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Global Administrative Law Dimensions of International Organizations Law

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International Law and Justice Working Papers

IIIJ Working Paper 2009/9
Global Administrative Law Series

GLOBAL ADMINISTRATIVE LAW DIMENSIONS OF INTERNATIONAL ORGANIZATIONS LAW

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ISSN: 1552-6275
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New York University School of Law
New York, NY 10012
U.S.A.



Cite as:
IILJ Working Paper 2009/9
(Global Administrative Law Series)
Finalized 12/09/2009
(www.iilj.org)

Global Administrative Law Dimensions of International Organizations Law^{*}

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Abstract

Several important legal features of the contemporary practice of international organizations (IOs) are not easily accommodated in standard approaches to international organizations law. This article argues that Global Administrative Law (GAL) approaches may strengthen analysis of operational issues such as emergency actions by IOs and the human rights implications of IO activities, structural issues such as the involvement of IOs in field missions and in public-private partnerships, and normative issues concerning the production and effects of non-treaty regulatory instruments by IOs (guidelines, best practices, national policy assessments, and other documents rather amorphously analyzed under the ‘soft law’ rubric.) In examining these activities as forms of administration (broadly understood), subject to precepts of good administration and legal standards concerning transparency, participation, reason-giving, review, and accountability, a GAL perspective provides a basis both for critique of problematic practices, and for increasing the effectiveness and legitimacy of some beneficial IO activities which are contentious or currently not undertaken. GAL also responds to the proliferation and differentiation of IOs and other entities in global governance through bringing to their interactions a principled ‘inter-public’ approach to the legal relations among global public entities. GAL provides a valuable, and thus far overly neglected, addition to the field of international institutional law.

* This article, like the others in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), is an extensively revised version of a paper written for the conference on “Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights” (Geneva, 20-21 March 2009), convened by the Department of Public International Law and International Organization at the University of Geneva Law School and the New York University (NYU) Institute for International Law and Justice (IILJ). A detailed report and other materials are available on the website of the NYU-IILJ “Global Administrative Law Project” at <www.iilj.org/GAL/GALGeneva.asp>. We thank José Alvarez, Sabino Cassese, Vikram Raghavan and Euan MacDonald for suggestions concerning this paper.

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Global Administrative Law Dimensions of International Organizations Law

1. Introduction

Many of the contemporary operations of inter-governmental organizations (IOs) have not been well conceptualized in legal terms, nor even studied in much detail, in traditional approaches to the law of international institutions. In this paper we argue that the emerging field of global administrative law (GAL) may provide a conceptual framework for addressing some of these under-theorized practical legal problems.¹ We suggest that this may contribute to the reframing and deepening of the existing field of international institutional law.² The central section of the paper seeks to substantiate this argument with reference to five sets of practical problems in the current work of IOs (although many other practical problems would be equally deserving of consideration in this agenda.³) Two of these sets of problems are broadly operational, two are more structural, and the fifth involves the treatment of normative outputs of IOs. These five sets of problems are the following.

1. *Emergency Actions by IOs.* Several IOs have taken, and in special cases many should be able to take, emergency action other than through the plenary inter-state organs, as with the WHO's travel advisories during the SARS crisis, or urgent humanitarian actions of the UNHCR, OCHA and other agencies.⁴ In some cases, such as the actions on SARS taken by Director-General Brundtland,⁵ the legal basis and mandate for the actions were not necessarily clear, there were potential risks of liability, and some significant opposition or foot-dragging by relevant governments, all of which might easily deter another IO leader from taking necessary action in a

¹ See B. Kingsbury *et al*, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005) pp. 15-62; S. Cassese, "Administrative Law without the State? The Challenge of Global Regulation", 37 *New York University Journal of International Law and Politics* (2005) pp. 663-694; B. Kingsbury, "The Concept of 'Law' in Global Administrative Law", 20 *European Journal of International Law* (2009) pp. 23-57. Symposia on GAL have been published in: 68:3-4 *Law and Contemporary Problems* (2005); 37:4 *New York University Journal of International Law and Politics* (2005); 17 *European Journal of International Law* 1 (2006). The GAL Project, jointly with leading law schools and research institutes in Africa, Asia, Europe and Latin America, has convened research and policy conferences in Buenos Aires, New Delhi, Cape Town, Geneva, Beijing, and Abu Dhabi. Publications and reports from these initiatives are at <www.iilj.org/GAL>. Books published from these conferences include: B. Kingsbury *et al* (eds.), *El Nuevo Derecho Administrativo Global en América Latina* (Ediciones Rap, Buenos Aires, 2009); H. Corder (ed.), *Global Administrative Law: Development and Innovation* (Juta, Cape Town, 2009); R.B. Stewart *et al* (eds.), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press, New York, 2009).

² Several leading works have called for such a remaking of the field. E.g., J.É. Alvarez, "International Organizations: Then and Now", 100 *American Journal of International Law* (2006) pp. 324-347, and J. Klabbers (ed.), *International Organizations* (Ashgate, Aldershot, 2005).

³ To give one example, the application of environmental law standards to the operations of IOs (and PPPs) is likely to be of increasing operational importance, beyond the familiar ones arising in development projects. FAO faces issues concerning safe disposal of unused agricultural chemicals shipped to African countries many decades ago; UN peacekeeping forces may work in areas where endangered species are threatened, as with gorillas in the eastern DRC; refugee camps may face problems of waste management and affect land use patterns in surrounding areas; a UN administrator may suddenly have charge of an environmentally damaging or potentially unsafe coal mine in the Balkans; issues arise concerning environmental impact assessment and access to information under Aarhus Convention standards for various UN operations; financial conditionalities may have environmental consequences.

⁴ C. Calhoun, "A World of Emergencies: Fear, Intervention, and the Limits of Cosmopolitan Order", 41 *Canadian Review of Sociology and Anthropology* (2004) pp. 373-395.

⁵ D. Fidler, *SARS: Governance and the Globalization of Disease* (Palgrave, London, 2004).

different crisis situation (and lessons learnt during the SARS have been providing useful tools in order to deal with the latest pandemic virus H1N1). In other cases, IOs may develop informal administrative actions that go beyond the traditional hard-law mechanisms: it happened, for instance, with the WTO's initial response to the recent 2008-2009 financial crisis.⁶

2. *Human Rights in the Work of IOs.* Human rights standards are of pervasive importance in the modern public arena of IOs, not only in the protection and fair treatment of the IO's own staff and contractors, or in the structuring of IO processes so as to comply with procedural human rights standards (e.g. in investigations), but also in the observance of substantive human rights of third parties where the IO affects them directly or indirectly, through the actions of a partnership or contractor.⁷ GAL issues arise also in the organization and operations of institutions with a specific human rights or humanitarian mandate.

3. *Field Offices and Missions of IOs.* Many IOs conduct or orchestrate field operations, whether through permanent field offices, sending visiting teams convened by headquarters, or contracting other public or private agencies. While many of the legal issues are well regulated through privileges and immunities conventions, status of forces agreements, and other traditional legal modalities, a number of different challenges arise on a daily basis: the relationships of the field unit to HQ and to host states and local political actors; the effective governance of field activities by contract, and by audit, investigation and staff discipline procedures based at HQ; and the practical application of anti-corruption, procurement, and elementary human rights standards, such as for the UNHCR's operations.⁸

4. *IO Public-Private Partnerships.* IOs increasingly form, and operate through, formalized partnerships made with private commercial and civil society entities.⁹ The growth of these Public/Private Partnerships (PPPs) has been driven in part by the ideology or culture of "new public management",¹⁰ and many of the relevant legal issues are the same as those arising for IOs from privatization and outsourcing of activities that in earlier epochs they would themselves have undertaken.¹¹ A good illustration of the PPP model is the Global Fund to Fight AIDS,

⁶ J. Pauwelyn and A. Berman, "Emergency Action By The Wto Director-General: Global Administrative Law and the WTO's Initial Response to the 2008-09 Financial Crisis", in this symposium on "Global Administrative Law in the Operations of International Organizations" (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

⁷ A. Clapham, *Human Rights Obligation of Non-State Actors* (Oxford University Press, Oxford, 2006).

⁸ See M. Pallis, "The Operation of UNHCR's Accountability Mechanisms", 37 *New York University Journal of International Law and Politics* (2005) pp. 869-918.

⁹ An overview is in B. Bull and D. Mc Neill, *Development Issues in Global Governance. Public-Private Partnerships and Market Multilateralism* (Routledge, Abingdon, 2007).

¹⁰ On the New Public Management, H.W. MacLauchlan, "Public Service Law and the New Public Management", in M. Taggart (ed.), *The Province of Administrative Law* (Hart, Oxford, 1997), pp. 118 et seq., T. Christensen and P. Laegreid (eds.), *New Public Management. The transformation of ideas and practice* (Ashgate, London, 2002); F. Naschold and J. Bogumil (eds.), *Modernisierung des Staates. New Public Management in deutscher und internationaler Perspektive* (Opladen, Wegener, 2000); W.J.M. Kickert (ed.), *Public Management and Administrative Reform in Western Europe* (Elgar, Cheltenham, 1997).

¹¹ For comparative material on use of PPPs in national systems, often for relatively narrow purposes, see M. Bult-Spiering and G. Dewulf, *Strategic Issues in Public-Private Partnerships. An international perspective* (Blackwell, Oxford, 2006). On outsourcing of public procurement by IOs (specifically the WTO), see Y. Renouf, "When legal certainty matters less than a deal: Procurement in International Organizations", paper first presented at the University of Geneva-NYU conference on "Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights" (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>.

Tuberculosis and Malaria, which has close links with the World Health Organization, but is, in formal legal terms, a Swiss Foundation.¹² Its Board is comprised of ten donors (eight donor or developed states, one business sector representative (in 2009 McKinsey & Co) and one private foundation (in 2009 the Gates Foundation), and ten recipients or implementers (seven developing states, one northern and one southern NGO, and one representative of groups affected by HIV and other infectious diseases the Global Fund combats), along with (as non-voting members) the WHO, UNAIDS, the World Bank, and one Swiss citizen (required for a Swiss Foundation). Recommendations are made also by a large Partnership Forum of stakeholders. The Global Fund has a sophisticated independent review system in its decision-making on grant applications (the Technical Review Panel), as well as oversight of policies and operations by a Technical Evaluation Reference Group (practitioners, academics etc) and by an Office of the Inspector-General (oversight of in-country and Secretariat operations).¹³

5. *Non-Treaty Normative Instruments of IOs.* IOs issue (publicly or internally) many forms of recommendations, guidelines, best practices, technical advice, findings, conclusions, committee rules, and other normative products. Debates about the legal character and effects of such normative materials (“soft law” etc), and debates about the sources of legal authority to produce such materials with significant normative effects (law-making power),¹⁴ do not exhaust the field of legal questions concerning these outputs of IOs. We refer in particular to the legal dimensions of increasing demands for GAL elements such as transparency, reason-giving, review, and in some cases participation or accountability, in relation to these instruments; different agencies take widely different approaches to such demands, and there is often uncertainty about the exact legal framework applicable to the production of these instruments, and about what procedural standards are – or ought to be – required.¹⁵

All five of these areas of contemporary practice can be understood as forms of administration (*lato sensu*).¹⁶ In each area, sound administrative processes guided by an understanding of (emerging) principles of administrative law and good practice on global governance are already being used to some extent, and if more widely embraced might make a difference for the better. We offer in this paper a short sketch of some ways in which a global administrative law approach, broadly understood, may be significant for these issues. We by no means suggest that this is a comprehensive perspective, but it may provide a valuable, and thus

¹² On the Global Fund, see S. Radelet, *The Global Fund to Fight AIDS, TB, and Malaria: Progress, Potential, and Challenges to the Future* (Center for Global Development, Washington D.C., 2004); A.F. Triponel, “Global Fund to Fight Aids, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid”, Asian Development Bank (2008) (<papers.ssrn.com/sol3/papers.cfm?abstract_id=1307926>); and A.L. Taylor, “Public-Private Partnerships for Health: the United Nations Global Fund on Aids and Health”, 35 *J. Marshall Law Review* (2002) pp. 400-406.

¹³ K. Lee *et al*, *Health Policy in a Globalizing World* (Cambridge University Press, Cambridge, 2002).

¹⁴ K.W. Abbott and D. Snidal, “Hard and Soft Law in International Governance”, 54 *International Organizations* (2000) pp. 421-456.

¹⁵ For a thoughtful proposal see M. Goldmann, “Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority”, 9 *German Law Journal* (2008) pp. 1865-1908.

¹⁶ In such cases, in fact, IOs’ action is neither legislative or judicial, so that it has genuinely administrative character and “can be distinguished from legislation in the form of treaties, and from adjudication in the form of episodic dispute settlement between states or other disputing parties” (Kingsbury *et al*, *supra* note 1, p. 17). Therefore we mean administration in a wider sense than, for example, the discussion of “expanding global bureaucracy” in M. Barnett and M. Finnemore, *Rules for the World. International Organizations in Global Politics* (Cornell University Press, Ithaca, 2004), p. 156 et seq. (examining the legitimacy of this bureaucracy.)

far overly neglected, addition to established approaches.¹⁷

Several unifying threads woven through these issues are of particular significance for this paper. First, the growth of IO activities in these areas raises specific normative pressures for what is already a fast-growing application of various mixes of GAL principles, particularly concerning *transparency* (a governance of *information*, including demands for active transparency and access to information, but also demands for confidentiality and privacy, and for legal or political controls on the gathering and use of policy-shaping information),¹⁸ *participation*, and *reason-giving*, along with more general pressures for *review* of administrative-type actions, and for heightened *accountability* with consequences for regimes of liability and immunity.¹⁹

Second, the proliferation of IOs and other institutions exercising public power or authority in global governance, accompanied by various forms of institutional differentiation and decentralization as well as complex field operations, has intensified the need for principles to structure the relations amongst these enterprises.²⁰ Such principles might be thought of as constitutional, or as general principles of public law, or more pragmatically as elements of co-ordination; and in many cases they are principles of administration. The relations between inter-governmental organizations, and the relations between such IOs and many other entities in global governance (including state agencies), have the distinctive feature that these are relations between *public* entities. Public entities are themselves subject to certain principles of publicness, of which GAL principles are one instantiation. Thus the relations between these public entities are to some extent conditioned by the nature of these entities and the public law principles that shape, empower and constrain these entities. The relations among them can be characterized in terms of inter-public law.²¹ GAL helps to structure processes to deal with overlapping and potentially conflicting assertions of applicable norms or of administrative competence by such

¹⁷ A. von Bogdandy *et al*, “Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities”, 9 *German Law Journal* (2008) pp. 1375-1400, propose a “public law approach” based on a “combination of the three main existing internal approaches to global governance phenomena: constitutionalization, administrative law perspectives, and international institutional law. All of them formulate important insights for a public law approach: that constitutional sensibility as well as comparative openness to administrative law concepts should inform the analysis of the material at hand, and that international institutional law should be the disciplinary basis for further inquiries” (p. 1390); see also A. von Bogdandy *et al* (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer, Heidelberg, 2010). For analysis of “global constitutionalism”, see J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009); and J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009).

¹⁸ A. von Bogdandy and M. Goldmann, “The Exercise of International Public Authority through National Policy Assessment: The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument”, 5:2 *International Organizations Law Review* (2008) pp. 241-298.

¹⁹ R.B. Stewart, “Accountability, Participation, and the Problem of Disregard in Contemporary Global Governance” (forthcoming).

²⁰ J. von Bernstorff, “Procedures of Decision-Making and the Role of Law in International Organizations”, 9 *German Law Journal* (2008) pp. 1939-1964; B. Kingsbury, “Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law”, 104 *Journal of International Law and Diplomacy* (2005) pp. 98-124.

²¹ B. Kingsbury, “International Law as Inter-Public Law”, in H. Richardson and M. Williams (eds.), *Moral Universalism and Pluralism: NOMOS XLIX* (NYU Press, New York, 2009), p. 167 et seq; Ming-Sung Kuo, “Inter-Public Legality or Post-Public Legitimacy: A Response to Professor Kingsbury’s Conception of Global Administrative ‘Law’”, 20 *European Journal of International Law* (2009).

entities, or overlaps and problems of responsibility and accountability in their field operations, or process incompatibilities (e.g. where one entity regards itself as obliged to make public information which another has promised is confidential).

Third, the interaction among the various institutions, state agencies, other actors, norms, ideas, values, policy choices, motivations, and influences on behavior, is not readily reducible to a simple system of rules and rule-appliers. It is regulatory, and dynamic. Embedding the analysis of law and legal process in the wider context of global governance, while retaining a concept of law and use of legal techniques, is essential.²²

2. The conceptual and legal framework: the limits of international law and the emergence of global administrative law

The proliferation and differentiation of IOs, and the expanded range and significance of their activities,²³ has been understood as a challenge (and opportunity) for international law since the 1860s or earlier. It was common in the late 19th century and early 20th century to regard many of these issues as part of an international law of administration,²⁴ or international administrative law,²⁵ and a large set of these IOs were analyzed under the rubric of ‘international administrative unions’.²⁶ A field of international institutional law developed,²⁷ typically oriented in a

²² Kingsbury, *supra* note 1.

²³ The number of international organizations (IOs) has been increasing steadily. In 2006, there were 61,345 international governmental organizations (IGOs) and non-governmental organizations (NGOs); in 1981, 14,752; in 1960, 1,422; in 1951, 955; taking into account the IGOs only, in 2006, there were 7,530; in 1981, 1,039; in 1960, 154; in 1951, 123 (see *Yearbook of International Organizations 2008*, published by UIA). Comparing data from 2001 and 2006: IGOs numbered 7,080 and 7,530 respectively; NGOs, 48,202 and 53,815; making the total number of IOs 55,282 in 2001 as compared to 61,345 in 2006. Total personnel and total financing of IOs have inevitably increased. In the case of the United Nations, despite stringent limitations on its growth set by the member states in many fields of activity, the dramatic growth in peacekeeping and other activities has seen an overall expansion in its operations. In 1997, the UN itself employed 13,627 officers; by 2007, this number had risen to 31,494 (UN, *Basic Information on United Nations System Organizations. Mission, Structure, Financing, and Governance* - UN website). Across the entire UN system, there were 52,107 officers in 1997 and 75,282 in 2007; the budget of the UN system was \$6.4 billion in 2007, rising from around \$5 billion in 1997 (UN, *Personnel Statistics (Data as at 31 December 2007)* and *Budgetary and financial situations of organizations of the United Nations system* - UN website).

²⁴ F.F. Martens, *Le droit international actuel des peuples civilisés* (3 vols, 1883) devotes one volume largely to this topic.

²⁵ E.g., P. Kazansky, “Théorie de l’administration internationale”, 9 *Revue Générale de Droit International Public* (1902) p. 353; P. Reinsch, “International Administrative Law and National Sovereignty”, 3 *AJIL* (1909) p. 1. See also M. Vec, *Recht und Normierung in der Industriellen Revolution: Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung* (Klostermann, Frankfurt, 2006), and C. Möllers et al (eds.), *Internationales Verwaltungsrecht* (Mohr Siebeck, Tübingen, 2007).

²⁶ See R Wolfrum, “International Administrative Unions”, in 2 *Encyclopedia of Public International Law* 1041 (first edition, Rudolf Bernhardt ed., 1995), and in the ongoing second edition (R. Wolfrum ed.).

²⁷ Among the leading works in English addressing this field of law as a whole, rather than studies of specific institutions or topics, are: P. Sands and P. Klein, *Bowett’s Law of International Institutions*, 5th edn. (Sweet and Maxwell, London, 2001) (the first edition, by D.W. Bowett, was published in 1963); H.G. Schermers, N.M. Blokker, *International Institutional Law, Unity Within Diversity*, 4th edn. (Martinus Nijhoff, Leiden, 2003) (the first edition, by Schermers, was published in 1972); J. Klabbers, *An Introduction to International Institutional Law* 2nd edn. (Cambridge University Press, Cambridge, 2009) (the first edition was published in 2002); C.F. Amerasinghe,

progressive fashion toward a “law of cooperation” going beyond an austere “law of co-existence”,²⁸ although standard international relations theory suggests that IOs and other international institutions can have significance even under tensely realist conditions of inter-state relations. The sanguine view that “when a problem arises in international life and relations, an international organization is developed to deal with it”,²⁹ has long since ceased to represent orthodox political ideology or international relations practice, as demands for value-for-money, “new governance” approaches, contracting-out, and the use of informal institutions,³⁰ have become increasingly influential.

The field of international institutional law has begun to confront the demands for deeper conceptual foundations and a more expansive theoretical and policy understanding.³¹ Jan Klabbers argues that there is a “paradox” within international institutional law:

As soon as organizations become more than debating clubs, as soon as they exercise public authority, it becomes possible and plausible to wonder whether they do a good job, or whether someone else would have done better. When organizations start to administer territory, or impose and monitor sanctions regimes, or regulate markets, or set standards, discussions will start about how they do so, and whether they do so well enough to merit further support. They operate, so to speak, on the market of legitimacy, and legitimacy, however precisely conceptualized, is a scarce resource. And when this happens, the organization loses its character as organization and becomes something else – whatever the “something else” may be.³²

It is often argued that public deliberative institutions unavoidably have, and ought to have,

Principles of the Institutional Law of International Organizations, 2nd edn. (Cambridge University Press, Cambridge, 2005) (the first edition was published in 1996).

²⁸ W. Friedmann, *The Changing Structure of International Law* (Columbia University Press, New York, 1964); for an application of Friedmann’s theory to international governance regimes, G. Abi-Saab, “Whither the International Community?”, 9 *EJIL* (1998) pp. 248-265.

²⁹ C.F. Amerasinghe, “International Institutional Law – A point of View”, 5:1 *International Organizations Law Review* (2008) pp. 143-150, at 146. The creation of the International Fund for Agricultural Development (IFAD) seems to have been exemplary in this regard. It is reported that IFAD was started “with advance prospects of a medium sized pot of money that could be spent only if an agreement was reached on establishing an appropriate institution”. See P.C. Szasz, “Establishment of the International Fund for Agricultural Development”, in E. Brown Weiss *et al* (eds.), *The World Bank, International Financial Institutions, and the Development of International Law*, ASIL Studies in Transnational Legal Policy No. 31 (1999), p. 32 et seq., at 33, and R.S.J. Martha, “Mandate issues in the activities of the International Fund for Agricultural Development (IFAD)”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

³⁰ E. Benvenisti and G. W. Downs, “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law”, 60 *Stanford Law Review* (2007) pp. 595-632.

³¹ See the set of reflections in 5:1 *International Organizations Law Review* (2008): C.F. Amerasinghe, “International Institutional Law – A point of view”, pp. 143-150; N. Blokker, “Comparing Apples and Oranges? Reinventing the Wheel? Schermers’ Book and Challenges for the Future of International Institutional Law”, pp. 197-213, P. Klein and P. Sands, “(Re)Writing a Handbook on the Law of International Organizations: Options and Challenges”, pp. 215-222; and J. Klabbers, “The Paradox of International Institutional Law”, pp. 151-173. Blokker, for instance, points up three challenges for the future of this field: 1) strengthening the unity within diversity; 2) the need for more coordination; 3) accountability and independence.

³² Klabbers, *supra* note 31, p. 169 et seq. Klabbers also explains: “First, to the extent that the law of an international organization covers only the internal legal order and is really residual (each organization is *sui generis* and has its own legal order), there cannot be said to exist any international institutional law. Second, the more active and successful organizations become, the less their existence will be seen as a specific branch of law; instead, they will be subjected to general public international law, even without a plausible theory of obligation”.

two different logics that variously meld and compete: a logic of talk and a logic of action,³³ or a logic of appropriateness and a logic of consequences. This dichotomy is too simple, but it is perhaps true that international institutional law has on the whole (with exceptions) not been highly effective in providing a deep structure for the operational or administrative-type activities of IOs. Scholarly writings on international institutional law have contributed much on constitutional issues concerning the competences of IOs and their various organs and about the relationships between them and the member states,³⁴ and on staff issues. Legal issues relating to decision-making process within IOs,³⁵ and to intra-organizational matters such as the relationships between IO headquarters and their field offices, have been studied much less.³⁶

Proliferation of IOs has been accompanied not only by increased differentiation in types of IOs,³⁷ but also by growing complexity of many regimes, due to increased density of norms and mandates, complex interactions with other IOs and with non-IO actors, and the simple increase in the number of states participating in IOs (the WTO, for instance, currently has more than 150 member states, whilst in the original GATT 1947 there were 23.³⁸) Networks of IOs acting together have in some cases gone beyond inter-agency co-ordination and cooperation, to the development of new institutional models. A first pattern is when states and IOs themselves create other specialized agencies or committees: take for instance, the International Agency for Research on Cancer, established in 1965 as an extension of WHO, which has, however, its own governing bodies, or the well-known Codex Alimentarius Commission. A second pattern is exemplified by the Global Environmental Facility (GEF), an inter-IO structure to provide funding and maximize the coherence and effectiveness of project design and selection.³⁹ Another

³³ N. Brunsson, *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations* (2nd edn, 2003). Klabbers is perhaps making such a point in asserting: “It may be the case, in other words, that organizations are at their best, their purest, so to speak, when they do nothing, because only then do they offer a platform for discussion, for debate, for politics. What I have called elsewhere the “agora” function may be crucial to the survival of organizations – and for the law of international organizations” (*supra* note 31, p. 170).

³⁴ See, for example, D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, Oxford, 2005), and reviews of this book by J.E. Alvarez in 101 *American Journal of International Law* (2007) pp. 674-679, and by V. Engström in 3:2 *International Organizations Law Review* (2006) pp. 356-361.

³⁵ von Bernstorff, *supra* note 20; also Schermers and Blokker, *supra* note 27, p. 705 et seq. A wider set of inter-disciplinary studies is exemplified by R.W. Cox and H.K. Jakobson (eds.), *The Anatomy of Influence. Decision Making in International Organizations* (Yale University Press, New Haven, 1973), which includes case studies of the ITU, ILO, UNESCO, WHO, IAEA, IMF, GATT, UNCTAD, and the environment.

³⁶ In a certain way, a similar phenomenon occurred in the domestic administrative law, during the XX century. For a long period of time, in fact, administrative lawyers focused mostly on the acts of public administrations and review on them, without considering their proceeding and their internal organizational framework: see S. Cassese, *La Construction du droit administratif: France et Royaume-Uni* (Montchrestien, Paris, 2000), and G. Napolitano (ed.), *Diritto amministrativo comparato* (Giuffrè, Milano, 2007).

³⁷ Attempts to classify and categorize IOs in light of this proliferation and differentiation include the clusters and groups used by the Yearbook of International Organizations (UIA), and also efforts by international institutional law scholars. See Schermers and Blokker, *supra* note 27, p. 48 et seq.; Klabbers, *supra* note 27, p. 23 et seq., and Klabbers, “Two Concepts of International Organization”, 2:2 *International Organizations Law Review* (2005) pp. 277-293. An international legal history of the growth of IOs and their functions is sketched by J.E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, Oxford, 2005), p. 17 et seq.

³⁸ On these aspects, see J. Pauwelyn, “New Trade Politics for the 21st Century”, 11 *Journal of International Economic Law* (2008) pp. 559-573.

³⁹ This point is underlined by L. Boisson de Chazournes, “The Global Environment Facility Galaxy: On Linkages among Institutions”, in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 3 (1999) p. 243 et seq.

is the creation in IOs of mechanisms or even specific entities to link national administrative bodies together, exemplified by the Organization for Economic Co-operation and Development (OECD)'s system of National Contact Points (NCPs) under the development of the OECD *Guidelines for Multinational Enterprises*.⁴⁰ A fourth pattern is contracting by IOs with private entities, or more ambitiously the creation of public-private partnership mechanisms. This pattern draws in transnational private law, with its deepening procedural and institutional dimensions; and many legal forms that cannot clearly be designated as private or public.⁴¹

Increased focus on the legitimacy and accountability of global institutions,⁴² the formation of global networks,⁴³ and other features of the organization (*vel non*) of global governance,⁴⁴ have not produced practical or scholarly agreement on a legal framework for understanding and structuring these phenomena. It has long been recognized that insights from administrative law, and from public law more generally, may help provide conceptual resources. Specific formal and operational features of IOs may be, unsurprisingly, similar to those found in national administrations.⁴⁵ An example was the functionalist approach to IOs propounded in Geneva by Michel Virally which,⁴⁶ in using function as the basis for “an attempt to provide coherence and unity to theory in the field of international organizations law”,⁴⁷ overlapped with national law theories in which the public function of administrative action (the public interest, identified and regulated by law) justifies application of public-regarding administrative law rules to the administrative actors. Another example is the contemporary application in IOs of theories of global public goods,⁴⁸ in which administrations are again conceived as instruments for furthering a definable public interest.⁴⁹ An administrative perspective on the work of IOs enables analysis of practices already occurring in IOs (and insufficiently assimilated in international law

⁴⁰ See http://www.oecd.org/document/60/0,3343,es_2649_34889_1933116_1_1_1,100.html.

⁴¹ E.g., M. Audit, *Les conventions transnationales entre personnes publiques* (LGDJ, Paris, 2002). A. Riles, “The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State”, 56 *Am. J. Comp. L.* (2008) pp. 605-630, at 629, for example, argues that global private law is “not a radical departure from state law, but really more of the same”.

⁴² A. Buchanan and R.O. Keohane, “The Legitimacy of Global Governance Institutions”, 20 *Ethics and International Affairs* (2006) pp. 405-437; R. Grant and R.O. Keohane, “Accountability and Abuses of Power in World Politics”, 99 *American Political Science Review* (2005) pp. 29-44; S. Chesterman, “Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law” 14 *Global Governance* (2008) pp. 39-52.

⁴³ A.-M. Slaughter, *A New World Order*, (Princeton University Press, Princeton, 2004); P.-H. Verdier, “Transnational Regulatory Networks and Their Limits”, 34 *Yale J. Int'l L.* (2009) 113, and M. Amstutz and G. Teubner (eds.), *Networks. Legal Issues of Multilateral Co-operation* (Hart Publishing, Oxford and Portland, 2009).

⁴⁴ For a multidisciplinary approach, see K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (Ashgate, Aldershot, 2004), and D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (Polity Press, London, 2003).

⁴⁵ S. Cassese, “Relations between International Organizations and National Administrations”, in *IISA, Proceedings, XIXth International Congress of Administrative Sciences* (Berlin, 1983).

⁴⁶ M. Virally, “La notion de fonction dans la théorie de l’organisation internationale”, in *Mélanges offerts à Charles Rousseau: La communauté internationale* (Pedone, Paris, 1974) p. 277 et seq.

⁴⁷ Blokker, *supra* note 31, p. 201.

⁴⁸ The contemporary theory of “global public goods” is discussed in E.A. Andersen and B. Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights* (Martinus Nijhoff, Leiden, 2007), and I. Kaul *et al* (eds.), *Providing Global Public Goods: Managing Globalization* (Oxford University Press, Oxford, 2003).

⁴⁹ In this way, it becomes possible to identify the administration in theoretical terms (this is the German *Begriff der Verwaltung*), but it remains both difficult and unnecessary to attempt a unitary definition in practical terms. To conceive administration as functionally oriented towards achieving a public goal produces variability in the delimitation of the public sphere: there is not, therefore, one single definition, but rather a range of notions of what can constitute “public administration”.

scholarship) which reflect changing patterns in contemporary management practices and philosophies more generally, such as new public management (steering-not-rowing, user charges, separation of funders from providers of services), or outsourcing and governance-by-contract.⁵⁰

More generally, the practice of IOs has some parallels with earlier national experience concerning such matters as: the proliferation and fragmentation of public bodies; the growing use of private law instruments; the increase in administrative rulemaking (a major feature of the US New Deal, addressed in the Administrative Procedures Act of 1946)⁵¹; and the establishment of multiple field offices (a feature of the French administrative system). Any transposition from state legal systems to the complex real practices of inter-governmental institutions in global governance is challenged, however, by fundamental differences between these enterprises.⁵² That many important activities of IOs can be regarded as administrative in nature, does not remotely suggest the existence of a general global public administration; there is no global government or global parliament, nor are there real global equivalents of other structures within which national administrations are nested. Nevertheless, some normative demands and procedural principles are sufficiently common across diverse IOs to suggest a unified field may be discernable: transparency in rule-making; due process (in certain cases including notice, hearings, and reason-giving requirements) in decisions that directly affect private parties; review mechanisms to correct errors and ensure rationality and legality; and in addition to review, a variety of other mechanisms to promote accountability.⁵³ These are among the key ideas in the exploration of a unified field of legal practice and study of global administrative law (GAL).⁵⁴

Many GAL principles are actively embraced in particular IOs, and these principles provide a basis for serious discussion and critique in the work of others. Thus transparency and participation are current preoccupations in relation to the WTO,⁵⁵ and due process is intensely

⁵⁰ M. Freedland, "Government by Contract Re-examined – Some Functional Issues", in P. Craig and R. Rawlings (eds.), *Law and Administration in Europe*. Essays in Honour of Carol Harlow (Oxford University Press, Oxford, 2003), p. 123 et seq., and C. Harlow and R. Rawlings, *Law and Administration*, 2nd edn. (Butterworths, London, 1997), p. 252 et seq.

⁵¹ D.C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", 115 *Yale Law Journal* (2006) pp. 1490-1563, at 1494, and R.B. Stewart, "The Reformation of American Administrative Law", 88 *Harvard Law Review* (1975) pp. 1667-1813.

⁵² D. Sarooshi, "The Role of Domestic Public Law Analogies in the Law of International Organizations", 5:2 *International Organizations* (2008) pp. 237-239.

⁵³ For a detailed analysis of principles governing IOs conceived as public authorities, see A. von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field", 9 *German Law Journal* (2008) pp. 1909-1938. See also F. Seyersted, *Common Law of International Organizations*, (Leiden-Boston: Martinus Nijhoff, 2008), and review of this book by J. Klabbers, in 5:2 *International Organizations Law Review* (2008) pp. 381-390. A GAL approach to international administrative tribunals is sketched in B. Kingsbury and R.B. Stewart, "Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations", in S. Flogaitis (ed.), *International Administrative Tribunals in a Changing World* (Esperia, London, 2008).

⁵⁴ S. Cassease *et al* (eds.), *Global Administrative Law: Cases, Materials, Issues* (2nd edition, 2008) (online GAL casebook, available at <www.iilj.org/GAL>.)

⁵⁵ See the mini-symposium on transparency in the WTO, published in 11 *Journal of International Economic Law* (2008) p. 705 et seq., where there is also a deep analysis of public participation, with a comparative perspective involving national and regional context: Y. Bonzon, "Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues" (p. 751 et seq.). On transparency, see T.N. Hale and A.-M. Slaughter, "Transparency: Possibilities and Limitations", 30 *The Fletcher Forum of World Affairs* (2006) pp. 153-164.

debated in relation to sanctions against individuals imposed by the UN Security Council.⁵⁶ In some other IO contexts, even consideration of such principles, let alone application of them, is incidental at most.⁵⁷ Some of the demands made by reference to GAL principles are unrealistic and potentially counter-productive: for example, too much accountability to the wrong people can be pathological; immense and perhaps insuperable problems arise in adequate representation or direct participation of civil society-type actors and their interests, so that compromises on this are often inescapable; at the global level participatory rights should be accorded considering the different nature of actors involved, which can be either private or public (such as states and domestic administrative agencies) or both;⁵⁸ ‘notice and comment’ requirements for rule-making can facilitate the capture of the process by special interest groups; entitlements to a lengthy hearing and appeal may “ossify” procedures and dissuade an underfunded and overstretched agency from acting at all.

With these considerations in mind, we turn in the next sections briefly to highlight five areas of current operational practice of IOs to which we believe a GAL approach may make some contribution.

3. Five sets of practical legal problems of IOs in GAL perspective

3.1. *Emergency actions by IOs: leadership, legal mandate, accuracy, review mechanisms, and liability issues*

Emergency actions by IOs in crisis situations can be extremely important. One central challenge has been establishing an adequate legal and political order for such actions. The growth of a field of humanitarian emergency action since the 1970s, with vastly-increased numbers of NGOs and volunteers operating on the ground (and in fund-raising) in the same space as numerous inter-governmental organizations and foreign and local state agencies, has been accompanied by an “emergency imaginary” in which emergency is “a sort of counterpoint to the idea of global order”⁵⁹ Attempts by IOs to follow established legal and administrative procedures in such situations have been caricatured, often rightly, as hopelessly ponderous and as putting bureaucratic routines above human suffering. Overlain on this are demands, mainly from states, that IOs and hybrid or private international institutions respond rapidly to what are

⁵⁶ On fundamental issues pre-Kadi, see V. Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Study* (Martinus Nijhoff, Leiden, 2004). On Kadi and its aftermath, see G. De Burca, “The EU, the European Court of Justice and the International Legal Order after Kadi”, 51 *Harvard International Law Journal* (2009). On due process generally, see S. Cassese, “A Global Due Process of Law?”, Paper presented at New York University, Hauser Colloquium on Globalization and Its Discontents, September 13, 2006 (<www.iilj.org/courses/documents/Cassese.AGlobalDueProcess.pdf>, visited on 31 July 2009).

⁵⁷ An overview is in C. de Cooker (ed.), *Accountability, Investigation and Due Process in International Organizations* (Martinus Nijhoff, Leiden-Boston, 2005).

⁵⁸ See J.-B. Auby, *La globalisation, le droit et l’Etat* (Montchrestien, Paris, 2003).

⁵⁹ C. Calhoun, “The Imperative to Reduce Suffering. Charity, Progress, and Emergencies in the Field of Humanitarian Action”, in M. Barnett and T. Weiss (eds.), *Humanitarianism in Question. Politics, Power, Ethics* (Cornell University Press, London and Ithaca, 2008), p. 73 et seq., at 85. See also J.D. Fearon, “The Rise of Emergency Relief”, in *Humanitarianism in Question. Politics, Power, Ethics*, op cit, p. 49 et seq.; F. Terry, *Condemned to Repeat? The Paradox of Humanitarian Action* (Cornell University Press, Ithaca, 2002); and D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton, 2004).

claimed to be security emergencies, whether by handing over personal data, ordering bank accounts frozen, withdrawing observers, sending inspectors, or even authorizing an invasion.

One approach to this can be pursued through general international law doctrine: implied powers of IOs, responsibility of IOs, duties to cooperate including duties of states to admit necessary aid and personnel in natural disasters,⁶⁰ and legal doctrines concerning protection of human rights and of community organizations in humanitarian emergencies.⁶¹

A second approach focuses more on institutions. Efforts to structure emergency responses through bodies which clearly have powers to take some such actions, such as the UN Security Council, may contribute both to the political legitimacy of such actions and to clarity of their legal bases. Some IOs have taken steps to provide an organized legal and policy framework for some of their actions in possible future emergencies. The World Bank, for example, has structures for rapid response to emergencies, including rapid disbursement through streamlined procedures, the possibility of retroactive authorization of finance provided before legal agreements could be put in place, downward delegation of decision-making authority, grants to local public or private entities or to IOs or international NGOs as an alternative to making grants to the state where necessary in “weak-capacity environments”, and attenuation where necessary of ex ante controls to be balanced by greater on-going supervisory controls against fraud, corruption and other risks.⁶² A second example is the adoption by the IAEA in 2002 of its Action Plan against the threat of nuclear terrorism. Similarly, the WHO Director General rightly judged that the SARS crisis called for the WHO to operate immediately, beyond her clear powers and perhaps beyond its explicit treaty mandate, adopting recommendations and measures addressed and sent by email to airline companies and other private subjects, even individuals;⁶³ in one assessment, “the global governance model that emerged during SARS accorded the WHO independent power vis-à-vis its member states, an astonishing development that indicates the extent to which Westphalian governance has been abandoned”.⁶⁴ The International Health Regulations were extensively revised in 2006 to take some account of this experience and regularize future emergency practice, including giving affected states some more influence or control over WHO actions.

The reality in many IOs, however, is that plenary and even executive board inter-state institutions may be ineffective at managing emergency responses: considerable discretion and authority may have to devolve on the secretariat and professional leadership (acting with support from specific states, or in collaboration with other IOs or state agencies or private actors), raising problems of mandate, powers (vires), oversight, and legal accountability. Thus the WTO’s initial response to the 2008-2009 financial crisis consisted in considerable part of emergency actions

⁶⁰ This is an area of work for the UN International Law Commission. See also “Symposium: Catastrophe”, 6 *Chicago Journal of International Law* (2006) p. 511 et seq.; and D.P. Fidler, “Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?”, 6 *Melbourne Journal of International Law Review* (2005) pp. 458-473.

⁶¹ See e.g., J. Klugman, *Social and Economic Policies to Prevent Complex Humanitarian Emergencies: Lessons from Experience* (United Nations University, World Institute for Development Economics Research, Helsinki, 1999).

⁶² World Bank Operational Policy 8.00 on Rapid Response to Crises and Emergencies (March 2007); World Bank, Bank Procedures 8.00 on Rapid Response to Crises and Emergencies (March 2007).

⁶³ J.W. Sapsin *et al*, “SARS and International Legal Preparedness”, 77 *Temple Law Review* (2004) pp. 155-174.

⁶⁴ D.P. Fidler, “Constitutional Outlines of Public Health’s ‘New World Order’”, in Sapsin *et al*, *supra* note 63, p. 268.

taken by the Director General and the Secretariat, and not by WTO legislative or judicial bodies.⁶⁵ The adoption of a public law conceptual framework, encompassing global administrative law dimensions, is potentially a promising way forward. One illustrative example is the principle that review mechanisms should be available where improper exercises of power may have seriously detrimental or abusive effects.

The structuring and roles of review mechanisms in relation to such emergency actions raises complex problems. Where the action is taken by the Director General or a comparable official, a political review may be conducted by the IO's inter-state assembly or executive board, which may in effect ratify the action, remain agnostic, issues criticism which may be accompanied by sanctions, or take action oriented to future cases. Other political checks also operate, as with the role in relation to the World Bank of individual executive directors and of political bodies in major contributing states or in the EU. Legal checks may be achieved internally if the legal counsel has a powerful role and relative independence. Inter-institutional processes may be important, as with interactions between UN headquarters and UN specialized agencies such as those between the World Bank and the UN over the role and interpretation of General Assembly resolutions and particularly over the interpretation and reach of Security Council resolutions.⁶⁶ In such contexts mandate issues and concerns about "mission-creep" may properly arise, and bureaucratic turf battles may and do hamper needed action.⁶⁷

National courts have played essential roles in democratic countries in limiting excesses or abuses of emergency powers, and both national and regional or supranational courts have been asked to exercise some review functions in relation to implementation of IO measures, particularly Security Council financial sanctions against named individuals and groups. But while some blocking or criticizing of implementation has occurred, and national governments have paid compensation for some implementation actions they could not later justify, the further step of imposing non-contractual liability on an IO for emergency action remains rare.⁶⁸ Liability concerns could have a chilling effect on action: as could easily have happened with the WHO's warnings and travel advisories concerning SARS, which had major consequences for private economic operators as well as entire cities and regions.

In addition to review, other global administrative law principles such as transparency, participation, and reason-giving may be applicable to IO emergency actions, but with specific limits and inflections for different IOs and in different circumstances. Issues concerning application of these public law principles sit alongside questions of institutional design, output-legitimacy, resource availability, effectiveness, and political sustainability, in what should become a sub-field of specialized work on emergency powers of IOs and other actors in global governance.

⁶⁵ Pauwelyn and Berman, *supra* note 6.

⁶⁶ For example, Security Council Resolution 1747 (2007), adopted in the context of concerns about Iran's nuclear program, which: "*Calls upon* all States and international financial institutions not to enter into new commitments for grants, financial assistance, and concessional loans, to the Government of the Islamic Republic of Iran, except for humanitarian and developmental purposes." The World Bank seems to have interpreted all of its activities as falling within the exception, but the Security Council could have challenged that interpretation in a review function had it decided to do so.

⁶⁷ von Bernstorff, *supra* note 20, p. 1945 et seq.

⁶⁸ A.J. Miller, "Privileges and Immunities of United Nations Officials", 4:2 *International Organizations Law Review* (2008) pp. 169-257.

3.2. Human rights dimensions of IO operations: GAL Aspects

The human rights elements of IO operations have several distinct dimensions from the standpoint of GAL.⁶⁹ First, IOs act in emergency contexts or other difficult situations, providing emergency shelter or food or water or sanitation, administering camps, negotiating with governments about treatment of dissidents, intervening to prevent abuses by armies and militias or even on occasion by NGOs. This is the frontline of human rights in emergency situations, in which every success and every failure or inability is of desperate importance.

Second, IOs may in their activities impinge on human rights, or trade off some human rights protection in pursuit of other objectives.⁷⁰ The familiar legal debates about the applicability of human rights law to IOs should not obscure the general feature of IOs is that accountability is strong (perhaps excessive) to funders and founders (i.e. states which in some sense delegate power to the IO), but often uneven with regard to other interests, in particular the interests of those third parties whom the IO affects. This issue is most acute with regard to human rights of individuals, particularly vulnerable individuals and groups with little ability to influence the IO directly or indirectly. Many IOs are now addressing these problems seriously, but the challenges remain formidable.

Third, relationships between IO headquarters and their field presence may precipitate some human rights complications⁷¹ -- for example, it may be difficult for a local UN human rights mission to threaten to exclude army units abusing human rights locally from further participation in lucrative UN peacekeeping work, if UN HQ has desperate need for those forces in other missions – and going beyond field offices, the practical and legal problems of coordination, authority, competition, and human rights responsibility among various actors (inter-governmental, state, PPPs, and private or non-governmental) can be acute, as for instance in demining.⁷² Such problems are compounded where action is taken under emergency conditions. In all of these cases, GAL issues must be integrated with effectiveness and efficiency objectives, to actually promote and protect human rights.⁷³

Fourth, the specific structural machinery of IOs aimed to promote and protect human rights requires much more systematic analysis from a GAL perspective than it has yet received. This includes issues such as transparency and reason-giving (or not) in the work of the UN Human

⁶⁹ See H.J. Steiner et al, *International Human Rights In Context. Law, Politics, Morals*, 3rd edn. (Oxford University Press, Oxford, 2008), C. Tomuschat, *Human Rights between Idealism and Realism*, 2nd edn. (Oxford University Press, Oxford, 2008), T. Buergenthal, “The Evolving International Human Rights System”, 100 *American Journal of International Law* (2006) pp. 783-807. From a wider perspective, A. Cassese, *The Human Dimension of International Law. Selected Papers* (Oxford University Press, Oxford, 2008).

⁷⁰ See F. Rawski, “Engaging with Armed Groups: A Human Rights Field Perspective From Nepal”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

⁷¹ Pallis, *supra* note 8.

⁷² A. Marschik, “The Administration of Arms Control - Ensuring Accountability and Legitimacy of Field Operations”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

⁷³ R. Goodman and D. Jinks, “Incomplete Internalization and Compliance with Human Rights Law”, 19 *European Journal of International Law* (2008) pp. 727-748, and Goodman and Jinks, “How to Influence States: Socialization and Human Rights Law”, 54 *Duke Law Journal* (2004) pp. 621-704. See also U. Garms, “Promoting Human Rights in the Administration of Justice in Southern Sudan. Mandate and Accountability Dilemmas in The Field Work of a DPKO Human Rights Officer”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

Rights Council and other bodies, transparency in appointments processes and mandate formulation and approved activities of special rapporteurs and special representatives, the use of review mechanisms and their effective operation, the effective and fair treatment of complainants/victims and other interested parties, the speed of work and the adequacy of the deliberative processes of human rights bodies, their criteria for taking up or not taking up particular cases, the adequacy of due process and notice to potential targets of international human rights investigations, and the robustness of fact-finding processes.

Fifth, IOs act to concretize or embellish already-agreed legal human rights standards (usually formulated in global or regional treaties) through sub-treaty normative activities: adopting guidelines, best practices and other documents of relatively general application; monitoring (as often conducted, for example, by the OSCE during elections⁷⁴); deploying newer techniques such as devising or using indicators to measure human rights compliance, which may come *de facto* to define what the human right means; deciding what to accept or not accept in a specific post-conflict peace deal or other negotiated solution; making determinations about individual situations, thereby establishing significant interpretations and precedents; and the creation of specialist institutions such as the Lebanon criminal investigatory mechanism and tribunal.

A descent over and above these five specific issues is heard in arguments that human rights may be acquiring a “constitutional” nature in global institutions of public governance,⁷⁵ thus creating a hierarchy of values and public interests which may be recognized by the different actors involved: IOs, states, national administrations, courts.⁷⁶ Such arguments are often made by reference to wider claims concerning the globalization of law⁷⁷ or “global constitutionalism”.⁷⁸

3.3. GAL and the administration of field offices and field missions of IOs

Closely connected to rise of emergency actions is the increase in field offices of IOs. After some studies conducted in the 1960s,⁷⁹ the topic of administration of field operations of IOs was largely neglected in the academic literature. However, it began to regain importance during the 1990s, with the increase in UN and other IO conflict-related field operations and international territorial administration.⁸⁰

⁷⁴ See W. Zellner *et al*, “New forms and Support Structures for OSCE Field Operations”, *Helsinki Monitor* (2004) p. 91 et seq.

⁷⁵ S. Gardbaum, “Human Rights as International Constitutional Rights”, 19 *European Journal of International Law* (2008) pp. 749-768.

⁷⁶ On the role of the Universal Declaration of Human Rights in contributing to this process, J. von Bernstorff, “The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law”, 19 *European Journal of International Law* (2008) pp. 903-924.

⁷⁷ S. Cassese, “The Globalization of Law”, 37 *New York University Journal of International Law and Politics* (2005) pp. 973-993, and D. Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000”, in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, Cambridge, 2006), p. 19 et seq.

⁷⁸ See Dunoff and Trachtman, *supra* note 17; Klabbers, Peters and Ulfstein, *supra* note 17.

⁷⁹ W.R. Sharp, *Field Administration in the United Nations System* (Stevens, London, 1961), or, on WHO, R. Berkov, *The World Health Organization, A Study in Decentralized International Administration* (Libr. Droz, Geneva, 1957).

⁸⁰ See R. Wolfrum, “International Administrations in Post-Conflict Situations by the United Nations and Other International Actors”, in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations*

During last ten years, field (i.e. non-HQ) operations and activities of many IOs have been growing relative to HQ. To take the UN system, in 2007 field personnel made up 61% of the total staff (45,818), rising to more than 75% in the case of WFP, UNICEF, UNDP, and UNHCR; in 1997, by contrast, the general figure stood at 44% of total staff (22,788). The HQ staff in 2007 consisted of 26,980 officers (36%), whilst there were 21,713 (42%) in 1997.⁸¹

This growing importance of field operations reflects the nature of the public goods or public goals that these IOs pursue, as well as a general emphasis placed (or at least ostensibly placed) by member states on “action” getting beyond “talk”, and in particular an emphasis on action relating to development or to humanitarian crises. Whether field operations are necessarily more action-oriented and less bureaucratic than HQ activities is a different question. There are of course many variations in IOs field offices and field operations, differences of function and indeed ideology, as illustrated by nomenclature for field activities: office, presence, department, mission, resident. Some IOs are structured around a permanent and wide-spread network of regional offices or field administrations. Regional structures are formally prescribed for the WHO and the International Telecommunications Union (ITU), for example. Many types of field activities, however, respond to local problems which are at least hoped to be temporary: peacekeeping, refugee operations, and human rights work of IOs in situations of violence, abuse or risk.⁸²

Field administrations tend to grow when there are demands from different states that the IO have a presence in the state or region (the Global Fund, for example, seems almost inexorably to face demands that it should have a project in each developing country, even if this does not maximize cost-effectiveness in improving health outcomes), or when the policy environment favors decentralization and subsidiarity.⁸³ Decentralization of IOs can (but need not) involve significant devolution of powers; powers of relatively autonomous field offices might diminish the powers of the HQ, and nullify or dissipate the centralization of responsibilities intended by the states that originally created the IO.⁸⁴ Such issues also arise where an IO’s structure has both network and hierarchical elements: for example, where a global IO does not entirely subsume preexisting organizations (as in the WHO-PAHO relationship), or where universal IOs form close-knit networks with regional IOs, or where multiple IOs form networks with some common operations and allocations of responsibility.

There is emerging (though still in a modest way) a specialist expertise on field

Law, Volume 9, 2005, pp. 649-696, R. Wilde, “From Danzig to East Timor and Beyond: The Role of International Territorial Administration”, 95 *American Journal of International Law* (2001) pp. 583-605, and M.J. Matheson, “United Nations Governance of Postconflict Societies”, 95 *American Journal of International Law* (2001) pp. 76-85.

⁸¹ United Nations, *Personnel Statistics (Data as at 31 December 2007)*, op cit. The remaining officers were employed on specific projects: 15% of total staff on 1997 (7,606 officers), against only 3% in 2007 (2,484 officers).

⁸² M. O’Flaherty (ed.), *The Human Rights Field Operation. Law, Theory and Practice* (Ashgate, London, 2007), and THE LOST AGENDA, *Human Rights and UN Field Operations* (Human Rights Watch, New York, 1993).

⁸³ The World Bank, for example, has made decentralization one of its criteria for good governance in the sphere of investment projects in depressed areas, pushing many Asian and African countries towards the strengthening of local and regional government structures: N. Devas and S. Delay, “Local Democracy and the Challenges of Decentralising the State: An International Perspective”, 32 *Local Government Studies* (2006) pp. 677-695, particularly p. 679.

⁸⁴ B. Koremenos *et al*, “The Rational Design of International Institutions”, 55 *International Organization* (2001) pp. 761-799; K.W. Abbott and D. Snidal, “Why States Act through Formal International Organizations”, 42 *Journal of Conflict Resolution* (1998) pp. 3-32, at p. 10 et seq.

administration of IOs,⁸⁵ approached from at least two perspectives. The first refers to the organizational framework, i.e. to the typology of field offices, their powers, and their relationship with headquarters. This kind of analysis deepens insight into the functioning of IOs worldwide, and into the legal tools they are using. The second perspective focuses on field operations conducted by IOs themselves, including: UN and regional organization peace-keeping operations;⁸⁶ local development and reform activities, especially post-conflict;⁸⁷ direct international administration of territory; UNHCR refugee-related supervisory responsibilities⁸⁸ and refugee status determinations, which can be an administration of persons;⁸⁹ election monitoring;⁹⁰ certification of environmental compliance;⁹¹ aid for trade initiative;⁹² humanitarian assistance; and human rights operations of many kinds.⁹³ Much attention is now being given to the regime of legal or *de facto* immunities granted to IOs officers and contractors in these operations; problems concerning waiver of such immunities;⁹⁴ and judicial

⁸⁵ That is confirmed by the presence of several handbooks and guidelines on the topic: see P. Larose-Edwards, *UN Human Rights Operations: Principles and Practice in United Nations Field Operations* (Canadian Department of Foreign Affairs, Ottawa, 1996), and A. Faye Jacobsen, *Human Rights Monitoring: A Field Mission Manual* (Martinus Nijhoff Publishers, Boston-Leiden, 2008); amongst IOs guidelines, see the WHO's *Handbook For Emergency Field Operations* (at <www.who.int/hac/techguidance/tools/7661.pdf>).

⁸⁶ R. Arnold and G.-J. A Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International Law* (Brill, London, 2006).

⁸⁷ See B. Burwitz, "The case of Kosovo", paper first presented at the University of Geneva-NYU conference on "Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights" (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>, and J. Jashari, "U.N. Field missions in the context of legal and judicial reform: the Kosovo case", 1 *Columbia Journal of East European Law* (2007) pp. 76-113.

⁸⁸ See V. Türk and E. Eyster, "Accountability mechanisms in UNHR field operations", paper first presented at the University of Geneva-NYU conference on "Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights" (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>, and V. Türk, "UNHCR's Supervisory Responsibility", 14 *Revue québécoise de droit international* (2001) 135. More generally, E. Feller *et al*, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003).

⁸⁹ See Barnett and Finnemore, *supra* note 16, p. 73 et seq.

⁹⁰ A van Aaken, "Independent Electoral Management Bodies, Any Impact on the Observed Level of Democracy?: A Conceptual Framework", *Constitutional Political Economy* (2009); and A. van Aaken and R. Chambers, "Accountability and Independence of International Election Observers", in this symposium on "Global Administrative Law in the Operations of International Organizations" (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

⁹¹ See S. Zarrilli, "Making Certification Work for Sustainable Development: The Case of Biofuels", paper presented at the University of Geneva-NYU conference on "Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights" (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp> .

⁹² G. Marceau and O. Illy, *Global Administrative Law Perspective of The WTO Aid For Trade Initiative*, in this symposium on "Global Administrative Law in the Operations of International Organizations" (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

⁹³ OHCHR's oversight and coordination mechanisms deal with field offices located in more than 100 countries. Among the myriad specific studies, see e.g. T. Howland, "Mirage, Magic, or Mixed Bag? The United Nations High Commissioner for Human Rights' Field Operation in Rwanda", 21 *Human Rights Quarterly* (1999) pp. 1-55; Id., "UN Human Rights Field Presence as Proactive Instrument of Peace and Social Change: Lessons from Angola", 26 *Human Rights Quarterly* (2004) pp. 1-28.

⁹⁴ D. Petrovic, "Privileges and immunities of UN Specialized Agencies in field activity", paper first presented at the University of Geneva-NYU conference on "Practical Legal Problems of International Organizations. A Global

or other accountability mechanisms which can be adopted.⁹⁵

Field administration relates closely to other operational issues: PPPs and contracting out; production of norms in less-formal ways; powers in emergency situations especially for the protection of human rights. The blend of concerns about legitimacy, accountability, effectiveness and efficacy can be distinctive in certain field situations: local participation (of national administrations and civil society), sometimes through PPPs, may be functionally and politically essential in order to accomplish field missions, in ways that do not hold for HQ operations. On the other hand, however, it is becoming ever more difficult for IOs in their current operations to meet legitimate accountability demands, avoid “capture” by special interests or stasis due to state manipulation, respect the interests of third parties especially the poor and vulnerable, and maintain operational effectiveness. Traditional international law tools are relevant, but inadequate for this purpose. A GAL methodology, which integrates accountability with principles and mechanisms of transparency, participation, and review, in rule-making and in actions affecting individuals and identifiable groups, may contribute to a unified and effective approach to these problems in specific contexts.⁹⁶

3.4. *Public-private partnerships of IOs: legal issues, and wider problems of privatization*

Public-private partnerships (PPPs) involving inter-governmental organizations as one of the partners, are important in the global governance of such areas as public health (including organizations such as the Global Fund and GAVI),⁹⁷ nuclear safety (the IAEA acts in a framework built upon a complex set of conventions, agreements, and MOU, either binding or non-binding),⁹⁸ environmental protection,⁹⁹ the internet,¹⁰⁰ and sports.¹⁰¹

Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights” (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>.

⁹⁵ See M. Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff, Leiden, 2005), and also “UN Peace Operations Between Independence and Accountability”, 5:1 *International Organizations Law Review* (2008) pp. 23-47, F. Rawski, *To waive or not to waive: immunity and accountability in U.N. peacekeeping operations*, in 18 *Connecticut Journal of Int'l Law* (2002-2003) 103, and A. Reinisch, “The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals”, IILJ Working Paper 2007/11 (Global Administrative Law Series).

⁹⁶ L. Boisson de Chazournes, *Concluding Remarks – Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

⁹⁷ On PPPs in the health sector, see G.L. Burci, “Public/Private Partnerships in The Public Health Sector: Opportunity or Challenge for The World Health Organization?”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009). See also K. Buse and G. Walt, “Global Public–Private Partnerships: part I – A New Development in Health?”, 78 *WHO Bulletin* (2000) pp. 549-561; R. Widdus, “Public–private partnerships for health: their main targets, their diversity, and their future directions”, 79 *WHO Bulletin* (2001) pp. 713-720.

⁹⁸ See M. Khalil, “The IAEA’s Legal Framework for Public and Private Partnerships”, paper first presented at the University of Geneva-NYU conference on “Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights” (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>.

⁹⁹ F.X. Perez, “Public-private partnerships: a tool to evade or to live up to commitment?”, paper first presented at the University of Geneva-NYU conference on “Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and

The growing engagement by IOs in hybrid public-private bodies, and their use or concerted action with such bodies and with fully private bodies as well as with state military forces and agencies, raises heightened accountability problems. The use of PPPs and contractors can potentially contribute to evasion of IO accountability, diminished use of legal and legal-type instruments for organization and control of activities, extension beyond established mandates, and avoidance of transparency on grounds such as commercial transparency.¹⁰² Conversely, there are circumstances in which use of PPPs and contractors may improve accountability, raise the standard of operations to industry-leader levels, heighten controls of legality through contracting, improve specificity and clarity of mandates, widen participation, and enhance transparency. At the same time, IOs may come to bear a disproportionate or unrealistic share of accountability and responsibility (including through attribution to them of acts and omissions of others), especially as the IO may be a more visible, more responsive and more enduring target for complaints than some states, many PPPs, and most contractors.¹⁰³ Insufficiency of accountability structures and responsiveness may lead to increasing pressure on immunities of IOs and IO staff in national courts. Some of the most difficult legal problems in relation to immunity are likely to concern IO PPPs and contractors, not least because the capacity of IOs themselves to impose strong accountability systems on such actors may be quite limited.¹⁰⁴

The use of private law instruments by national administrative bodies,¹⁰⁵ and the integration of private actors in national regulatory processes,¹⁰⁶ are among characteristics of the “new public

Human Rights” (Geneva, 20-21 March 2009), available at www.iilj.org/GAL/GALGeneva.asp; and, more generally, F. Biermann (ed.), *International Organizations in Global Environmental Governance* (Routledge, London, 2009).

¹⁰⁰ See e.g., T. Schultz, “Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface”, 19 *European Journal of International Law* (2008) pp. 799-839, and, more generally, D. Lindsay, *International Domain Name Law: ICANN and the UDRP* (Hart, Oxford, 2007).

¹⁰¹ On the hybrid public-private sports regimes, L. Casini, “Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009), and A. Van Varenbergh, “Regulatory features and administrative law dimensions of the Olympic movement’s anti-doping regime”, IILJ Working Paper 2005/11 (Global Administrative Law Series).

¹⁰² On issues concerning private military companies, including their relations to IO peace operations, see S. Chesterman and C. Lehnardt (eds.), *From Mercenaries to Market. The Rise and Regulation of Private Military Companies* (Oxford University Press, Oxford, 2007). On regulation of this sector generally, see J. Cockayne et al, *Beyond Market Forces: Regulating the Global Security Industry* (International Peace Institute, New York, 2009). Regulation of private actors in the security/violence sector is compared to regulation of privatized prisons, privatized utilities, and other sectors in Simon Chesterman and Angelina Fisher (eds.), *Private Security, Public Order: The Outsourcing of Public Services and its Limits* (Oxford University Press, Oxford, 2010).

¹⁰³ K. Mujezinovic Larsen, “Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test”, 19 *European Journal of International Law* (2008) pp. 509-531; M. Sassoli, “State Responsibility for Violations of International Humanitarian Law”, 84 *IRRC* (2002) pp. 401-434.

¹⁰⁴ Indeed, IOs may find it necessary to trigger national criminal prosecutions of such actors in extreme cases, or to launch civil suits against them in national court where arbitration is not sufficiently effective. (Comparable measures have already been taken in several cases against errant IO staff, particularly in situations of alleged corruption or financial misappropriation.)

¹⁰⁵ See T. Daintith, *Regulation by Contract: The New Prerogative*, in *CLP*, 1979, p. 41 et seq.; I. Harden, *The Contracting State* (Open Univ. Press, Buckingham, 1992); M. Freedland, *Government by Contract and Private Law, Public Law* (1994), p. 86; J.P. Gaudin, *Gouvernement par contrat* (Presses Sc. Po, Paris, 1999).

¹⁰⁶ J. Freeman, *The Private Role in Public Governance*, in *NYU Law Rev.* (2000), p. 43 et seq.; and Id, *Private Parties, Public Functions and the New Administrative Law*, in *Admin. Law Rev.*, 2000, p. 814 et seq.; A.C. Aman Jr., “Politics, Policy and Outsourcing in the United States: the Role of Administrative Law”, in L. Pearson et al (eds.), *Administrative Law in a Changing State. Essays in Honour of Mark Aronson* (Hart, Oxford, 2008), p. 205 et

management” in national administration that have become significant as techniques and to some extent as ideologies in IOs. Responses to these phenomena in national administrative law may thus be of some relevance even in the very different contexts in which IOs operate. GAL approaches to global governance may help in addressing such problems as: under what conditions should global public administrative bodies engage in PPPs and associated private law instruments?¹⁰⁷ What kinds of effective and non-stifling oversight mechanisms could such public bodies use in relation to PPPs?¹⁰⁸ Will these be sufficient to ensure adequate accountability, and legitimacy?¹⁰⁹ Should the various privileges and immunities granted to IOs be extended to the private bodies involved in, or created as a result of, PPPs?¹¹⁰ The Global Fund, for instance, has privileges and immunities in Switzerland where it is based and in the U.S.A. where much of its money is, but should other states (particularly developing countries where it operates) accord such immunities or in some other ways recognize the Global Fund as a public international organization?¹¹¹ Where PPPs directly affect fundamental human rights or other interests of persons, it may be becoming orthodox practice that extension of the regime of immunities and privileges to PPPs (under the condition of a delegation or a similar connection between them and the public IO in question), should be accompanied by rights and guarantees for individuals or legal persons similar to those they have in cognate national public bodies, including rights of access to information.¹¹²

Treating a distinction between public and private as being rigid and obvious risks “to conceal both the complexity of its political history and important potential areas of overlap and

seq.; J.B. Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif*, AJDA (2001) p. 912 et seq.

¹⁰⁷ On these aspects, see G. Burdeau, “La privatisation des organisations internationales”, in H. Gherari and S. Szurek (eds.), *L’Émergence de la société civile internationale. Vers la privatisation du droit international?*, Cahiers internationaux n. 18, Paris, Ped, p. 179 et seq.

¹⁰⁸ Cf. M. Audit et al (eds.), *Conflits de lois et régulation économique*, (LGDJ, Paris, 2008).

¹⁰⁹ K. Buse, “Governing Public-Private Infectious Disease Partnerships”, 10 *The Brown Journal of World Affairs* (2004) pp. 225-242; A. Davies, *Accountability: a Public Law Analysis of Government by Contract* (Oxford University Press, Oxford, 2001).

¹¹⁰ On the traditional regime of IOs immunities, P.H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Brill, Dordrecht, 1994), and A. Reinisch, *International Organizations Before National Courts* (Cambridge University Press, Cambridge, 2000).

¹¹¹ See D. Abdul Aziz, “Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

¹¹² Regional or national regulations often impose human rights obligations on certain categories of private actors to protect rights and guarantees of civil society or individual. See, for instance, the UK Human Rights Act of 1998, which defines the “public authorities” as “a court or tribunal, and any person certain of whose functions are functions of a public nature” (section 6, subsection 3); the House of Lords provided a broad and functional interpretation of this definition, independently of the formally public or private nature of the subjects considered (see the cases Aston, Cantlow and Marcis, both from 2003). This interpretation was confirmed in 2004 by the Report of Joint Committee on Human Rights, a body created by the UK parliament (D. Oliver, “Functions of a Public Nature under the Human Rights Act”, *Public Law* (2004), p. 329 et seq., and M. Sunkin, “Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the Human Rights Act”, *ibidem*, p. 643 et seq.). However, more recently, in *YL v. Birmingham City* (2007), the House of Lords declined the opportunity to reconsider the public-private distinction in relation to human rights protection: see S. Palmer, “Public Functions and private services: A gap in human rights protection”, 6 *International Journal of Constitutional Law* (2008) pp. 585-604.

compromise in the future".¹¹³ In relation to the multiple modalities of PPPs, the public/private distinction appears "not as a spectrum with some actions more or less public or private than others"; it is political more than structural, and can be made and remade very quickly. These is considerable imprecision, and tension, about what it means to be "public" in global governance. Given the absence of a decisive referent (beyond the simply inter-state nature of IOs), the public and indeed democratic interests at stake in use of PPPs by IOs call for especially careful procedures, through administrative law mechanisms such as transparency and participation.¹¹⁴

3.5. The increasing use of recommendations, guidelines, informal norms, and technical advice: the production of "soft law" from the GAL perspective

IOs influence general international law, and set specific norms which may be binding or non-binding but in any event can have significant implications for other IOs, states, national administrations, and private persons.¹¹⁵ The processes for producing such norms vary from one IO to another, from one specific sector to another, from one time to another, and depending on what is sought to be achieved.¹¹⁶ Some IOs have long histories of, and an explicit constitutional architecture for, producing norm-setting mechanisms more flexible than treaties or conventions: the ILO's recommendations, for example, which are monitored by its Committee of Experts.¹¹⁷ Similarly the International Telecommunication Union (ITU) adopts hundreds of resolutions and recommendations every year that, even if non-binding, are accepted by its members as regulatory.¹¹⁸ ICAO's Standard and Recommended Practices,¹¹⁹ ILO and UNESCO Recommendations, and World Bank operational policies are among numerous other examples of

¹¹³ Aman Jr., *supra* note 106, p. 218; Cassese, *supra* note 36. See also M. Taggart, "The Peculiarities of English': Resisting the Public/Private Law Distinction", in Craig and Rawlings, *supra* note 50, p. 107 et seq., and M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?* (British Institute for International and Comparative Law, London, 2009).

¹¹⁴ Aman Jr., *supra* note 106, p. 207 and 218.

¹¹⁵ Alvarez, *International Organizations as Law-Makers*, *supra* note 37; A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, New York, 2007). Also D. Shelton (ed.), *Commitment and Compliance, The Role of Non-binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000); R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, ed. by (Springer, Heidelberg, 2005), particularly T. Franck, "Non-Treaty Law Making: When, Where, and How?", p. 417 et seq., and comments by L. Boisson de Chazournes, "Treaty Law-Making and Non-Treaty Law-Making : The Evolving Structure of the International Legal Order", p. 463 et seq.; and Goldmann, *supra* note 15.

¹¹⁶ See P. Roch and F.X. Perrez, "International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient International Environmental Regime", 16 *Colorado Journal of International Environmental Law and Policy* (2005) pp. 1-25.

¹¹⁷ F. Maupain, "International Labor Organization: Recommendations and Similar Instruments", in Shelton, *supra* note 115, p. 372 et seq., and A.C.L. Davies, "Global Administrative Law at the International Labour Organization: the Problem of Softer Standards", paper presented at the NYU Law School Conference on "Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance", 22-23 April 2005, New York University (<[iilj.org/GAL/documents/DaviesPaper.pdf](http://www.iilj.org/GAL/documents/DaviesPaper.pdf)>).

¹¹⁸ J. Hinricher, "The Law-Making of the International Telecommunication Union (ITU) – Providing a New Source of International Law", 64 *ZaöRV* (2004) p. 489 et seq.

¹¹⁹ Standard setting is indeed one of the oldest normative activities of IOs: see for instance the ICAO, on which T. Buergenthal, *Law-making in the International Civil Aviation Organization* (New York, 1969), and T. Fidalgo de Freitas, "From participation towards compliance: The role of private actors in the making of SARPs by ICAO", paper presented at the Viterbo III Global Administrative Law Seminar (2007) (available at <www.iilj.org>).

significant normative activity of inter-governmental organizations.¹²⁰ Even without such a clear constitutional architecture, the OSCE uses such techniques routinely,¹²¹ and the UNHCR has also done so out of operational necessity, as with the UNHCR's 2003 Procedural Standards for Refugee Status Determination, which are not directly binding, but are designed to provide important guidelines for the agency's field offices.¹²²

Hybrid public-private international bodies, and some formally private transnational bodies, may also produce standards, guidelines, policies, best practices, and other normative instruments which may have considerable impact, as for example do the Codex Alimentarius Commission,¹²³ ISO, ICANN, WADA,¹²⁴ or the International Committee of the Red Cross. Reducing the discussion of such normative materials to the binary or binding/non-binding, or to an amorphous and undifferentiated category of "soft law", not only misses much about their widely varying effects, it diverts attention from questions as to how and under what procedures they are made, promulgated, reviewed, contested, or subjected to processes of accountability. International Health Regulations (IHR) propagated by the WHO.¹²⁵

In some cases, this spread of normative functions has led to the creation of complex sectoral legal orders, which may have practical implications not only for the effects, but also on one view (adumbrated below) for the legal status, of some of these normative materials. Three examples of these normative orders may be noted in a very simplified way: the nuclear energy, health, and trade sectors.

The international nuclear energy order developed by the IAEA through a system of standards and conventions ("a mixture of internationally binding and non-binding principles and norms"¹²⁶); moreover, regarding the protection of nuclear materials, IAEA adopts recommendations that "take up where treaties leave off, filling in gaps by furnishing the elaborate detail of protective measures".¹²⁷

The "world order" in the public health sector has at least two distinctive features for present

¹²⁰ See B. Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous People", in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford, 1999), p. 323 et seq., and L. Boisson de Chazournes, "Policy Guidance and Compliance: the World Bank Operational Standards", in Shelton, *supra* note 115, p. 281 et seq.

¹²¹ E.B. Schlager, "A Hard Look at Compliance with 'Soft' Law: The Case of the OSCE", in Shelton, *supra* note 115, p. 346 et seq.

¹²² M. Smrkoly, "International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination", 9 *German Law Journal* (2008) pp. 1779-1803.

¹²³ M. Livermore, "Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius", 81 *NYU Law Review* (2006) pp. 766-801.

¹²⁴ See Casini, *supra* note 101, and, from a broader perspective, H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, (Hart Publishing, Oxford, 2005).

¹²⁵ D.P. Fidler, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations", 4 *Chinese Journal of International Law* (2005) pp. 325-392, and E. Mack, "The World Health Organization's New International Health Regulations: Incursions on State Sovereignty and Ill-Fated Response to Global Health Issues", 7 *Chicago Journal of International Law* (2006) pp. 365-377.

¹²⁶ See W. Tonhauser, "IAEA Technical Standard Setting", paper first presented at the University of Geneva-NYU conference on "Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights" (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>, and H. Blix, "The Role of the IAEA in the Development of International Law", 58 *Nordic J. Intl L.* (1989) p. 231 et seq.

¹²⁷ B. Kellman, "Protection of Nuclear Materials", in Shelton, *supra* note 115, p. 486 et seq.

purposes.¹²⁸ Firstly, although WHO was conceived in 1948 as a normative organization with powers to adopt conventions and make binding regulations (arts. 19 and 21 of the WHO Const.), it has engaged in explicit law-producing functions much less than many other agencies. Secondly, global public health law inevitably encompasses norms produced in many different functional sectors, such as food safety, arms control, environment, trade, and human rights, and many of these sectors have norm-producing institutional structures quite separate from the WHO.¹²⁹ Within this framework, the revised International Health Regulations (IHR) adopted by the WHO after the SARS crisis are important and influential, but the normative and operational environment of their use and interpretation continues to be strongly influenced by PPPs, industry, and other IOs affecting the public health sector.¹³⁰

The WTO's complex system of norms across different fields ranges from GATT and GATS through the TBT and SPS agreements to TRIPS and a set of plurilateral agreements; many of these have some potential for overlap or conflict, on occasion with each other but more problematically with norms of other special regimes or of general international law.¹³¹ Beyond this, the WTO produces guidelines, recommendations, best practices, informal committee or secretariat interpretations. These contribute to normative development and harmonization,¹³² and can appear as authoritative interpretations or statements of international law, calling forth hermeneutic issues and interpretive techniques such as reasonableness and proportionality.¹³³

The various mechanisms for producing norms other than in traditional treaty form raise familiar and important issues concerning their legal nature,¹³⁴ often theorized in the rather amorphous and conceptually obscure notion of "soft law".¹³⁵ One approach to determining the legal character of such norms is to use a positivist theory of law based on H.L.A. Hart rather than positivist theories which depend entirely on showing that the norm has been made into one of

¹²⁸ On the global public health order, Fidler, *supra* note 64.

¹²⁹ L. Gostin, "A Proposal for a Framework Convention on Global Health", 10 *Journal of International Economic Law* (2007) pp. 989-1008. On the role of WHO from a GAL perspective, Esty, *supra* note 51, p. 1550 et seq.

¹³⁰ Fidler, *supra* note 125.

¹³¹ J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, Cambridge, 2003).

¹³² I. Feichtner, "The Administration of the Vocabulary of International Trade: The Adaptation of WTO Schedules to Changes in the Harmonized System", 9 *German Law Journal* (2008) pp. 1481-1511; A. Lang and J. Scott, "The Hidden World of WTO Governance", 20 *European Journal of International Law* (2009) pp. 575-614.

¹³³ See M. Andenas and S. Zlepnić, "Proportionality and Balancing in WTO law: A Comparative Perspective", 20 *Cambridge Review of International Affairs* (2007) pp. 71-92; A. Stone Sweet and J. Mathews, "Proportionality Balancing and Global Constitutionalism", 47 *Columbia J. Transnat'l L.* (2008) 72-165; Benedict Kingsbury and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", IILJ Working Paper 2009/6, www.iilj.org, published in A.J. van den Berg (ed.), 50 Years of the New York Convention, ICCA Congress Series no. 14 (Kluwer Law International, Leiden, 2009), 5.

¹³⁴ See E. Brosset and E. Truillet-Marengo (eds.), *Les enjeux de la normalisation technique internationale. Entre environnement, santé et commerce international*, Centre d'études et de recherches internationales et communautaires (CERIC) et La Documentation française, Aix-en-Provence et Paris, (2006), particularly the article by M. Mbengue, "Technique de l'opting out": acceptation par le États des normes techniques internationals", p. 121 et seq.

¹³⁵ See analysis in A. Di Robilant, "Genealogies of Soft Law", 54 *Am. J. Comp. L.* (2006) pp. 499-554; J. d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials", 19 *EJIL* (2008) pp. 1075-1093; P.-M. Dupuy, "Soft Law and the International Law of the Environment", 12 *Mich. J. Int'l L.* (1991) pp. 420-435.

international law through the authoritative expression of the will of states in treaty or custom. Law is a social practice. Norms of law generate an internal sense of obligation felt by addressees separately from their calculation of the externally-imposed costs and benefits of following the norm. To be a legal norm, the norm must originate in an authoritative source, which ordinarily involves creation or endorsement of the norm by an inter-state organ (IO) and/or some acceptance of the norm by states (thus the sectoral normative order may be significant in practice for the status of a particular norm which is part of that order, or falls outside it.) In relation to relatively technical areas of very specific IO practice, the set of authoritative sources and their application in doubtful cases may be determined by the recognition practice of the key actors in the specific community of expertise on the subject matter and normative regime involved. Thus there is a rule of recognition in Hart's sense, but for these purposes it is not a general rule of recognition covering the whole of international law, but a rule of recognition among a narrower set of specialized actors. Where the norm-generation or norm-acceptance is only shakily related to the will of states, a relevant factor for outsiders in deciding what weight to give to the norm may be the ways in which it was produced, that is adherence to standards of publicness and desiderata of GAL.¹³⁶

In IO processes for production of normative materials, participation and information rights are accorded formally to states or governments in many cases, creating a normative expectation that is more and more costly to depart from.¹³⁷ Among the numerous examples of such routine state participation rights are the Procedures for the Elaboration of Codex Alimentarius Standards and Related Texts, where there are two consultations with Members of the Commission (i.e. Member Nations and Associate Members of the Food and Agriculture Organization (FAO) and World Health Organization (WHO)); or the Operational Guidelines for the Implementation of the World Heritage Convention established by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, which enable states parties to participate in the process for the inclusion of cultural sites on the world heritage list.¹³⁸ IOs frequently extend participation beyond states, national administrations and other public global institutions, to private parties. Among the myriad examples are the WTO's "Guidelines for arrangements on relations with non-governmental organizations",¹³⁹ the "Public Consultation Guidelines" adopted by Joint Public Advisory Committee (JPAC) within the Commission for Environmental Cooperation (CEC), and the FAO "Code of Conduct for Responsible Fisheries".¹⁴⁰

The law-making processes of IOs frequently involve numerous committees, commissions, or other bodies that take part in the process:¹⁴¹ the Codex Alimentarius Commission is a prominent but typical example. This leads to familiar problems of administrative law-making processes. There is a tendency of IOs "to hear what the agency wants to hear" during hearings of expert or

¹³⁶ This argument is developed much more extensively in Kingsbury, *supra* note 1.

¹³⁷ Note for example the controversy when, prior to the 2003 invasion of Iraq, some Security Council member states refused to allow a very detailed report to the UN on Iraq's weapons programs to be read by other Security Council members.

¹³⁸ Boisson de Chazournes, *supra* note 115, p. 473; and, more generally, D. Zacharias, "The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution", 9 *German Law Journal* (2008) pp. 1833-1864.

¹³⁹ See S. Charnovitz, "Transparency and Participation in the World Trade Organization", 56 *Rutgers Law Review* (2004) pp. 927-959.

¹⁴⁰ J. Friedrich, "Legal Challenge of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries", 9 *German Law Journal* (2008) pp. 1539-1564.

¹⁴¹ W. Edeson, "The Role of Technical Bodies", in Wolfrum and Röben, *supra* note 115, p. 63 et seq.

technical committees, which might affect the credibility of decisions taken by the agency in question. Scrutiny and/or transparency are often not built in to the decision-making process initially, with controversies then ensuing as states and NGOs press for these procedures to be opened up. The WHO did this with regard to the approval of its essential medicines list; moreover, WHO is currently assessing the possibility of introducing more structured forms of participation of NGOs, corporations, and civil society actors in the production of its norms and guidelines.¹⁴² In this example, the backdrop is that the WHO relies on committees of experts, largely appointed by the Organization itself, operating in private without wide participation of states or corporations; however much of the pressure by states or non-state actors (including pressure from the EU) for more participation is aimed at giving a voice to special interests, in some cases those seeking direct commercial advantage, leading to calls for the WHO to continue to resist.¹⁴³

The implementation of participation, transparency, and access to information may be shaped also by the nature of the review mechanisms available to assess the agency's decisions on such matters. It is possible that, for individuals and other third parties affected, such rights may be more actively respected when such review mechanisms have been adopted by the IOs in question, whether the model is an Ombudsman or something like the World Bank's inspection panel.¹⁴⁴

4. Conclusion: A GAL Approach to the Law of IOs

Innovation in the focus and methods of work of IOs, exemplified in the five areas considered above but evident in many other areas also, poses many legal questions that necessitate a broadening, and probably a rethinking, of the field of international institutional law. GAL offers a potentially fruitful perspective from which to address the relevant contemporary problems created by the growth of IOs and their activities, for at least three sets of reasons.

First, demands for accountability affect IOs in myriad ways, and if managed poorly may seriously limit the effectiveness of IOs. Thus oversight and control by states of IOs (accountability to founders and funders) can distort priorities and effective structures, and may even worsen problems of IO misconduct and corruption;¹⁴⁵ this is one of the lessons of the

¹⁴² G. Silberschmidt *et al*, "Creating a Committee C of the World Health Assembly", *The Lancet* vol. 371, May 3 2008, p. 1483 et seq.

¹⁴³ An example is the 2009 assessment made by the International Agency for Research on Cancer (IARC) – a WHO expert committee but with its own governing bodies – according to which use of sunbeds is “carcinogenic to humans”, like smoking or exposure to asbestos. This clearly could have significant impact on sunbed businesses, and the UK Sunbed Association replied that there is no proven link between the “responsible” use of sunbeds and skin cancer). See the IARC working group report “A review of human carcinogens–Part D: radiation”, *The Lancet Oncology* vol. 10, August 2009 pp. 751-752, and related news at <news.bbc.co.uk/2/hi/health/8172690.stm> visited on July 31 2009.

¹⁴⁴ L. Boisson de Chazournes, “Public Participation in Decision-making: The World Bank Inspection Panel”, in Brown Weiss *et al*, *supra* note 29, and L. Boisson de Chazournes, “Le panel d’inspection de la Banque Mondiale: a propos de la complexification de l’espace public international”, 105 *Revue Générale de Droit International Public* (2001) pp. 145-162.

¹⁴⁵ See A. Trebilcock, “Implications of the UN Convention against Corruption for International Organizations: Oversight, Due Process, and Immunities Issues”, in this symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009).

Security Council's involvement in the oil-for-food program.¹⁴⁶

Second, in all of the five areas discussed above, an important feature is institutional differentiation in IOs and in the wider global governance environment on a particular issue. This phenomenon features both a horizontal dimension – such as for relations between IOs and other global actors – and a vertical one – e.g., the relationships between IOs, states and national administrations.¹⁴⁷ Most IOs can be now studied along these coordinates: thus the WTO has both the vertical dimension represented by the relations between the WTO and its members' domestic administrations, and the horizontal dimension presented by the WTO's recognition (through the TBT and particularly the SPS agreements) of regulatory standards set by other global regulatory bodies.¹⁴⁸ Moreover, the proliferation and differentiation of IOs lead to the multiplication, on one hand, of IO field offices, and, on the other, of new specialized domestic bodies (this often happens with hybrid public and private regimes, such as ISO, Internet, or sports). The relations among all of these entities of global governance that themselves operate under public law principles, may usefully be analyzed in terms of inter-public law.

Third, IO activities produce or entail a multiplicity of rules, principles, decisions, soft-law, and non-legal norms, which may be layered over each other historically.¹⁴⁹ These are now produced and administered in a bewildering variety of institutional settings and interpretive communities, in ways that are often fragmented and incompletely reconciled.¹⁵⁰ Fragmentation is not so much a problem, or a solution, or an analytic idea: it is simply a feature. It entails that many practical and normative activities of IOs, and of the other actors in complex governance regimes, must be managed not simply by formal norms and rules of jurisdiction or hierarchical or interpretive solutions to overlaps, but by a dynamic process of regulation in which global administrative law can play a useful part.¹⁵¹ Treaty law and traditional customary international law are relevant but not remotely sufficient for this. Regulatory approaches emphasize process,

¹⁴⁶ See also J. D'Aspremont, "Abuse of the Legal Personality of International Organisations and the Responsibility of Member States", 4:1 *International Organizations Law Review* (2007) pp. 91-119.

¹⁴⁷ See E. Fromageau, "Assistance in Administrative Matters between International Organizations and States: Towards a Clearer Legal Framework", paper first presented at the University of Geneva-NYU conference on "Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights" (Geneva, 20-21 March 2009), available at <www.iilj.org/GAL/GALGeneva.asp>. On these aspects, see also S. Battini, "Le due anime del diritto amministrativo globale", in S. Battini et al, *Il diritto amministrativo oltre I confini. Omaggio degli allievi a Sabino Cassese* (Giuffrè, Milano, 2008), p. 1 et seq.

¹⁴⁸ R.B. Stewart and M. Ratton Sanchez Badin, "The World Trade Organization and Global Administrative Law", IILJ Working Paper 2009-7, www.iilj.org, forthcoming in C. Joerges and E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* 2nd edn. (Hart Publishing, Oxford and Portland Oregon, 2010).

¹⁴⁹ International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN General Assembly, A/CN.4/L.682 13 April 2006, P.-M. Dupuy, "A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law", *European Journal of Legal Studies* 2 (2007), Benvenisti and Downs, *supra* note 30. A critical view on fragmentation is in B. Conforti, "Unité et fragmentation du droit international: glissez, mortels, n'appuyez pas!", 111 *Revue Générale de Droit International Public* (2007) pp. 5-18. More generally, M. Koskenniemi, "The Fate of Public International Law: Between Technique and Politics", 70 *Modern Law Review* (2007) pp. 1-30.

¹⁵⁰ J.H.H. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", 64 *Zeitschrift für Ausländisches Recht und Völkerrecht* (2004) pp. 547-562, and M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties", 15 *Leiden Journal of International Law* (2002) pp. 553-579.

¹⁵¹ B. Kingsbury, "The Administrative Law Frontier in Global Governance", 99 *ASIL Proceedings* (2005) 143.

directions of change, gradual improvement rather than instant results, and dynamic rather than simply static analysis. Law in such regulatory processes does not occupy the whole field; and is generated through accretion, accumulation, sifting, dialogue among regimes,¹⁵² and the honing of general principles in balances and interaction with one another for specific contexts. Incorporation of such global administrative law approaches, principles and techniques may make a significant contribution to the law of international organizations.

¹⁵² S. Cassese, “Is There a Global Administrative Law?”, in von Bogdandy *et al*, *supra* note 17, p. 772 et seq.