontologically subjective” but “epistemologically objective” applies to all of those objects that clearly exist, but that are equally clearly entirely human inventions. Hacking gives the example of the laws of baseball in this regard (see generally Ian Hacking, *The Social Construction of What?* (Cambridge, MA: Harvard University Press, 1999) pp. 9-36); I see no reason for conceiving of the laws of society in different philosophical terms.

³ For a short analysis of the importance of having “named” the phenomenon of global administrative law, see Susan Marks, “Naming Global Administrative Law” 37 *New York University Journal of International*

character, the latter contains both an empirical and an irreducibly *creative* (and hence, ultimately, *ethical*) element. In this paper, I want to begin to take seriously this common rhetoric of emergence in the field, and ask: what might – and should – global administrative law look like when it has fully emerged?

Global administration exists. This, perhaps, is a more controversial statement; but only marginally so. It is in many respects the foundational insight of the global administrative law project, without which much of the argumentative platform of the entire project simply collapses.⁴ Certainly, there are difficult questions to be answered at both margins in defining what is meant by “administration” in this context: what distinguishes “global” administration from the exercise of other clearly public forms of power – in particular legislative and judicial – in the global sphere? And where – and how – should the line be drawn between those forms of power that are to be treated as essentially public and private in nature? The existence of such hard cases, however, should not distract us from the fact that much of what would normally be unproblematically regarded as public power is now exercised at a global level by bodies that can clearly lay claim to none of the usual bases of legitimacy that characterise legislative or judicial power. Whether or not this developing, highly sectoral global administration can yet be described as constituting a discrete, unitary “global administrative space” in the manner suggested by Kingsbury, Krisch and Stewart remains an open question.⁵ For my purposes here, however, it is sufficient that their basic insight, that “much of global governance can be understood and analyzed as administrative action”⁶ is accepted.

Global administrative laws exist. This is perhaps the most controversial of my three opening statements; particularly if the argument in the opening paragraph is accepted. A significant part of this paper is concerned with illustrating why this is not as contradictory as it might at first appear. Put simply, however, this is nothing more than the claim that a

Law and Politics (2005) 995. Unlike Marks, however, I am here concerned, in the first instance at least, not so much with the emergence of a rhetoric, but rather with the rhetoric of emergence itself.

⁴ On this, see e.g. Kingsbury, Krisch, Stewart and Weiner, “Global Governance as Administration: National and Transnational Approaches to Global Administrative Law”, 68 *Law and Contemporary Problems* (2005) 1.

⁵ See Kingsbury, Krisch and Stewart, loc. cit. n. 1, at pp. 18-20.

⁶ *Ibid.*, at p. 17.

sufficient empirical basis exists to render the claim that something we can plausibly refer to as a global administrative law is indeed emerging; that this is not simply a statement of utopian desire, but rather something that finds real support in concrete legal practice. Examples abound in GAL literature, illustrating how many of the legal tools and concepts developed within the framework of domestic administrations have been transposed to the setting of global regulatory governance, either as limitations on the actions of global administrative bodies,⁷ or as global rules and principles imposed on national administrative procedures.⁸ If, however, that which is currently in existence – in many sectors a fairly underdeveloped borrowing of some basic participation and transparency rules, or rudimentary accountability mechanisms – were to be the end-point of development in this regard, if what *is* now were to represent all that *will be*, then the use of the term Global Administrative Law to define this would indeed seem a rhetorical excess. In short, the claim that global administrative laws exist relies on the expectation of further progressive development in the field, from a loose set of fragmented laws to an (at least in some sense) unitary Law. How this gap between the global administrative laws that do exist and the Global Administrative Law that (as yet) does not might be bridged is, of course, the central focus of this paper.

In many respects, then, this paper seeks to confront head-on the general topic of this seminar: GAL: From Fragmentation to Unity? The question mark at the end of the title strikes me as of particular importance here: not only does it serve to underline the necessarily contingent nature of this progression, it also problematises the notion of “unity” itself that is to inform the analysis. It speaks directly to a major tension that has

⁷ For some short studies of various different types of global regulatory bodies, see Sabino Cassese *et al* (eds.), *Global Administrative Law: Cases, Materials, Issues* (2nd edition, 2008), particularly Chs. 1, 2 and 4. See also, among many others, James Salzman, “Decentralized Administrative Law in the Organization for Economic Cooperation and Development”, 68 *Law and Contemporary Problems* (2005) 189; Mark Pallis, “The Operation of the UNHCR’s Accountability Mechanisms”, 37 *New York University Journal of International Law and Politics* (2005) 869; Michael S. Barr and Geoffrey P. Miller, “Global Administrative Law: The View from Basel”, 17 *European Journal of International Law* (2006) 15; Michael Livermore, “Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius”, 81 *New York University Law Review* (2006) 776; and Errol Meidinger, “The Administrative Law of Global Private-Public Regulation: the Case of Forestry”, 17 *European Journal of International Law* (2006).

⁸ On this, see generally Cassese *et al*, op. cit. n. 7, particularly Ch. 3; see also Cassese, “Global Standards for National Administrative Procedures”, 68 *Law and Contemporary Problems* (2005) 109.

been present in the GAL project since its inception: that it has arisen out of – indeed largely in response to – the conditions of radical plurality and fragmentation that currently characterise the field of global regulatory governance, while simultaneously envisaging the new field in fundamentally unitary terms (as is illustrated by the singular rhetoric not simply of one “Law”, but also of a unitary “global administrative space” within which it is to be applicable). As suggested above, this fundamental unity is at once affirmed and deferred in the basic claim GAL is as yet only “emerging”. In this paper, I will seek to unpack what this notion of unity might mean in the context of Global Administrative Law, using as a counterpoint the (correlated, complementary, contradictory) notion of global constitutionalism.

Comparing and contrasting global constitutionalist discourse is a useful strategy for a number of reasons. Firstly, it is often asserted – if less often argued – that administrative law cannot exist in the absence of a constitutional framework.⁹ Within such a conception, any global administrative law can only ever be a subsidiary complement to the project of global constitutionalism; in the absence of the former, the latter must of necessity fail. Secondly, even where an essential analytical connection is not postulated, those that have addressed this issue have, given that both projects are seeking to perform a similar function (generally speaking, the subjection of public power to public control in global governance), by and large assumed that GAL will ultimately develop towards a unified and coherent system, as part of the more general project of global constitutionalism in which administrative law elements are a necessary complement.¹⁰ Thirdly, and relatedly, this functional overlap has led many to assume that GAL and global constitutionalism will progress by the same means to the same ultimate ends.¹¹

⁹ Cassese notes, but rejects this challenge. See Sabino Cassese, “Administrative Law Without the State? The Challenge of Global Regulation”, 37 *New York University Journal of International Law and Politics* (2005) 663, at pp. 687-689.

¹⁰ See, in this regard, e.g. Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, 19 *Leiden Journal of International Law* (2006) 579; for a different perspective, see Nico Nico Krisch, “The Pluralism of Global Administrative Law”, 17 *European Journal of International Law* (2006) 247, at p. 253.

¹¹ For an approach of this kind, see e.g. David Dyzenhaus, “The Rule of (Administrative) Law in International Law”, 68 *Law & Contemporary Problems* (2005) 127, at p. 139. For a contrary perspective, see e.g. Daniel Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale Law Journal* (2006) 1490

Lastly, there often appears to be a general view that, ultimately, a global constitutional framework represents the most normatively desirable method for regulating global regulatory governance.¹² In this paper, I want to begin to formulate a challenge to all of these assumptions, arguing that the undeniable links between constitutionalism and administrative law are merely contingent when transposed to the global level, and that GAL neither need nor necessarily should aspire to the type of unity implied in the former.

II. GLOBALISING ADMINISTRATIVE LAW / CONSTITUTIONALISM: THREE COORDINATES

In this section, I want to propose one way of structuring an examination of the emergence of global administrative law that is perhaps a little different from that adopted by other works in this area (even as it draws on the approaches that inform many of those works). These have tended to focus either on institutional distinctions (often following the five-way typology established by Kingsbury, Krisch and Stewart in the framing paper),¹³ or on the author of the rules or oversight in question (as suggested, for examples, by analyses of the “bottom-up” and “top-down” approaches to global administrative law),¹⁴ or on particular mechanisms of constraint and control (most commonly on the theory of “accountability”).¹⁵ While each of these undoubtedly has important merits, none seems particularly well calibrated for the purposes in hand here. Instead, I suggest that it may be fruitful to look instead at the manner in which various referents of the term “global” when applied to the fields of administrative law and constitutionalism engenders different “coordinates” for the analysis and application of these concepts. Of these coordinates, I

¹² For one of the most striking formulations of this type of claim, see Ernst-Ulrich Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration”, 13 *European Journal of International Law* (2002) 621.

¹³ See Kingsbury, Krisch and Stewart, loc. cit. n. 1. The five types of global regulatory authority that they identify are as follows: 1) international organizations; 2) informal networks of governmental officials; 3) state agencies charged with the administration of global regimes (“distributed administration; 4) hybrid public-private institutions; and 5) private bodies entrusted with governance functions (p. 20).

¹⁴ On this, see generally Richard Stewart, “US Administrative Law: A Model for Global Administrative Law?”, 68 *Law and Contemporary Problems* (2005) 63, at p 76 *et seq.*

¹⁵ On this important issue, see e.g. Ruth W. Grant and Robert E. Keohane, “Accountability and Abuses of Power in World Politics”, *IILJ Working Paper 2004/7: Global Administrative Law Series* (2004); Richard Stewart, “Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance”, draft paper presented at New York University Law School Hauser Colloquium on Globalization and its Discontents (Sept. 2006), available at http://www.law.nyu.edu/kingsburyb/fall06/globalization/speakers_papers.html; and John Ferejohn, “Accountability in a Global Context”, *IILJ Working Paper 2007/5: Global Administrative Law Series* (2007).

identify here three, which provides us with a structure mirrored in the discourse of both projects:¹⁶ the first referring us back to the domestic context (in which the referent of the term “global” is the *source* of the administrative rules and principles in question); the second to that of what might best be termed “extranational”¹⁷ institutions/ regimes (wherein “global” refers to the *subjects* of the administrative law) ; with the third, undoubtedly the most speculative of the three levels, relating to the possibility of instituting either administrative law or constitutionalism on a truly universal level (an administrative law that has become genuinely global in *scope*).¹⁸ I will outline here each in turn.

These three analytic coordinates can be illustrated by brief reference to the body of literature commonly grouped under the heading of “global constitutionalism”. Firstly, there is the commonly-made claim that international law and institutions – or, indeed, consistent foreign practice – can now provide a global *source* of national constitutional commitments (understood either in a soft, “persuasive” sense,¹⁹ or as law that either does²⁰ or should²¹ bind states). Secondly, there has been a significant body of work,

¹⁶ It is worth noting here that the same three coordinates are also present, and function in a structurally similar manner, in what might be (loosely) termed the global democracy project. These issues are all set out in more detail in my paper entitled “GAL, Constitutionalism, Democracy: A Common Project?” (*supra*, n. *).

¹⁷ This term is proposed as one way of encapsulating the four types of global regulatory bodies (excluding “distributed administration; see *infra*, n. 29) identified by Kingsbury, Krisch and Stewart (see *supra*, n. 1) that escapes some of the baggage involved with other possible signifiers. It is intended to refer to the fact that many of these bodies go “beyond” the nation-state not simply territorially, but also institutionally or structurally, and thus to capture some of the richness of existing forms that the terms “supranational” or “transnational” tend to disguise.

¹⁸ Some works have presented an analysis that strikes me as similar, if not identical. The closest by far is that offered by Stefano Battini, in a paper entitled “International Organizations and Private Subjects: A Move Towards a Global Administrative Law”, *IILJ Working Paper 2005/3 Global Administrative Law Series*), available at <http://www.iilj.org/publications/2005-3Battini.asp>.

¹⁹ This was the approach eventually adopted by, for example, the US Supreme Court in its recent judgment in *Roper v. Simmons* (543 U.S. 551 (2005)), in which it relied in part (as a “non-controlling but confirming” factor) upon prevailing international norms and practice in other like-minded countries in declaring the juvenile death penalty unconstitutional. More generally in this regard, see Bruce Ackerman, “The Rise of World Constitutionalism”, 83 *Virginia Law Review* (1997) 771.

²⁰ Dyzenhaus provides a number of examples from certain common law jurisdictions in which the 1989 Convention on the Rights of the Child was directly relied upon by national judges even although it had not been formally incorporated into domestic law by the relevant legislatures. See David Dyzenhaus, “The Rule of (Administrative) Law in International Law”, 68 *Law & Contemporary Problems* (2005) 127, at p. 139; for more detail, see David Dyzenhaus, Murray Hunt, and Michael Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation”, 1 *Oxford University Commonwealth Law Journal* (2001) 5.

particularly in the last fifteen or so years, either identifying or calling for increased levels (or, indeed, both) of “constitutionalism” within global regulatory bodies themselves.²² Lastly, there is a relatively small but growing body of scholarship that relates to the existence or emergence of a unitary, “constituted” global polity, ultimately encompassing all individual, institutions and other relevant actors in the world.²³ In what follows, I want to argue in a little more detail that the structure of the GAL project, as conceived by the scholars writing in this field, mirrors precisely (both structurally and functionally) the discourse of global constitutionalism in this regard.

1. The domestic coordinate of GAL

The application of globally-sourced rules of administrative law to national administrative agencies is viewed by many writing within the field as the paradigmatic case of global administrative law; perhaps unsurprisingly, given that administrative law is likely to be at its most developed. It is on this basis, for example, that Van Harten and Loughlin identify investment treaty arbitration as “the clearest example of global administrative law – strictly construed – yet to have emerged”, as, through this process, “the regulatory conduct of states is, to an unusual extent, subject to control through compulsory

²¹ Petersmann has adopted this approach, in criticising both the EU and its Member States for not individuals to rely directly on the “constitutional guarantees” of freedom and non-discrimination established in WTO law before national and regional fora. See e.g., Ernst-Ulrich Petersmann, “How to Reform the UN System? Constitutionalism, International Law, and International Organizations”, 10 *Leiden Journal of International Law* (1997) 421.

²² By far the most common of this type of analysis is to be found in relation to the WTO. See e.g. Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford: Oxford University Press, 2005); and Neil Walker, “Constitutionalism in a New Key: The EU and the WTO”, in Gráinne de Búrca and Joanne Scott, eds., *The EU and the WTO: Legal and Constitutional Perspectives*, (Oxford: Hart, 2001) 31. Proposals have been made to extend this type of “constitutionalism” to all worldwide organizations, however; see Petersmann, Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration”, 13 *European Journal of International Law* (2002) 621, at p. 631.

²³ One of the first texts to propose global constitutionalism in this universal coordinate (here in relation to the UN) was Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Duncker & Humblot, 1976). For more recent expression of this type of thinking, see Bardo Fassbender, “The United Nations Charter As Constitution of the International Community”, 36 *Columbia Journal of Transnational Law* (1998) 529; and, for a broader approach not limited to the UN framework, see two articles by Erika de Wet: “The International Constitutional Order”, 55 *International and Comparative Law Quarterly* (2006) 51; and “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, 19 *Leiden Journal of International Law* (2006) 611.

international adjudication”.²⁴ A number of other articles written in the field also focus on this particular example;²⁵ however, it is clear that the importance of this analytical level to the global administrative law project extends much further than this.

Sabino Cassese, for example, has written at some length on precisely this issue, taking a broader approach. Using the world trade regime as an example, he adopts a dual focus: first on the administrative law rules contained in certain treaties, such as the SPS Agreement, the TBT Agreement, and the GATS; and second on the administrative law that is generated by bodies that are themselves administrative: the SPS and TBT Committees, the Council on Trade in Services, and – outwith the WTO system – the Codex Alimentarius Commission.²⁶ Moreover, it is worth mentioning in this regard the 1998 Aarhus Convention, a new kind of international environmental agreement that obliges national administrative agencies to provide information to and allow participation by interested stakeholders in the administration of domestic environmental policy. Clearly, then, it is difficult to overstate the importance of this “domestic” analytic coordinate within the broader global administrative law project.

2. The extranational coordinate of GAL

Almost all of the empirical analyses – and several of the theoretical ones – produced within the emerging field of global administrative law that are not concerned with the

²⁴ Gus Van Harten and Martin Loughlin, “Investment Treaty Arbitration as a Species of Global Administrative Law”, 17 *European Journal of International Law* (2006) 121, at p. 121.

²⁵ See e.g. Stephan W. Schill, “Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law”, IILJ Working Paper 2006/6: Global Administrative Law Series (2006); Rudolf Dolzer, “The Impact of International Investment Treaties on Domestic Administrative Law”, 37 *New York University Journal of International Law and Politics* (2005) 953; and Santiago Montt, “What International Investment Law and Latin America Can and Should Demand from Each Other: Updating the Bello/Calvin Doctrine in the BIT Generation”, paper presented at the Buenos Aires GAL workshop (March 2006) (available at http://www.iilj.org/global_adlaw/).

²⁶ Sabino Cassese, “Global Standards for National Administrative Procedure”, 68 *Law and Contemporary Problems* (2005) 109. See also Cassese *et al*, op. cit. n. 7, Ch. 3.

domestic coordinate outlined above focus instead on the extranational element.²⁷ that is, rules and norms of administrative law as applied to the four types of global regulatory institutions as delineated by Kingsbury, Krisch and Stewart (international organizations, informal governmental networks, and hybrid public-private and purely private bodies operating beyond the boundaries of the nation-state).²⁸ These thus include what Stewart has referred to as both “bottom-up” and “top-down” approaches to global administrative law.²⁹

The former seeks to subject constrain the exercise of public power by these global regulatory bodies “through application of domestic administrative law to the decisions of three types of global regulatory regimes”.³⁰ It is worth noting, however, that Stewart identifies two different means of “bottom up” administrative regulation of global regulatory bodies: the application of domestic administrative law mechanisms directly to the decisions or actions of these bodies or the subjection of the implementation of these decisions by domestic administrative agencies to the disciplines of domestic administrative law. This demonstrates well the dynamic manner in which these various coordinates can, and frequently do, interact (on which more later).

Less ambiguously belonging at the extranational coordinate are the “top down” set of approaches that Stewart identifies, which involves the construction of “new

²⁷ A brief outline of many of these can be found in MacDonald, Stewart and Kingsbury, “The Global Administrative Law Project: Stocktaking and Possible Research Trajectories”, paper circulated at the Viterbo III GAL Seminar (June 2007).

²⁸ See generally Kingsbury, Krisch and Stewart, loc. cit. n. 1. It is worth noting at this point the difference between the analysis in that article and the one I am pursuing here: Kingsbury *et al* identified five, not four types of global regulatory institution; the one I have left out (or rather dealt with in the previous section) is the category that they refer to as “distributed administration”, in which “domestic regulatory agencies act as part of the global administrative space” (p. 21). In essence, then, Kingsbury *et al* propose that we should view domestic agencies as global regulatory bodies, thus restricting the referent of the term “global” within the GAL project strictly to the *subject* of the administrative law in question. However, although appealing insofar as it breaks down the increasingly defunct dichotomy between the national and the international, for me such a categorization not only fails to encapsulate a significant proportion of the effect of globally-sourced administrative law rules, but it also cannot account for the important ways in which the domestic and the extranational are interacting in the production of Global Administrative Law.

²⁹ See generally Richard Stewart, “US Administrative Law: A Model for Global Administrative Law?”, 68 *Law and Contemporary Problems* (2005) 63.

³⁰ *Ibid.*, at p. 76.

administrative law mechanisms directly at the level of global regulatory regimes”.³¹ Although conceding that most regimes of this type lack the degree of institutional differentiation and legalization needed for the establishment of a complete, US-style administrative law system at this level, he notes that nonetheless certain instances of regimes containing both administrative agencies and review bodies have emerged. Most notable in this regard is, for example, the World Bank Inspection Panel, which has developed into an independent review body that can be invoked by a wide range of actors, charged with the task of ensuring that the Bank’s administrative action is carried out in conformity with its own internal policies.³² Even short of the establishment of a full, domestic-style administrative law system, however, there are countless examples of administrative law-type mechanisms having been established in all of the different types of global regulatory bodies, ranging from the more highly developed examples of the World Bank or the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea³³ down to the institution of rudimentary notice-and-comment mechanisms in bodies such as the Basel Banking Committee.³⁴ Regardless of where these examples fall on that scale, they should be viewed as instances of top down administrative law regulation. As noted above, then, these two coordinates – the domestic and the extranational (or, put otherwise, the global *source* and the global *subject* of administrative law norms) – together constitute the vast majority of work produced within the emerging field of global administrative law to date.

3. *The dialectical production of the universal coordinate*

If the analysis until now is accepted, we have arrived at a point at which there has been significant development of global rules and principles to be applied to national administrative procedures (often, but not always, expressed through the instruments of traditional public international law) on the one hand, and a less developed, but still significant tendency to transpose the rules and mechanisms of domestic administrative

³¹ Ibid., at p. 88.

³² Ibid., at p. 95. For a more detailed discussion of this top down review mechanism, see Mariarita Circi, “The World Bank Inspection Panel: Is It Really Effective?”, 6 *Global Jurist Advances* (2006).

³³ Stewart, loc. cit. n. 30, at p. 95.

³⁴ On this, see e.g. Michael S. Barr and Geoffrey P. Miller, “Global Administrative Law: The View from Basel”, 17 *European Journal of International Law* (2006) 15.

law (in particular relating to participation, transparency and accountability) to global regulatory bodies on the other. Indeed, we might think of this in basic terms as an extension of traditional international law from the exclusive domain of inter-state relations into domestic administrative relations, and a concurrent extension of domestic administrative law into international (both state and non-state) institutions.³⁵ In order to justifiably refer to these as global administrative laws, however, I suggest that two important factors are, as yet, missing from the analysis: firstly, there must be an expectation that these developments will continue to progress beyond their current state of development (that is, they can only be recognised as such with reference to the emergence of an as yet deferred Global Administrative Law); and secondly, that this imagined universal coordinate (an administrative law global in scope) must contain all of both, yet be something *more* than the sum of their parts. It is in this sense that I suggest that the domestic and extranational coordinates be understood as engaging in the *dialectical* production of the universal.³⁶

Such a dialectic can be clearly recognised in the work (sometimes implicitly, some explicitly, but nearly always present in some form) in the work of advocates of global constitutionalism. In this context, it is usually most clearly manifest in the arguments offered in support of the claim that a global constitution is emerging (or has emerged): it is extremely common, for example, to see a claim based on the domestic coordinate (e.g. that the growing consensus on international human rights has engendered a high level of

³⁵ Indeed, Battini refers to these as “international administrative law” and “administrative international law” respectively. See generally Battini, loc. cit. n. 18.

³⁶ It is with some hesitation that I refer to this process as a “dialectic”, as it is difficult to escape the impression that today it is often used in a manner that comes with much of the baggage yet none of the rigour of its previous iterations in Western thought. Certainly, what I am proposing here bears some passing resemblance to the Hegelian usage, in which thesis and antithesis collide in order to produce a synthesis; the undesirable baggage here, however, comes in the form of a claim to objective historical necessity, an inexorable path dependency, and a certain triumphalism about the perfection of the synthesis. I certainly mean to suggest none of these things; neither that GAL need necessarily emerge, nor that it will do so in the manner that I am proposing here. Suitably chastened, however, in terms of the necessary contingency of the process and the inevitable imperfection of the outcome, I think the notion of “dialectic” is appropriate here; understood, perhaps, more in the terms proposed by Ost and Kerchove, according to which it refers to the interaction between two terms of a traditional dichotomy, bringing them together in a relation of presence and mutual constitution rather than negation that transforms and ultimately transcends both (“à la fois lui-même et autre, toujours en devenir... [dans un] processus d'engendrement réciproque”). See François Ost and Michel van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit* (Brussels : Publications des Facultés universitaires Saint Louis, 2002), at pp. 36-37.

homogeneity among national constitutions) interact with one drawn from the extranational coordinate (i.e. that domestic constitutional rules are increasingly being exported to international organizations such as the WTO) in providing the argumentative basis for the assertion that we are well down the road towards constituting a “global polity”. Leaving aside (for the moment) the plausibility of this claim, the point I want to make here is that such a dialectic is one of the key factors driving the emergence of GAL in the universal coordinate.

Variants of this claim are already to be found in GAL and related literature, with some recounting in considerable detail the bewildering complexities and range of the interactions between the domestic and the extranational coordinates.³⁷ Battini, for example, has suggested that the vastly increased levels of interdependence (and particularly economic interdependence) between states on one hand, and the emergence of genuinely global public goods that require global coordination (such as human rights or environmental protection) on the other, has led to an increase in the penetration of global rules and principles into the administrative mechanisms of nation-states: both through the traditional instruments of public international law, and, increasingly, through administrative action taken by global regulatory bodies themselves. The fact that the actions of global governance bodies now impact directly upon the rights of private parties has led to demand for, and often the establishment of, certain rules and mechanisms transposed from national administrative law – importantly, even in relation to those bodies that escape the classical inter-state structures of traditional international organisations.³⁸

At this stage, however, we are still discussing the emergence of the domestic and extranational coordinates of GAL – the transposition of national administrative law rules to the global setting and the establishment of global rules for national administrative

³⁷ The importance of this mutually constitutive interaction between the two coordinates, although phrased in different terms, seems to me to be a central theme in Battini, loc. cit. n. 18, and Cassese, loc. cit. n. 8. Echoes of it can also be found in Auby’s discussion of a “dialogue” between the global and the local, particularly in terms of the impact of globalization on national public institutions. See Jean-Bernard Auby, *La globalisation, le droit et l’État* (Paris: Montchrestien, 2003), pp. 106-111.

³⁸ See generally Battini, loc. cit. n. 18

procedures, respectively. Of primary interest to me here, however, is the manner in which these two elements are engaged in a dialectical process that is contributing to the emergence of GAL in the universal coordinate: that is, how are these examples of global administrative laws interacting to produce Global Administrative Law? The most striking illustration of this is, I think, to be found in what Stewart has defined, as outlined in the previous section, as “bottom-up” approaches to GAL; particularly as expressed in the increasingly prevalent adoption by national and regional courts of variations of what might be termed the “*Solange* stance”.³⁹

In essence, this stance is adopted wherever a court is prepared to either accept the decisions or apply the rules of a global administrative body (or recognise as legitimate a domestic decision implementing these) only where and to the extent that the body in question provides certain administrative law protections (typically things like participation rights, reason-giving and transparency obligations, and rights to impartial hearings and review) “equivalent to” those guaranteed by the legal system within which they operate. Interestingly, this stance is itself often informed not simply by domestic constitutional and administrative guarantees, but also those furnished by international and regional human rights law. Already, then, we see the influence of the domestic coordinate of GAL; and, in taking this stance, courts are in essence demanding the creation of GAL extranationally (at least to the extent that the global administrative body in question wishes its action to be effective in the jurisdiction in question). Crucially, however the court or tribunal in question then begins to create a degree of homogeneity in the administrative law regime of the governance sector in question: it is not enough that *some* administrative law protections be established within the global body – rather, these must be *substantially equivalent* to those provided for in the legal order in

³⁹ This is a reference, of course, to the famous *Solange* judgment of the German Constitutional Court (*Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (BVerfGE 37, 271; 1974 2 CMLR 540), decided on May 29, 1974), in which it held that the transfer of powers by Germany to the EC was constitutional “as long as” (“*solange*”) European institutions provided the same level of individual rights protection as did the German Basic Law.

question.⁴⁰ Any finding that this is the case will, of course, provide a precedent that might then be applied internally in similar controversies.

There are a number of instances of this type of process already in operation. For example, domestic and regional courts are showing themselves ever more prepared to set aside both the immunities and the decisions of international organisations in internal staffing disputes where these organisations do not provide for effective alternative mechanisms for ensuring that the rights of private individuals are respected, such as international administrative tribunals.⁴¹ Of course, what these courts accept as sufficiently effective may well have a precedential effect on what rights domestic administrative authorities under its jurisdiction must provide, thus illustrating the mutually constitutive – and potentially homogenising – dialectic effect of this process. We may soon, however, have an even more striking example of this process to work with, depending on whether or not the ECJ decides to follow the advice of its Advocate General, Poiares Maduro, in his recent Opinion on the *Kadi* affair,⁴² a case of potentially crucial importance in the emergence of Global Administrative law. The case involves a challenge to the legitimacy of an EU measure implementing a UN Security Council Resolution, itself passed on the basis of a decision of the Sanctions Committee to list

⁴⁰ See, for example, *Waite and Kennedy v. Germany* (Application No. 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13; 116 ILR 121, 134), in which the ECtHR, in a case involving the legality of a decision by German courts to grant immunity to the European Space Agency over an staffing dispute, held that “a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention” (para. 68). It is worth noting, however, that a number of scholars have criticised the Court for the cursory manner in which it established that the ESA provided “reasonable alternative means of redress”; see e.g. Emmanuel Gaillard and Isabelle Pingel-Lenuzza, “International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass”, 51 *International and Comparative Law Quarterly* (2002) 1, at pp. 6-7.

⁴¹ See both the *Waite* judgment, and also the case of *Beer and Regan*, Application No. 28934/95, European Court of Human Rights, 18 February 1999, [1999] ECHR 6. For subsequent cases in which European national courts have followed this line of reasoning, see August Reinisch, “The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals”, *IILJ Working Paper 2007/11 (Global Administrative Law Series)* at pp. 11-19, available at <http://www.iilj.org/publications/2007-11Reinisch.asp>.

⁴² For the Court of First Instance judgment in this case (which found that laws implementing UN resolutions could not be challenged on human rights grounds before the Court), see *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case T-315/01 (2005). For some history and analysis of this and similar cases, see Chia Lenhardt, “European Court Rules on UN and EU Terrorist Suspect Blacklists”, 11 *ASIL Insight* (Jan. 2007), available at <http://www.asil.org/insights/2007/01/insights070131.html>.

Kadi as suspected of funding terrorist groups, and thus to freeze all of his assets. Maduro makes clear his preference for the ECJ to adopt a *Solange* stance in this case:

respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review.

...

Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists.⁴³

Of course, it remains to be seen whether the Court itself will embrace this progressive line of thinking. As should be clear from the foregoing, however, to do so would not be to turn against the current trend in European jurisprudence; quite the contrary.⁴⁴ Indeed, it seems clear that, should the ECJ decline to take the Advocate General's advice, this will be on based on the particular supremacy of UN law under Article 103 of the UN Charter, and not as a result of any other, more generalisable consideration. If they do, on the other hand, we will have the opportunity to examine the strength of national (or regional) courts' demands for accountability in global regulatory institutions in what is perhaps the most testing environment for such claims – the Security Council's regulation of global terrorism – imaginable. If any such eventual demand does indeed (as would seem likely) provoke the Security Council to institute more robust procedural protections in the functioning of its listing mechanism, we may just also be witnessing the first tentative steps towards the emergence of a relatively homogenous administrative law regime (at least in terms of minimum standards) in the field of global security.

⁴³ Opinion of the Advocate General in the *Kadi* case, C-402/05, delivered on the 16th of January, 2008, at paras. 51, 53. For a reading of this as analogous to the *Solange* position, see my blog entitled "Global Administrative Law and the ECJ: The Advocate General and Kadi", available at <http://globaladminlaw.blogspot.com/2008/02/global-administrative-law-and-ecj.html>. The same reading has also been proposed in Aldo Sandulli, "Rapporti tra diritto europeo ed internazionale. Il caso *Kadi*: un nuovo caso *Solange*?", 5 *Giornale di diritto amministrativo* (2008) 1.

⁴⁴ See *supra*, n. 41.

III. DISTINGUISHING GAL: PROBLEMATISING THE EXTRANATIONAL COORDINATE

So far, so similar: both the global administrative law and the global constitutionalist projects display domestic, extranational and universal coordinates in their analysis of the emergence of their chosen object, and both present, to some degree at least, the first two of these as engaged in the dialectical production of the third. It is also clear that there are significant areas of overlap between the two projects, not least of all in the goal of both to bring the exercise of public power in global governance back under some form of public control. Should they, then, be seen as a necessarily common endeavour? Perhaps even as simply coterminous, some minor semantic differences aside? My view is that they are not; and that to view them as so is to undermine some of the most important advantages that the perspective of an emerging Global Administrative Law can bring to the table. In the interests of space, in this section I want to focus on only one – albeit, to my mind, the most important – distinguishing feature between the two: the existence of a relevant “global” subject at the extranational coordinate of each.

As noted above, the central referent of the term “global” at the extranational coordinate is *subject-oriented*: put otherwise, its condition of possibility is the existence or emergence of bodies at the extranational level that can be justifiably characterised as “global” in nature.⁴⁵ Global administrative laws require the existence of global administrative bodies; otherwise, we would be left simply with the domestic coordinate, which could (in the absence of such bodies) doubtless be adequately theorised within the conceptual framework offered by traditional public international law. As Battini has illustrated, the claim that global administration exists became plausible with the increasing power and range of international organisations, their growing ability to penetrate into domestic legal regimes, and the concomitant “direct effect” that they have on the rights and duties of

⁴⁵ There is, certainly, room for discussion here whether this must refer only to those that are effectively global in *membership* (such as, for example, the UN administrative bodies, or the major international financial institutions), or whether it can also include those of more limited membership who nonetheless take action that is of global *effect* (for example, the Basel Banking Committee or the Financial Action Task Force). An interesting and important discussion, certainly; but one that is beyond the scope of the present paper, whose resolution is not required for the basic claim I am making here to stand.

private parties.⁴⁶ Administrative laws thus have “global” subjects to which they can attach.

The same cannot be said – at least, not at present – for global constitutionalism. There are two important points to be made in this regard. Firstly, even taking the claims of the constitutionalists at face value, it seems clear that the range of subjects that are envisaged in the extranational coordinate is profoundly limited: for the most part, only traditional inter-state organisations are considered as potential candidates for constitutionalisation – and this list shrinks even further upon consideration of those that are offered as empirical evidence that this process is already underway (largely, the EU,⁴⁷ the WTO⁴⁸ and the UN).⁴⁹ Thus it appears that, even in the best case scenario, the project of global constitutionalism simply cannot account for the vast array of different bodies now exercising public power in global governance, at which global administrative law is specifically targeted. The former remains, it seems, even as it urges the decoupling of constitutionalism from its traditional mooring in the nation-state, conceptually tied to basic statal forms.

Secondly, and more importantly, it is crucial not to lose sight of the fact here – as at least some texts on the subject seem to – of the fact that global constitutionalism is necessarily claiming *something* is being constituted. This points to a fundamental ambiguity in the term “constitution” itself, in that it is frequently used to apply to a wide range of different documents, norms and procedures instituting an equally wide range of societies, organizations or polities. Any society, indeed any more or less organized group of more than one individual, can be said to have a constitution if by that term we intend the basic rules, written or unwritten, which govern its makeup and its functioning.⁵⁰ This means

⁴⁶ See Battini, loc. cit. n. 18, at p. 20.

⁴⁷ See e.g. Petersmann, loc. cit. n. 14.

⁴⁸ See e.g. Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford: Oxford University Press, 2005).

⁴⁹ See e.g. Fassbender, loc. cit. n. 23; Fassbender, “‘We the Peoples of the United Nations’: Constituent Power and Constitutional Form in International Law”, in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 269.

⁵⁰ This is the broad meaning given to the term by, for example, Philip Allott. See generally Allott, *Eunomia: New Order For a New World* (Oxford: Oxford University Press, 2nd edition 2001).

that, depending on precisely what *type* of entity is putatively emerging at the global level, statements asserting that it has a “constitution” can fall anywhere on the scale from the utterly banal (e.g. the claim that where there is international law, there is of necessity an international constitution) to the profoundly controversial (the claim that there is a single global polity, characterised by a unitary interpretative community for fundamental values).⁵¹

It is clear that most, if not all, global constitutionalist discourse has as its ultimate end the creation (or sometimes recognition) of a global constituted polity, in which not only states, but all actors endowed with capacity to engage in legal relations at the global level constitute the relevant “interpretive community”.⁵² As one prominent proponent of (one strand of) global constitutionalism notes, “[t]hose who oppose the relevance of constitutionalism to international law correctly note that the concept is meant to describe or promote a legal integration of states which is more intense than the traditional one... The idea of a constitution is summoned as a symbol of (political) unity which eventually will be realized on a global scale”.⁵³ What is striking is that the *form* of the central referent of the term “constitution” remains identical in both the national coordinate and in the universal one: a unitary, heirarchical, constituted polity.⁵⁴

What this means, however, is that the central referent of global constitutionalism disappears in the extranational coordinate, as there is no unitary polity to refer to in that context.⁵⁵ Global constitutionalist discourse at this level, then, is compelled to either refer back to the domestic setting (e.g. through suggesting that global regulatory authorities provide sources for national constitutional law, or at least reflect principles

⁵¹ Both of these usages can be found, playing different justificatory roles, in Fassbender, loc. cit. n. 23.

⁵² See e.g. Fassbender, loc. cit. n. 23, at p. 597.

⁵³ Ibid., at p. 552. It should also be noted that Fassbender insists that membership of the international community, of which in his view the UN Charter is the complete constitution, now extends well beyond nation-states (even if this is not yet adequately reflected in the Charter itself).

⁵⁴ On this, see e.g. Krisch, loc. cit. n. 10, at p. 253.

⁵⁵ There is, of course, the possible – but still controversial – example of the European Union. Had regional integration in other parts of the world developed to the same extent and along the same lines, there would indeed be a powerful argument for the existence of an extranational coordinate in the development of global constitutionalism; however, the fact that this example stands alone seems to me to suggest the contrary of what the constitutionalists argue: that the conditions of possibility of a constitutional polity simply are not present on the global scale in the way that they (at least arguably) are within Europe.

thereof), or onwards to the speculative, universal context (e.g. by claiming that the norms and principles identified as “constitutional” in each institution or regime are actually derived from the constitution of the global polity). In practice, of course, the two are most often presented in dialectical interaction: that widespread agreement of constitutional principles among nation-states, and the transposition of these to global regulatory bodies, provides empirical evidence for the existence, or at least emergence of the global polity – and the existence of such “global” norms is then used to criticise those states and international institutions that do not adequately reflect them. There is no conceptual space here, however, for the referent itself to exist at the extranational coordinate; which in turn means that, while the basic condition of possibility of a Global Administrative Law (i.e., global administrative bodies that are subjected thereto) are already in existence, that of an eventual Global Constitutional Law, at present at least, is not.

Put simply, this means that those norms and principles relied upon in support of an emerging global constitutionalism are only recognisable as such *if, and to the extent that, they are contributing to the emergence of a unitary global polity*. It is not, in this regard, sufficient that global bodies are subject to certain laws, and structured in certain ways, that resemble national constitutional frameworks: if the relevant object of the discourse, the putative entity in question, is not itself being *constituted* in the process, then the rhetoric of “constitutionalism” appears thoroughly inappropriate. In much the same way as with global administrative laws, then, the identification of the developments in some sectoral regimes as “constitutional” (in the sense intended by those advocating it) itself relies upon the expectation that a global constitution will emerge. Unlike in Global Administrative Law, however, in which the existence of global administration functions as a basic premise of the entire project (much as I presented it at the outset of this paper), in global constitutionalism the existence of a global polity must of necessity function as at once premise and *telos* of the discourse. This fact, created by the lack of a referent at the extranational coordinate, is alone sufficient to pose a significant challenge to the coherence of much of global constitutionalist discourse as currently framed: ultimately, the very (“empirical”) premise upon which it proceeds is itself a speculative – and

thoroughly controversial – political goal. The existence of global administration – albeit radically fragmented and heterarchical – appears an entirely plausible hypothesis; that of a global constitution, however, does not – in large part as a function of those same conditions of fragmentation and heterarchy.

While the emergence of Global Administrative Law is being driven, in significant part at least, by a dialectic between its domestic and extranational coordinates, that possibility simply does not exist for global constitutionalism within the framework of contemporary global governance. I contend that, in order to bridge this gap between the domestic and the universal, global constitutionalist discourse relies instead upon various techniques of the *rhetorical elision of difference*, which alone are capable of rendering what remains a startling claim – that, despite the apparently irreducible plurality of values evident in the world today, and the conditions of complex regulatory fragmentation that characterise contemporary global governance, we are “progressing” towards a global polity based on common values interpreted and applied by a universal community of mankind – plausible. Here, in the interests of space, I want to flag only the most important – and the most prevalent – of these: the exploitation of one of the constitutive ambiguities of the term “constitution”, namely the question of precisely *what type* of entity is putatively being constituted.⁵⁶

As noted above, the term “constitution” can be used to apply to almost any entity in some form or another. Even if we narrow this down, however, to the idea that global constitutionalism envisages the creation or existence of a global *community*, the key question remains: what *type* of community (moral, legal, economic, political) is being envisaged? In my view, each of these different possibilities would require a different (if sometimes overlapping) set of arguments in order to establish persuasively the existence of such an entity: we can, for example, easily conceive of a moral community that is not a legal one, or an economic community that is not a political one (and, indeed, this holds

⁵⁶ I deal with these issues in considerably more detail in the paper I flagged in the opening footnote, “Constitutionalising the Globe? The Rhetorical Construction of Community in International Legal Scholarship” (*supra*, n. *). There, I identify five different sets of techniques of the rhetorical elision of difference, relating to the issue of “what”; the issue of “how”; progressive narratives; appeals to universality; and appeals to fact.

for practically any combination of the different possible forms). It is thus perhaps quite plausible to argue that the developments in the Uruguay Round and since have led to the establishment of the WTO as a global economic community (and with a constitution that reflects that); it is another thing entirely to argue that this can then be used as evidence of an emerging global political community,⁵⁷ as the – often vociferous – debates surrounding the integration of human rights issues into the mandate of the WTO dispute resolution system amply demonstrate.⁵⁸ Yet this move, exploiting the ambiguity of the term “constitution” and eliding the important (ethical) differences between different meanings, seems to me to form an integral part of the argumentative platform of much global constitutionalist scholarship.⁵⁹

IV. THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW: FIVE PROPOSITIONS

In what remains, I want to begin to draw out what I think some of the consequences might be of the foregoing analysis in terms of the “emergence” of Global Administrative Law, and its relation to the project of global constitutionalism. Given the limitations of space, and the evident fact that this is very much a work-in-progress, I present these not as conclusions of the analysis, but rather as a set of five propositions for discussion.

⁵⁷ This is the claim made most notably by Erika de Wet. See generally Wet, loc. cit. n. 23.

⁵⁸ See, in this regard, the (fairly heated) debate between Petersmann and Alston (and also the contribution by Howse) in the *European Journal of International Law*: Ernst Ulrich Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration”, 13 *European Journal of International Law* (2002) 621; and, in the same volume, Robert Howse, “Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann” (661); Philip Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann” (815); and finally Petersmann, “Taking Human Rights, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston” (845).

⁵⁹ This technique is also in evidence in the formulation of the ultimate *telos* – that is, the constituted global community – of much work in this field. As noted above, Fassbender makes the claim that “[i]n principle, there cannot be a community, understood as a distinct legal entity, in the absence of a constitution providing for its own organs” (loc. cit. n. 23, at pp. 566-567) hand in hand with the assertion that “[t]he idea of a constitution is summoned as a symbol of (political) unity which eventually will be realized on a global scale” (ibid., at p. 552). Erika de Wet is, if anything, less circumscribed in this regard: she states that she is using the term “constitution” to denote “an embryonic constitutional order in which the different national, regional and functional (sectoral) regimes form the building blocks of the international community (‘international polity’).” The key point here is, of course, the asserted equivalence between the notions of “community” and “polity”, which receives no further elaboration. In doing so, she is able to draw both on the familiarity of the term “international community” and the constitutional implications of the term “polity” without confronting the differences between the two. See Wet, loc. cit. n. 23, at p. 612.

1. Global administrative law, unlike global constitutionalism, functions as pure instrumentality

This first proposition is a development from the claim – central to the argument of this paper – that the link between administrative law and constitutionalism, often viewed as necessary in the national context, should be understood as (at best) contingent when both are transposed to the global setting. That they can be complementary, and in particular that GAL might act as a surrogate for constitutionalism in the extranational coordinate of the latter – I certainly do not deny. GAL can, however, also be used in service of the ends of democracy in a manner that can be in tension with national constitutional law; moreover, in those situations in which it serves neither, it remains instrumental to some other aim of governance (regulatory efficiency, for example – itself an important normative goal). Its character, I suggest, is that of pure instrumentality; the goals of which – while of central relevance to the global administrative law project – nonetheless remain external to global administrative law itself.⁶⁰

2. Global administrative law, unlike global constitutionalism, has an extranational coordinate

This is, in essence, the claim advanced in the previous section of the paper: that the existence of global administrative bodies (and hence global administration) is a central and necessary premise of the GAL project. Global constitutionalism, however, lacks an analogy, and is thus compelled to justify its claims that a particular international organization has been “constitutionalised” either with reference to national constitutional frameworks (and thus run the risk of presenting partial and particular conceptions as in some sense universal) or to a putative “global” constitution (which appears both speculative and, I suggest, profoundly counter-intuitive given the structures of contemporary global governance). Neither of these strategies can provide the argumentative support that global constitutionalism needs if it is to appear plausible.

⁶⁰ Of course, in making this claim, I do not mean to suggest that the application of GAL mechanisms is in some sense neutral, without normative consequence; rather that the consequences can only be understood and evaluated in terms of the specific goals that the institution of administrative law mechanisms was intended to achieve.

3. *Global administrative law is a necessary complement to any global constitutionalism; the inverse, however, does not hold*

This proposition is, in many ways, directly related to the previous one; however, it pushes the claim a little further. On one level, if, as noted above, global constitutionalism remains, even in the best case scenario, largely limited to the structures and actions of traditional international organisations, then a supplementary global administrative law will undoubtedly be required in order to regulate those bodies exercising public power in global governance that do not display the statal forms with which the discourse of constitutionalism is conceptually geared to accommodate. Moreover, if the previous proposition is accepted, it is difficult to see how, under current conditions and in the absence of hegemonic imposition, a global constitution could emerge without a developed Global Administrative Law acting as surrogate for the spread of common principles in the extranational coordinate. GAL does not, however, depend upon global constitutionalism for its emergence (which follows from the claim that the two are only contingently related); rather, its sole conceptual condition of possibility is the existence of global administration – that is, public power exercised with an effect on the rights of private parties.⁶¹

4. *Global administrative law remains, at present and for the foreseeable future, functionally superior to global constitutionalism*

If the previous propositions are accepted, this one seems to follow inevitably. Firstly, a Global Administrative Law, understood as pure contingency and divested of a constitutional impulse to hierarchy and unity, seems uniquely well calibrated to respond to the irreducibly plural and heterarchical conditions of contemporary global governance. Decoupled from the constitutionalist project, GAL can be harnessed to any end, allowing – in theory at least – for the benefits of regulatory fragmentation and specialisation to be reaped, whilst also providing an explicit space, and developed tools, for contesting the

⁶¹ It might, of course, be argued that the term “administrative” in this context of necessity refers to, in distinguishing itself from, legislative and judicial power – and thus by definition operates within a constitutional framework. As should be clear from the foregoing, this is a plausible but hardly fatal claim; that there is an international legal order with a “constitution” that designates subjects, sources, and a rudimentary separation of powers strikes me as, by now, a fairly banal claim. The key point here is that this is a very different entity than that envisaged in global constitutionalist scholarship.

level and type of public control and oversight that should be maintained over each. Of course, this presents (at least) as many difficulties and challenges as it does solutions, in terms of regulatory capture, legitimization of relations of *de facto* domination, etc;⁶² however, it is at least arguable that the best response to these is to confront them as they arise in each concrete situation, rather than to continue to insist upon an (at present fundamentally unrealistic) move to unity and hierarchy in the global legal order. Indeed, it is its comparative realism that the functional superiority of GAL finds perhaps its most striking expression.

5. *Global administrative law remains, at present and for the foreseeable future, ethically superior to global constitutionalism*

This proposition is undoubtedly the most controversial of the five; and, regrettably, it is the one that I have been able to develop least in the arguments outlined above. In part, however, it reflects the arguments from fragmentation and plurality made in the previous one; not, this time, in terms of the sphere of global governance, but rather in those of the different value systems that inform, evaluate and critique it. My claim here is that GAL is well calibrated to both: in largely shunning, for example, the illusion of thick global consensus on a set of shared substantive values, it can – indeed, is in large part intended to – provide mechanisms through which a plurality of voices, including those most often marginalised, can be heard.⁶³ In contrast, then, to global constitutionalist discourse, which relies heavily upon the elision of difference in its drive to unity, GAL is, in theory at least, intended to ensure that difference is both confronted and respected in the exercise of public power at the global level.

V. CONCLUSION: GAL IN THE UNIVERSAL COORDINATE

In conclusion, I want to outline very briefly here what I see as the implications of the foregoing for the question animating this seminar: GAL: from fragmentation to unity? If

⁶² On this, see e.g. Eyal Benvenisti and George Downs, “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law”, *IILJ Working Paper 2007/6 (Global Administrative Law Series)*, available at <http://www.iilj.org/publications/2007-6Benvenisti.asp>.

⁶³ Richard Stewart has advanced this type of understanding of GAL, in particular in his notion of “disregard”. See Stewart, “Accountability, Participation, and the Problem of Disregard in Contemporary Global Governance” (forthcoming, 2008).

the foregoing is at all persuasive, I see four main elements to this, to a Global Administrative Law in its universal coordinate. The first should, by now, be clear: that GAL neither need, nor should, aspire to the type of unity implied in global constitutionalist discourse; indeed, to do so would undermine most if not all of its “comparative advantage” in confronting and regulating the current conditions under which public power is exercised in the contemporary global sphere. More positively, however, I suggest that we might expect to see this eventual unity manifest itself in three main ways: in a relative homogeneity of general, abstract principles that are then applied differently in different sectors; in a relative homogeneity in the more concrete rules and mechanisms applied within sectors both domestically and extranationally; and in the creation of a generalised “culture” of administrative law, in which it can be generally expected that some type of administrative law rules, some form of concretisation of the general principles, will attach to all exercises of public power in global governance.

That a relatively homogenous body of administrative law principles is emerging at the abstract level is perhaps the least controversial of these three elements. While by no means (yet) universal, there is a clear trend towards increasing things like transparency, participation, reason giving and accountability within both global and national regulatory institutions, as a number of authors writing in the field have illustrated. That the emergence of these principles has been in part driven by a dialectical interaction between the domestic and the extranational coordinates seems clear: international treaties and organisations alike demand certain procedural requirements of national actors (themselves drawn from national administrative traditions), which, when assimilated in domestic legal orders, are reflected back in demands on the very same organisations to live up to the standards that they expect of others. This interaction is not, of course, always (or even usually) based upon formal legal relations: national courts might refuse to accept domestic regulations implementing global decisions, even where they have no formal jurisdiction over the organisation in question itself; civil society actors such as NGOs put pressure on global regulatory bodies to practice what they preach; and, of course, academic criticism can have a significant impact in this regard. In many ways, of course, the global administrative law project is itself concerned with precisely this: not

simply identifying the emerging principles, but advocating their spread. Although the principles themselves are legal, the means of their diffusion need not be.

More controversial is the claim that we should expect to see an increasing degree of homogeneity across the coordinates in the more concrete rules and mechanisms applied within particular sectors. My authority for this suggestion also centres on the argument offered above concerning the dialectical production of the universal, and in particular in the examples of “bottom-up” approaches to GAL: national courts deciding what constitutes an “effective alternative means of redress” in terms, for example, of staffing disputes in international organisations, and in doing so creating precedents that may well have an impact on purely domestic controversies in the future. In this regard, the forthcoming *Kadi* judgment from the ECJ has the potential to be one of the most important judgments in the short history of GAL, depending on the verdict. This relative sectoral homogenisation can also come about, however, in other ways: where, for example, international treaties provide for robust administrative law rights and obligations in a particular field of national administration, and are then picked up and applied by global regulatory bodies active in the same area. We might think, in this regard, of an instrument like the Aarhus Convention: should those global institutions engaged in environmental decision-making agree to be bound, as are states parties, by the administrative law rules it establishes, then a high degree of sectoral homogeneity in this field would be ensured.

Lastly, and perhaps most importantly, any Global Administrative Law worthy of the name (and, in particular, of the capital letters) must presume a general legal culture in which the submission of public power to public control is simply assumed. Of course – as in many domestic systems – the level, type, ends and precise configuration of control exercised can vary from sector to sector; what is essential, however, is that the implementation of global administrative laws becomes not an exception but rather an expectation in each and every public body. To this end, GAL must provide not simply a set of legal tools, but also a site of explicit and ongoing contestation of the ways in which these are applied to all institutions of global regulatory governance. When these three

conditions obtain, we will, I suggest, be entitled to speak of a Global Administrative Law that has, finally, fully emerged.