

Hauser Globalization Colloquium Fall 2008: Global Governance and Legal Theory

NYU Law School

Professors Benedict Kingsbury and Richard Stewart
Furman Hall 324, 245 Sullivan St. (unless otherwise noted)
Wednesdays 2.15pm-4.05pm

Provisional Semester Program - Attached Paper is shown in Bold

- August 27- Teaching Session: Introductory Class (course instructors)
September 3- No class (legislative Monday)
September 10- Speaker: David Dyzenhaus, University of Toronto, NYU Global Law Professor
Topic: The Concept of (Global) Administrative Law
September 17- Panel Discussion on the September 2008 ECJ Decision in Kadi.
Professors Stewart, Kingsbury, and members of the international law faculty.
September 24- Speakers: Eyal Benvenisti (Tel Aviv/NYU) and George Downs (NYU)
Topic: Toward Global Checks and Balances

- October 1- Speakers: Nico Krisch (LSE); and Euan MacDonald and Eran Shamir-Borer (NYU)**
Topics: Postnational Constitutionalism? - Krisch
Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches - MacDonald/Shamir-Borer

Friday October 3 - SPECIAL SESSION Furman Hall 310, 3pm-5pm

- Speaker: Neil Walker, Edinburgh
Topic: Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders
Background reading: Constitutionalism Beyond the State
- October 8- Speaker: Meg Satterthwaite (NYU)
Topic: Human Rights Indicators in Global Governance
- October 15- Speaker: Janet Levit, Dean, University of Tulsa College of Law
Topic: Bottom-Up Law-Making Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit
- October 22- Speaker: Jack Goldsmith, Harvard Law School
Topic: Law for States: International Law, Constitutional Law, Public Law (paper co-authored with Daryl Levinson)
Guest Commentator: Prof Georges Abi-Saab, Geneva, former Chair of WTO Appellate Body
- October 29- *[The IILJ will convene jointly with JILP a conference on International Tribunals, on Wed Oct 29, 9am-6pm, at the Law School. Global governance issues will feature. Students should attend this conference during the regular Colloquium time slot, and are welcome to attend other parts of the conference also. See the IILJ Website for details.]*
- November 5- Speaker: Robert Keohane, Princeton and Kal Raustiala (UCLA)
Topic: Toward a Post-Kyoto Climate Change Architecture: A Political Analysis
- November 12- Speaker: Jeremy Waldron (NYU)
Topic: International Rule of Law
- November 19- Speaker: Benedict Kingsbury (NYU)
Topic: Global Administrative Law: Conceptual and Theoretical Problems
- November 26- Student paper presentations [may be rescheduled, due to Thanksgiving break]
- December 3- Student paper presentations and wrap up.

Program and papers available at: <http://iilj.org/courses/2008HauserColloquium.asp>

Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches

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Abstract

This paper contrasts two approaches to global regulatory governance, those of global administrative law and global constitutionalism, and makes the claim that the former is better suited (pragmatically, conceptually and normatively) to meeting the challenges raised by the shift of regulatory power and authority from the state to extra-state processes and norms. While both approaches share the goal of subjecting public power exercised outwith the state to public control, we argue that global administrative law is better calibrated to confront the conditions of radical institutional, structural and normative plurality and fragmentation that currently characterize global regulatory governance.

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I. INTRODUCTION

This paper contrasts two approaches to global regulatory governance, those of global administrative law and global constitutionalism, and makes the claim that the former is better suited (pragmatically, conceptually and normatively) to meeting the challenges raised by the shift of regulatory power and authority from the state to extra-state processes and norms. While both approaches share the goal of subjecting public power exercised outwith the state to public control, we argue that global administrative law is better calibrated to confront the conditions of radical institutional, structural and normative plurality and fragmentation that currently characterize global regulatory governance.

We evaluate global administrative law and global constitutionalism from the perspective of three fundamental challenges presented by the currently prevailing conditions of global governance. The first is the institutional diversity that characterizes this field. While previously regulation was reserved to national regulatory bureaucracies, it is increasingly carried out today at the global level, through a myriad of institutional forms and actors, ranging from national regulatory bureaucracies, through networks of national regulators and intergovernmental organizations, to hybrid public-private and even purely private bodies. A second challenge is that of the radical fragmentation of global governance, characterized by a heterarchical multiplicity of sites in which regulatory power is exercised. Lastly, in the absence of broad global agreement over values and moral norms, the value diversity of global governance presents a third challenge. With respect to each of these challenges we argue that global administrative law ultimately provides a better framework – functionally, conceptually, and normatively – than that offered by global constitutionalism in any of its varied forms.

There are good reasons to compare – and contrast – global constitutionalism and global administrative law. Both approaches have developed against the background of increasing globalized interdependence, and the subsequent shift of previously

governmental functions to the global level.¹ They share the concern over the resulting erosion in the effectiveness of domestic public law control mechanisms, and aspire to subject public power exercised outwith the state to public control.² The goal of correcting the legitimacy deficit that global regulatory governance suffers from is a recurring theme in both approaches;³ and both rely upon discourses and institutions of public law developed at the national level and seek to translate them into the global setting. It is therefore perhaps no wonder that these approaches have been regarded as interrelated, even as engaged in the same basic enterprise, which has led many to assume that they will progress by the same means to the same ultimate ends.⁴ Moreover, it has been assumed by some that global administrative law will ultimately develop towards a unified and coherent system, as part of the more general project of global constitutionalism in which administrative law elements are a necessary complement.⁵ Indeed, it is often asserted – if less often argued – that administrative law cannot exist in the absence of a constitutional framework.⁶ As we will seek to show in what follows, however, the relations between the two approaches are decidedly more complex than such accounts seem to suggest.

¹ With respect to global constitutionalism, *see, e.g.*, Anne Peters, *Global Constitutionalism Revisited*, 11 INT'L LEGAL THEORY 39, 40-41 (2005) (“[A] constitutionalist reconstruction is a desirable reaction to the visible de-constitutionalization on the domestic level. ... Previously typical governmental functions ... are in part transferred to ‘higher’ level [of international organizations and bilateral and multilateral treaties.]”); Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006) [hereinafter de Wet, *International Constitutional Order*], at 53 (“This vision of an international constitutional model is inspired by the intensification in the shift of public decision-making away from the national State towards international actors of a regional and functional (sectoral) nature ...”).

² With respect to global constitutionalism, *see, e.g.*, De Wet, *id.* at 52 (“The debate pertaining to European constitutionalization has illustrated the utility of the transposition to the post-national level of abstract notions of constitutionalism, in order to acquire control over decision-making taking place outside national borders”); Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations*, 10 LEIDEN J. INT'L L. 421 (1997) [hereinafter Petersmann, *How to Reform the UN*], at 425 (“[C]onstitutionalism emphasizes the need for long-term rules and institutions limiting abuses of government powers and protecting the general interests of citizens.”).

³ With respect to global constitutionalism, *see, e.g.*, De Wet, *id.* at 53 (“European constitutionalists have illustrated the significance of constitutionalism as a frame of reference for a viable and legitimate regulatory framework for any political community, including those in a post-national setting.”).

⁴ This seems to be the view taken in, for example, David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 L. & CONTEMP. PROBS. 127, 139 (2005).

⁵ *See, e.g.*, Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579 (2006).

⁶ Cassese notes, but rejects this challenge. *See* Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 671 (2005).

These similarities aside, there are also a number of important structural, conceptual and rhetorical differences between global administrative law and global constitutionalism that require us to distinguish between the two, and, as we argue in this paper, render the former better suited, both conceptually and normatively, to meeting the challenges of contemporary global regulatory governance. We discuss these differences in the following sections. Section II makes the claim that global administrative law enjoys functional superiority over what might be termed “extra-national” constitutionalism, as it takes better account of the entire range of forms, actors and practices that together constitute global regulatory governance. While states and intergovernmental entities remain the primary – indeed, in the majority of cases the exclusive – subjects of extra-national constitutionalism (regardless of the particular strand of global constitutionalist thinking in question), global administrative law acknowledges that much extra-state governance is comprised of actors of various kinds, engaged in practices that can and do exert a normative pull despite often lacking formal legal status. (An important caveat should, however, be inserted here: that in those versions of extra-state constitutionalism, often referred to as “transnational”, which focus upon specific regimes or organizations, we see genuine and contemporary potential for complementarity between constitutional and administrative approaches).

The rest of the paper shifts the focus from extra-national constitutionalism in general to the genuinely global strand of that approach – that is, to those scholars who either identify or advocate the emergence of a global constituted polity. We argue that, when conceived of in this way, the constitutional and administrative approaches radically depart, both conceptually (Section III) and normatively (Section IV), in their perception of – and vision for – global governance. While global constitutionalists espouse the ideals of unity, hierarchy and coherence, the framework of global administrative law acknowledges the structural and normative pluralism of global governance. Rather than the single international community recognized (or envisioned) by global constitutionalism, a global administrative legal framework acknowledges – and accommodates – the multiplicity of heterarchical sites in which public power is exercised, and provides tools for enabling the relatively stable interaction between them and with

national and regional administrative bodies, without seeking to synthesize them within an overarching constitutional framework. In this sense, together with its emphasis on formal and procedural rather than substantial norms, global administrative law pays greater respect to the legitimate – and radical – value diversity that currently characterizes the global realm.

Section V concludes by drawing together the analyses of the preceding sections, concluding that – under the conditions prevailing now and for the foreseeable future – global governance is best conceived of as a space in which different sites of public power and significance interact, compete, conflict with and complement each other; and that global administrative law provides the most plausible and attractive general framework for both grasping and managing these complex sets of relationships.

II. INSTITUTIONAL DIVERSITY IN GLOBAL GOVERNANCE

Driving both the global administrative law and global constitutionalist approaches to the challenge(s) of global governance is the demise of the sovereign state, and the corresponding rise in the exercise of public functions at the international and transnational levels. The two approaches diverge, however, in the extent to which they take account of the full range of structural forms and actors through which such public functions are exercised, as well as of the mechanisms that have developed to control them. We argue that, because the concept of global administrative law better acknowledges the variegated nature of the institutional forms of global governance, it provides a general framework that is functionally superior in achieving the goal of subjecting public power exercised outside the state to public control.

i) The institutional topology of contemporary global governance

It can hardly be contested that the dramatic shift in the locus of public power from the state to the extra-state setting characteristic of the last few decades has led to the creation of a wide range of new regulatory actors and agencies at the global level. It is not – or not only – that traditional international (inter-state) organizations, such as the UN and its various agencies, have seen a considerable increase in both the scope and the impact of

their activities; just as importantly, public power is now exercised at and through a vast range of different institutions and networks, as varied in composition and activity as they are diverse in form. It seems plausible to suggest that any attempt to regulate the activity of these actors – to, as it were, govern governance at the global level – must be able to account for all of these.

There are, broadly speaking, three main elements that must be taken into consideration in this regard. The first of these is the institutional diversity evident amongst global regulatory bodies themselves. In general terms, and drawing on the typology outlined by Kingsbury, Krisch and Stewart in their article that framed and launched the global administrative law project,⁷ we can identify four main types of global regulatory body – four different institutional forms – through which public power is exercised at the global level. Firstly, there is administration by formal intergovernmental organizations. Examples include the UN High Commissioner for Refugees (UNHCR) and its work in carrying out refugee status determinations;⁸ the World Bank setting “good governance” standards for specific developing countries as a condition for financial aid; and the role played by bodies such as the International Organization for Migration (IOM) in the administration of aid and camps for internally displaced persons. Secondly, we can identify administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials. The Basel Committee on Banking Supervision, which operates as a vehicle for policy coordination and standard-setting outwith any formal treaty structure, provides an example in point,⁹ as do the networks of regulators brought together under the auspices of the OECD.¹⁰ Thirdly, a number of important administrative functions are today carried out by hybrid inter-governmental-private arrangements, such as the Internet Corporation for Assigned Names

⁷ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 20-23 (2005).

⁸ On this, see e.g. Mark Pallis, *The Operation of the UNHCR’s Accountability Mechanisms*, 37 N.Y.U. J. INT’L L. & POL. 869 (2005).

⁹ See, e.g., Michael Barr and Geoffrey Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT’L L. 15, 25 (2006).

¹⁰ See e.g. James Salzmänn, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189 (2005).

and Numbers (ICANN)¹¹, the International Organization for Standardization (ISO)¹² and the World Anti-Doping Agency (WADA);¹³ and lastly, there are also a wide range of formally private bodies that perform public governance functions, such as the International Olympic Committee (IOC),¹⁴ and the Forest Stewardship Council (FSC).¹⁵

The second, related, element of the institutional topology of contemporary global governance that must be taken into consideration is the use of traditional bodies for novel purposes. Certainly, this is in evidence in the extended scope offered to intergovernmental organizations – one striking example, to which we shall return in a little more detail below, is the use of the UN Security Council to impose sanctions upon specific individuals, rather than entire states.¹⁶ It is at its clearest, however, when we consider the new role that domestic state agencies play in administering global regimes.¹⁷ The best example of this is given by the international trade regime, which is overseen by the WTO but which requires – as many global regimes do – the use of state administrative actors as intermediaries for its effective implementation. It is worth stressing here that there exist almost no developed global governance regimes that do not implicate – at some stage at least – the traditional administrative agencies of nation-states. The novel role(s) of these actors in the global setting, then, is another key feature of the institutional topology that we are sketching here.

¹¹ For an overview, see Bruno Carotti and Lorenzo Casini, *A Hybrid Public-Private Regime: The Internet Corporation for Assigned Names and Numbers (ICANN) and the Governance of the Internet*, in GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES 29 (Sabino Cassese et al. eds., 2008), available at <http://www.iilj.org/GAL/documents/GALCasebook2008.pdf>.

¹² For more detail on the structure and functioning of ISO, see Eran Shamir-Borer, *The Evolution of Administrative Law-Type Principles, Mechanisms and Practices in the International Organization for Standardization (ISO)*, paper presented at the Viterbo II Global Administrative Law Conference (June 2006), available at <http://www.iilj.org/GAL/ViterboII.asp>.

¹³ See Lorenzo Casini, *Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA)*, in Cassese et al., loc. cit. n. 11, 37.

¹⁴ For an overview of the activities of a wide range of different bodies of this sort from a global administrative law perspective, see Cassese et al., loc. cit. n. 11.

¹⁵ See Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry* 17 EUR. J. INT'L L. 47 (2006).

¹⁶ See *infra*, section II.IV.

¹⁷ This is, in essence, the category referred to by Kinsbury, Krisch and Stewart as “distributed administration”: see *The Emergence of Global Administrative Law*, loc. cit. n. 7, at 21-22.

Lastly (and inevitably, given the previous two considerations), any attempt to furnish a general framework for comprehending and regulating global governance must also be able to account for the complex and myriad interactions between the diverse forms and novel activities outlined above. On occasion, and notwithstanding the novelty of the activity and/or sources of obligation, these appear to be fairly straightforwardly hierarchical: there are by now innumerable examples of national administrative actors that are bound to follow rules established by global regulatory regimes, and whose activity is then reviewed for compliance by the oversight bodies of those regimes (a central example here is, of course, the WTO with its developed legal system that reviews the compatibility of national administrative actions with international trade law; others can be found, for instance, in areas as diverse as the UNESCO World Heritage Convention¹⁸ and the Aarhus Convention on environmental decision making, and their respective compliance committees). However, instances of less clearly vertical interactions than this abound: take, for example, the reference in the SPS agreement within the WTO to the standards generated by external bodies such as the Codex Alimentarius Commission or the International Office of Epizootics, and their role in establishing a presumption of WTO-compatibility in the adoption of trade-restrictive measures;¹⁹ not to mention the myriad other cases in which the norms of one institution or regime have an impact or influence that is not formally constituted upon the activities of another.

This, then, in broad outline at least, is the institutional topology that is presented by the currently prevailing conditions of global governance. Any attempt to formulate a general framework capable of accounting for and regulating this vast sphere of regulatory activity must thus confront the three elements outlined above – the diversity and novelty of, and interactions between, institutional forms and activities.

¹⁸ For detailed case studies of the WTO controversy surrounding genetically modified organisms involving the EU and the US, and of the *Baikal* and *Cologne Cathedral* affairs before the World Heritage Committee, see generally STEFANO BATTINI, AMMINISTRAZIONI NAZIONALI E CONTROVERSIE GLOBALI (Milano: Giuffrè, 2007).

¹⁹ XX

ii) *Global governance as administration*

A central insight of the global administrative law approach – indeed, the argumentative platform for the entire project – is that much of global governance can be understood and analyzed as administrative action: rule-making that is not strictly legislative in nature, administrative adjudication that is not strictly judicial, and other forms of regulatory and administrative decision and management.²⁰ It is suggested that these regulatory and adjudicative processes are now both widespread and dense enough to conclude that the basic object of a global administrative law – global administration, however fragmented and variegated – is already largely in existence:

Trade, finance, the environment, fishing, exploitation of marine resources, air and maritime navigation, agriculture, food, postal services, telecommunications, intellectual property, the use of space, nuclear energy, and energy sources are all subject to global regulation. But global regulation involves many other sectors as well, such as the production of sugar, pepper, tea, and olive oil. It can be said that there is no realm of human activity wholly untouched by ultra-state or global rules.²¹

Admittedly, the task of identifying administrative action at the global level is not without its conceptual difficulties. In the domestic setting, administrative action is often defined by the organizational identity of the actor (an administrative agency or another arm of the executive branch), or in the negative, as public acts that are neither legislative nor judicial in character. The idea of separation of powers at the global level is, however, at best only loosely applicable. Traditionally, the international sphere has been conceived as the realm of states, functioning, if a domestic analogy is required, as “world legislators”; whose will is then interpreted and applied by an increasing number of judges whose independence, doctrines of precedent, expertise and professional ethics in general mirror those of developed national legal systems (even if compulsory jurisdiction remains the exception rather than the rule). We might suggest, then, that – as in the domestic sphere – “administrative” action is the residual category for those sites of public power (that by now are in the majority, both nationally and in particular globally) that cannot draw on the bases of legitimacy peculiar to properly legislative and judicial action. In the global

²⁰ Kingsbury, Krisch & Stewart, *supra* n. 7, at 17.

²¹ See Cassese, *loc. cit.* n. 6, 671.

setting, this would mean, for example, rule-making that is made by means other than direct state consent; or dispute settlement by those other than fully independent and qualified judges. For instance, the determination of individuals' refugee status or the development of applicable standards for such proceedings by the UN High Commissioner for Refugees can be distinguished from functions of legislative nature in the form of inter-state negotiations over amendments to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol; and the work of the Inspection Panel established by the World Bank to ensure that it complies with its own internal policies can be distinguished from those adjudicative functions carried out, for example, by the International Court of Justice.

However, even if accepted, this negative definition – public, but not legislative or judicial – only carries out half of the task; particularly for a framework that seeks to encompass certain private actors, a robust definition of “administrative” would require also drawing a line between what is properly viewed as public action, even when carried out by private actors, and what remains within the private sphere. (To give but one among many possible examples, how should the generation of private standards for eco-labeling, which have no government endorsement but still generate important trade-distorting effects, be conceptualized?).²² These definitional problems are important, and will have to be confronted sooner rather than later; however, they are beyond the scope of the present paper, and the existence of these “hard cases” should not blind us to the fact that very much of global governance would be entirely uncontroversially regarded as administrative in nature were it to appear within a purely national context. The existence of hard cases at the periphery need not distract us here from the existence of a relatively unproblematic core. In this regard, the use of the term “administration” as employed within the global administrative law project appears at least plausible, definitional issues at the margins notwithstanding.

²² See, e.g., Samir R. Gandhi, *Voluntary Environmental Standards: The Interplay Between Private Initiatives, Trade Rules And The Global Decision-Making Processes*, paper presented at the Viterbo III Global Administrative Law Conference, 15-16 June 2007, available at <http://www.iilj.org/GAL/documents/Ghandienvironment.pdf>.

iii) *The institutional inclusiveness of global administrative law*

Having acknowledged that significant portions of global governance can be accurately understood as administration, it can be further observed that such global administration is often organized and shaped by principles of an administrative law character. The shift of public power to the various global administrative bodies just described has given rise to concerns as to their legitimacy, accountability, and responsiveness to different societal and private interests. These concerns are often framed in administrative law terms, and are thus often countered through the application of administrative law-type mechanisms, such as increased requirements of transparency, consultation, and participation; a requirement to furnish reasoned decisions; and the establishment of review mechanisms, either administrative or judicial in nature.²³ To adopt a global administrative law perspective is to affirm that the pattern that is emerging, although still embryonic and largely incoherent, should be understood as part of a common, growing trend towards the use of administrative law-type mechanisms for ensuring that global regulatory governance is responsive to the interests upon which it impacts, and holding it to account in that regard.²⁴

The capacity of global administrative law to apply to such a broad range of regulatory forms and actors – whether public or private, formal or informal, rooted at the domestic, international, or transnational levels – is exactly where its functional virtue lies. The key point to be made in this regard is that, just as the insight that much global governance can be recast as public administration appears empirically plausible, so the emergence and increasing importance of administrative law mechanisms and procedures can be empirically verified – to varying degrees in different contexts, admittedly – in relation to all four types of global administrative bodies outlined above. It is neither surprising nor particularly controversial to affirm that such is the case within traditional intergovernmental organizations: a large number of these have, for example, reasonably

²³ Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan B. Wiener, *Forward: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1, 2 (2005).

²⁴ Benedict Kingsbury & Nico Krisch, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 1-2 (2006).

long traditions of administrative tribunals ensuring review of internal staff disputes;²⁵ and more recent innovations, such as the World Bank Inspection Panel take this a stage further. Even within the informal setting of transnational networks, however, such mechanisms are beginning to emerge: the Basel Committee, for example, instituted a rudimentary “notice and comment” procedure in the process of formulating its recent Basel II Accord;²⁶ and even within the OECD networks, a range of different administrative law models have been employed.²⁷ Lastly, some hybrid and private bodies already display highly developed use of administrative law principles and procedures: the WADA Anti-Doping Code, for example, contains detailed provisions ensuring that athletes suspected of drug use have the opportunity to be heard and to contest any decision taken against them, and to have such decisions reviewed by an independent body; whilst the ISO’s own Code of Ethics proclaims explicitly that that ISO Members are committed to “ensuring fair and responsive application of the principles of due process, transparency, openness, impartiality and voluntary nature of standardization”.²⁸ While important questions can undoubtedly be raised as to the specifically *legal* nature of particularly the last of these examples, what it does serve to demonstrate well is the in-principle applicability of this type of framework to that type of institution.

Moreover, it is worth noting that a global administrative law framework provides us with the necessary conceptual tools to grasp the novelty of many of the activities in which traditional administrative actors are now implicated, and – perhaps – to guide their interactions. This latter point will be considered in more detail in subsequent sections below. In terms of the former, conceiving global governance as a novel form of public administration enables us to account, at least descriptively, for the new role accorded to state agencies in administering global regimes and to global bodies in taking decisions that directly affect individuals, in ways that the traditional conceptual categories of

²⁵ August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, IILJ Working Paper 2007/11 (Global Administrative Law Series) 11-19, available at <http://www.iilj.org/publications/2007-11Reinisch.asp>.

²⁶ See Barr and Miller, loc. cit. n. 9.

²⁷ See Salzmänn, loc. cit. n. 10.

²⁸ ISO Code of Ethics (2004), available at http://www.iso.org/iso/codeethics_2004.pdf.

international law seem ill-equipped to emulate. Moreover, from within this perspective, the processes of mutual review between the two levels – as occurs, for example, when a national administrator is called to account before a global compliance committee, or when a national court reviews a decision taken by a global administrative body for its compliance with certain procedural human rights standards – appears not as a jurisprudential problem (as it can do under international law) but rather as the healthy functioning of a rudimentary “order”.

In this regard at least, then, global administrative law is first and foremost pragmatic, acknowledging and confronting the realities of globalization. It recognizes the structural nature of global governance “as is”, and works from within. In doing so, however, it also accommodates the flexibility necessary in global governance if we are to capture the regulatory gains that have accompanied the rise of new institutional forms and techniques. The use of informal means of regulatory coordination (such as the Basel Committee) or formal but non-legally binding institutions (such as the Financial Action Task Force, which sanctions violations by specific countries of its anti money-laundering policies) is often precisely the source of the success of these forms of global administration in terms of efficiency and effectiveness. The same is true for global administration through hybrid public-private or purely private bodies (such as the Forest Stewardship Council (FSC), a private body that relies on the market for the effectiveness of its standards for sustainable forest use). The framework provided by global administrative law is relatively well calibrated to respect this structural diversity without significantly compromising its effectiveness. Global administrative law thus has a modular quality: it provides a toolkit that allows us to pick and choose the mechanisms that best suit the particular regulatory structure in question.

This assertion regarding the structural flexibility of global administrative law should, however, be qualified in at least two respects. Firstly, it may be that its effectiveness in subjecting public power to public control will vary between different types of global administrative practices. Administrative law as we know it from the domestic context seems to function more effectively in formal institutional environments; and the adoption

of a global administrative law framework does carry some risks of exerting pressures on, or creating incentives within, the institutions of global governance towards greater formalization. Secondly, we do not ignore the fact that, on occasion, the move to non-traditional forms of regulation is motivated precisely by the desire of the participants involved to evade public control, to “pass below the radar screens of international [and domestic] law.”²⁹ Informality and “soft” mechanisms should not always be celebrated; and the application of elements of global administrative law can, in principle at least, also assist in countering this phenomenon when appropriate.

In addition to its pragmatism and flexibility, the capacity of global administrative law to encompass those sites of administrative action that are largely beyond the reach of national administrative law should also be highlighted. The advisory warnings issued by the World Health Organization (WHO), which might have grave economic consequences, are a case in point. Domestic administrative law is simply incapable of guaranteeing that all those potentially affected by such warnings are provided a fair opportunity to be heard, and national courts have no jurisdiction in terms of which they could find the WHO negligent and order compensation.³⁰ Global administrative law can also be important in cases in which domestic administrative law is insufficient or could have distorting effects because it addresses only segmented parts of the administrative process.³¹ The litigation in domestic courts and before the European Court of Justice of decisions of the UN Security Council to freeze assets of individual suspects illustrates this point.³²

iv) *The institutional bias of “extra-national” constitutionalism*

²⁹ Eyal Benvenisti, *Coalitions of the Willing and the Evolution of Informal International Law*, in *Coalitions of the Willing – Advantage or Threat?* XX (C. Calliess, C. Nolte & G. Stoll eds., forthcoming 2008). For the motivations of states to operate through coalitions of like-minded states that seek to avoid international law, see *id.* at XX. See also Eyal Benvenisti & George Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, IILJ Working Paper 2007/06 (Global Administrative Law Series) (2007), at http://www.iilj.org/working%20papers/documents/2007-6.Benvenisti-Downs.web_000.pdf.

³⁰ Benedict Kingsbury, *Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law*, 104 J. INT’L L. & DIPL. 98, 105 (2005).

³¹ *Id.* at 106.

³² *Id.* at 106-107.

Far more challenging, indeed scarcely possible, is to define clearly the contours of a “global constitutionalist project”, given the diversity of global constitutionalist literature and the terminological ambiguity that more often than not characterize it.³³ The terms “constitutionalism” and “constitutionalisation” are often used both descriptively, for instance to analyze the structural changes in inter-governmental organizations,³⁴ and normatively, as a strategy to enhance the legitimacy of international law and inter-governmental organizations;³⁵ and their scope of application has ranged from the entire global domain³⁶ to specific types of international institutions, primarily intergovernmental organizations,³⁷ or transnational regimes.³⁸

This undeniable diversity within the constitutionalist project exists, however, within the confines of some fairly narrow limits. In contrast to the elements of global administrative law outlined above, constitutionalist discourse – even when explicitly decoupled from its traditional association with the nation-state and applied to the field of global governance, tends to focus on a relatively limited range of public actors (largely, if not exclusively,³⁹

³³ On the diverse use and ambiguity of the terms “constitutionalisation” and “constitution” in the international context, see, e.g., Deborah Z. Cass, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the engine of constitutional Development in International Trade*, 12 EUR. J. INT’L L. 39, 40-41, 47-49 (2001); Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK U.N.Y.B. 261, 271-282 (2003). Fassbender, of the leading figures of contemporary global constitutionalism, recently observed that “[t]oday many writers use [the constitutional idea] as a sort of *leitmotif* to capture, name, and also promote the fundamental changes in the international legal order which we all are sensing but cannot easily express in the language of (international) law that we learned. ... However, the growing popularity of the use of the constitutional language in international law had rather increased the terminological confusion.” Bardo Fassbender, *The meaning of international constitutional law*, in TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS 307, 309, 311 (Nicholas Tsagourias ed., 2007) [hereinafter Fassbender, *Meaning of international constitutional law*].

³⁴ See, e.g., JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998).

³⁵ See, e.g., Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations*, 10 LEIDEN J. INT’L L. 421 (1997) [hereinafter Petersmann, *How to Reform the UN*].

³⁶ See, e.g., Bardo Fassbender, *The United Nations Charter As Constitution of The International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998) [hereinafter Fassbender, *U.N. Charter as Constitution*]; Erika de Wet, *The International Constitutional Order*, 55 INT’L & COMP. L.Q. 51 (2006) [hereinafter de Wet, *International Constitutional Order*].

³⁷ See, e.g., Jan Klabbers, *Constitutionalism Lite*, 1 INT’L ORG. L. REV. 31, 32 (2004).

³⁸ See, e.g., Petersmann, *How to Reform the UN*, *supra* note 35; Cass, *supra* note 33; JACKSON, *supra* note 34; XX.

³⁹ Perhaps the most prominent attempt to avoid the statal implications of constitutionalist rhetoric is to be found in the works of Teubner. See, e.g., Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3

those structured around basic statal forms) and overlooks, or at least downplays, the reality that significant portions of global regulatory governance are carried out through non-traditional institutional forms (e.g., non-state actors or state actors acting beyond their traditional domestic functions). What represents only one form of relevant administration from a global administrative law perspective – that carried out by intergovernmental organizations – seems to largely exhaust the landscape of global governance for global constitutionalists. Bearing in mind that both global constitutionalism and global administrative law share the basic goal of subjecting public power to public control, the former appears to neglect many of the important sites in which public power is exercised that form a central focus of the latter. The sites offered as putatively “constitutionalisation” are almost exclusively intergovernmental organizations (primarily the UN, the EU and the WTO).⁴⁰ To the extent that the notion of international or global community – a central idea in one particular strand of global constitutionalism – has been developed, its membership seems to remain statist in nature, including states, international and regional organizations, and to some degree also individuals (to the extent that states have agreed to accord them human rights).⁴¹ The common emphasis on the UN and its Charter as the cornerstones of the international constitutional order,⁴² or at least as the main connecting factor of the international community,⁴³ also illustrates the central place that state and inter-governmental structures occupy within this particular strand of global constitutionalism, at least.

(Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004). An analysis of Teubner’s constitutionalism is beyond the scope of the present paper; it is worth noting, however, that he remains very much an outlier in this regard. Fassbender, for example, has referred to Teubner’s use of constitutionalist rhetoric as “inflationary”, arguing that “[n]ot every increase in legal regulation or control, and not even every evolution of a hierarchical system of rules, equates to a ‘constitutionalisation’”. Fassbender, *Meaning of international constitutional law*, *supra* note 33, at 311-312.

⁴⁰ See *supra* note 38.

⁴¹ See, e.g., de Wet, *International Constitutional Order*, *supra* note 36, at 55. De Wet regards individuals as members of the international community, “to the extent that they possess international legal personality, for example in the context of global or regional systems for the protection of human rights.” *Id.* Fassbender seems to espouse a broader membership of the international community, as encompassing “all subjects of international law”, but admits that the U.N. Charter, which he holds as the constitution of that community, appears incomplete, as no community members but sovereign states are considered. Fassbender, *U.N. Charter as Constitution*, *supra* note 36, at 532, 562-564, 577.

⁴² See Fassbender, *U.N. Charter as Constitution*, *supra* note 36; Petersmann, *How to Reform the UN*, *supra* note 35; Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK U.N.Y.B. (1997).

⁴³ De Wet, *International Constitutional Order*, *supra* note 36, at 54, 56.

Moreover, it is not only that current global constitutionalist discourse does not take account of the entire range of global administration, but also that what global constitutionalists most often conceptualize as evidence for or elements of constitutionalisation simply could not be found in many important sites of global governance as currently instituted. Only if such sites were to re-organize around specific institutional characteristics (at the potential expense of losing their idiosyncratic form and associated virtues) may they manifest signs of emerging constitutionalisation.

There is no single list of indicators of constitutionalism or constitutionalisation. The number of such lists found in the literature is at least equal to the number of authors writing in the field. The indicators used by those global constitutionalists who conceive of a political unity at the global level are largely irrelevant to many if not most global administrative bodies, as they deal with the international sphere as a whole (rather than certain portions of it). De Wet, for instance, conceives of the global constitutional order as standing on the three pillars of an international community, an international value system, and structures for its enforcement (referring primarily to structures that fulfill and protect the “international value system”, such as the UN organs, international tribunals, states, and national and regional tribunals).⁴⁴ Fassbender identifies the UN Charter as “the constitution of the international community”, based on a set of features of an “ideal constitution” that appear to have been selected on the basis their conformity to Charter characteristics, rather than the other way around (which include such criteria as a “constitutional moment”; an “aspiration to eternity”; the drafting of a Charter and the existence of a “constitutional history”; and the establishment of a hierarchy of norms).⁴⁵ For Petersmann, on the other hand, basic constitutional principles include such principles as the rule of law and primacy of constitutional rules, separation of powers and “checks and balances”, human rights and market freedoms, necessity and proportionality of governmental restrains, democratic participation in the exercise of public power , and

⁴⁴ *Id.* at 64-71.

⁴⁵ Fassbender, *U.N. Charter as Constitution*, *supra* note 36, at 573 et seq.

social or redistributive justice.⁴⁶ Whether or not approaches such as these are either adequate or appropriate at the global level at which they are aimed will be considered in the next two sections of this paper; for the moment, it is sufficient to note that none of these diverse indicators take account of the vast majority of forms of global administration, and nor are they, by and large, applicable to them.

More pertinent, at first glance at least, are those indicators developed by “transnational” constitutionalists, who concentrate on instances of constitutionalism or constitutionalisation within specific institutional contexts. Klabbers, for instance, conceptualizes constitutionalism along similar lines as global administrative law, as including due process and participation on the basis of equality, transparency, and judicial review (but also democracy, free expression, the rule of law).⁴⁷ He limits his analysis, however, to international organizations.⁴⁸ Cass, focusing on the context of international trade law, interprets constitutionalisation as judicial norm-generation through interpretation by the WTO Appellate Body (“judicial constitutionalisation”).⁴⁹ Circumscribed as this notion of constitutionalisation may be, however, it is irrelevant to administrative bodies that lack a sophisticated adjudication system. Walker, one of the most nuanced proponents of extra-national constitutionalism currently writing in the field, discusses various different “frames” of constitutionalism, the presence of one or more of which justifies the label *to some degree*. Even here, however, the need for a “mature, rule-based order” (the “juridical frame”) and “a set of organs of government that provide an effective instrument of rule across a broad jurisdictional scope for a distinctive polity” (the “political-institutional frame”) are paramount.⁵⁰ Elsewhere, Walker is keen to stress that any usage of the term “constitution” must fulfil a requirement of “historical continuity”, inasmuch as “[h]owever radically the concept of constitutionalism has been transformed, there must remain a plausible and recoverable causal connection with its

⁴⁶ Petersmann, *How to Reform the UN*, *supra* note 35, at 425-437.

⁴⁷ Jan Klabbbers, *Constitutionalism Lite*, 1 INT’L ORG. L. REV. 31, 33 (2004).

⁴⁸ *Id.* at 32 (“[A]t its core [constitutionalism] has to do with placing limits on the activities of international organizations, subjecting those organizations to standards of proper behaviour.”).

⁴⁹ See generally Deborah Cass, *The ‘constitutionalization’ of international trade law: judicial norm-generation as the engine of constitutional development in international trade*, 12 EUR. J. INT’L L. 39 (2001).

⁵⁰ See generally Neil Walker, *Taking Constitutionalism Beyond the State* (unpublished paper, on file with the authors).

historical origins” – i.e. the nation-state;⁵¹ and, perhaps most tellingly, that “[n]ot everything which meets the test of legal or other qualifying normative order... also qualifies as a constitutional discourse”.⁵²

It becomes apparent, then, that even the more subtle approaches to constitutionalism, which focus on specific institutions rather than on the entire international sphere, still bear the deep scars of their statal origins; and, as a result, fall short of the capacity – even at an abstract level – to subject many of the forms of global administration to public control. Teubner, who criticizes Fassbender and others who conceive of a global constitution as “uncritically transferring nation-state circumstances to world society”,⁵³ employs almost equally harsh words against other more nuanced constitutionalist approaches, pointing to their shortcomings in generalizing and re-specifying the traditional concept of the constitution sufficiently in order to capture the decentralization of world society and the reality of non-state actors and regimes:

These... concepts of a global constitution constitute quite dramatic extensions from the constitutional tradition, yet ultimately they cannot free themselves of the fascination of the nation-state architecture, but merely seek to compensate for its obvious inadequacies with all sorts of patches, add-ons, re-buildings, excavations and decorative façades – altogether merely complexifying the construction instead of building ex novo... For all the courage to rethink the constitution in a direction of political globality, in the light of an intergovernmental process, through the inclusion of actors in society, and in terms of horizontal effects of fundamental rights, they nonetheless remain stuck at seeing the constitution as tied to state-political action.⁵⁴

v) *The necessary complementarity of global administrative law*

Therefore, almost regardless of what version of extra-national constitutionalism is adopted, the institutional bias of the discourse – cast by the shadow of the state – means

⁵¹ Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 334 (2002).

⁵² *Id.*, 335.

⁵³ Gunther Teubner, *Civil Constitutions in Global Society: Alternatives to State-Centered Constitutionalism*, in CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE 3, XX (Christian Joerges, Inge-Johanne Sand & Gunther Teubner eds., 2004). See also *supra* note 39.

⁵⁴ *Id.* at XX. Walker (who is among those criticized by Teubner) refers to the “public institutional prejudice” of the state-centered constitutionalist legacy, which makes the institutional form of constitutional thinking inadequate to capture new forms of power and social organization. Walker, loc. cit. n. 33, 323-324.

that something more, something at the very least complementary, is required if any form of constitutionalism is to confront the general task of subjecting public power to public control in the currently prevailing conditions of contemporary global governance. Those deployments of constitutional discourse that seem most plausible at present – for example, those that focus on areas with developed legal systems and compulsory adjudication – are almost without exception limited to institutions and regimes such as the UN, the EU and the WTO (with occasional voices suggesting a similar analysis for the law of the sea regime under the UNCLOS). The only exception to this general rule might be found in the international sports law regime – which, as noted above, is largely governed by private or hybrid institutions. Again, however, the main reason for such a conclusion – if accepted – is the compulsory jurisdiction of the Court of Arbitration for Sport which, despite its official title, has effectively developed into a genuinely judicial institution.

It is important to stress here what we are not seeking to argue. In particular, we make no claim as to the appropriateness of the deployment of the discourse of constitutionalism to these organizations and regimes: as Cass insists, this is largely a function of how that concept is defined in the work of each individual author. Rather, we want to draw attention to those governance organizations and regimes – and it is the vast majority of them – that simply *do not figure* in extra-national constitutional discourse of this sort. The silence here speaks volumes – for every institution for which a suitably circumscribed version of constitutionalism is proposed as plausible, there are tens, perhaps hundreds of others that are never seriously entertained as potential candidates for this type of reconceptualization and analysis. The majority of sites at which public power is exercised in contemporary global governance are simply not well calibrated, in institutional terms, to the deep structural bias implied in the very conceptual grammar of constitutionalism. What this means, of course, is that, regardless of the progress made by constitutional approaches to the challenges of global governance in the years and decades to come – and barring a radical rewrite of the concept itself – something like a global administrative law, capable of encompassing the institutional forms to which constitutional discourse is effectively blind, must figure as a *necessary complement* to the

constitutionalist project. The key question remains, however: is the inverse equally necessarily the case?

III. FRAGMENTATION, UNITY AND PLURALISM IN GLOBAL GOVERNANCE

While the previous section was concerned with the institutional limitations of all constitutionalist discourse – or at least those uses of which that, in Walker’s terms, display sensitivity to the “historical and discursive continuity” of the term⁵⁵ – when freed from its statist roots and transposed to (some of) the institutions of global governance, the purpose of this and the next sections is instead to evaluate global administrative law with reference to a particular strand of constitutional thinking: namely, that which is putatively “global” in scope, envisaging (identifying, encouraging) the existence of a single constitutional framework for the exercise of public power within the entire global community. From this point onwards, then, we focus primarily on that strand of global constitutionalism that advocates a single constitutional framework for the exercise of public power within the entire global community. This community, whose membership varies according to different scholars but includes primarily states, inter-governmental organizations and to certain extent private individuals, is characterized by a relatively high level of consensus on basic normative, political and economic issues. Effective mechanisms to enforce these shared values are critical. Broadly speaking, among the prominent scholars who understand global constitutionalism in this way we can include Bardo Fassbender,⁵⁶ Erika de Wet,⁵⁷ and Ernst-Ulrich Petersmann.⁵⁸ It is important to stress that not all of those deploying the rhetoric of constitutionalism beyond the nation-state are making this type of claim; indeed, a number take pains to state quite explicitly the contrary.⁵⁹ However, “global” constitutionalism is of central importance to us here,

⁵⁵ Walker, *id.* at 334. See, however, Krisch’s critique of Walker’s “Postnational Constitutionalism” (suggesting that he himself fails to do this). Nico Krisch, *Europe’s Constitutional Monstrosity*, 25(2) OXFORD J. LEGAL STUD. 321, 325-327 (2005).

⁵⁶ Fassbender, *U.N. Charter as Constitution*, *supra* note 36; Fassbender, *Meaning of international constitutional law*, *supra* note 33.

⁵⁷ De Wet, *International Constitutional Order*, *supra* note 36; Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT’L L. 611 (2006) [hereinafter de Wet, *The Emergence of Value System*].

⁵⁸ See, e.g., Petersmann, *How to Reform the UN*, *supra* note 35; XX.

⁵⁹ See, e.g., Walker, *id.* at 357 (dismissing the “prospect of a monolithic ‘regional’ or ‘global’ constitutional order” as being “as undesirable as it is unlikely”); Cass, *supra* note 33, at 43 (who insists that

precisely because, like global administrative law, it purports to offer both a general framework of analysis for responding to the challenges posed by the increasing exercise of public power in the global setting, and a set of conceptual and practical tools for doing so.

i) Fragmentation and unity in global constitutionalist discourse

It is not, by now, disputed that global governance – or what we are contending here is best viewed as global administration – is currently characterized by conditions of profound fragmentation.⁶⁰ This fragmentation is manifest in a number of different, and equally important, manners. Firstly, it can be understood in *functional* terms, creating a plethora of different sectoral regimes (relating, for example, to international trade, investments, the environment, banking, sports, aviation, security – the list is endless),⁶¹ in which more often than not more than one body plays a significant regulatory role. Secondly, as suggested in the previous section, there has also been a profound *institutional* fragmentation, with a wide range of different bodies (traditional international organizations, networks, and a variety of different hybrid and private actors) now exercising recognizably public governance functions in the global sphere. Lastly, it is also important to note the existence of fragmentation across different *levels* of governance, from genuinely global, through inter-, trans- and supra-national, regional and finally domestic spheres.⁶²

A central element of the notion of “constitution” appears to be its need for unity, with “constitutionalization” almost always representing a tendency, or a drive, towards such unity. As Fassbender openly affirms, “[t]hose who oppose the relevance of constitutionalism to international law correctly note that the concept is meant to describe

the type of constitutionalization that she identifies within international trade law cannot be extended to international law more generally, as the relevant developments in each field are “qualitatively and quantitatively different”).

⁶⁰ XX. See also Benvenisti & Downs, *supra* note 29.

⁶¹ On these, generally see, e.g., GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES, *supra* note 14.

⁶² XX. See also Martti Koskenniemi & Päivi Leino, *The Fragmentation of International Law: Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553 (2002); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT’L L. 247 (2006).

or promote a legal integration of states which is more intense than the traditional one... The idea of a constitution is summoned as a symbol of (political) unity which eventually will be realized on a global scale”.⁶³ When this discourse remains limited to particular regional or sectoral settings (such as the EU or the WTO), it speaks only to the establishment of unity within that setting;⁶⁴ when extended to the global level, however, it is most often proffered as the best – indeed, perhaps the only – response to the conditions of radical fragmentation outlined immediately above:

Constitutionalism, then, is in large part a knee-jerk response to come to terms with the existential anxiety of fragmentation. In a world where specialist action, on the basis of specialist knowledge, carries the day, constitutionalism carries the promise that there is some system in all the madness, some way in which the whole system hangs together... a matrix [of constitutionalism] would suggest that there are some values which simply cannot be affected: there is a bottom line, somewhere, somehow, an apparent unity underlying all apparent disunity.⁶⁵

What is striking about this passage is the dichotomy that it postulates between fragmentation, on one hand, and (constitutional) unity on the other. This putative dichotomy plays a key role in much global constitutionalist discourse, in which it is presented as essentially exhausting the possibilities of debate, and then used to inscribe the audience within a particular progress narrative, in terms of which any evidence of a move away from fragmentation is *ipso facto* a move towards constitutionalism. Within such a framework, when the abandonment of fragmented modes of governance can be presented as a part of a general trend, then the suggestion that a constitutional unity is emerging can begin to appear both plausible and, indeed, almost inevitable (not to mention desirable – an issue that will be dealt with in the next section).

This style of argumentation is bolstered by one of what might be termed the “constitutive ambiguities” of the term “constitution” itself: the fact that it can be – indeed, often is –

⁶³ Fassbender, *U.N. Charter as Constitution*, supra .n ???

⁶⁴ There are, as always, exceptions to this rule: see, e.g., Walker, *supra* note 54.

⁶⁵ Klabbers, *supra* note 37, at 49.

used to refer to both a *thing* (existing in space) and a *process* (developing over time).⁶⁶ Indeed, common to all global constitutionalists seems to be the view that it is in an important sense *both*; a position encapsulated most eloquently in Allott's claim that "[a] society forms its constitution to bear its identity. But it also forms its constitution to shape its identity".⁶⁷ This idea, of something that already exists, but that should also be understood as interacting in a progressive, dialectic process of mutual reinforcement with the global community, is strongly present in the approaches of all of those engaged in this particular strand of the global constitutionalist project;⁶⁸ and it has the key benefit, when combined with a rhetoric of "emergence", of allowing the idea of a "global constitution" to function, as it does, as at once premise and *telos* in the work of each.

This, in turn, has three main consequences. Firstly, the claim that a global constitution is at once a process and a thing – and often an "emerging" thing at that⁶⁹ – enables those writing in the field to set a relatively low standard of proof in identifying whether or not it already exists. In this regard, those many aspects of current global governance that do not support their thesis, where they are addressed at all, can be dismissed as merely evidence of the "rudimentary" or "embryonic" nature of the global constitution; they are usually not confronted as possible proof that such, be it thing or process, does not exist.⁷⁰ Once this threshold – preliminary evidence of a basic move away from a radically fragmented state – has been met, a second possibility opens up: not only can the potential counter-elements be ignored, they can actually be criticized in the light of their non-conformity with the idea of the global constitution *qua telos*; as obstacles that must be overcome if we are to move away from the (clearly undesirable) conditions of radical fragmentation. The argument proceeds something like this: *having established* that there

⁶⁶ For an account of this ambiguity as common to (almost) all words that end with "-tion", see (in the particular context of "construction") IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* (1999). Of course, it is also true that the same observation holds for "administration", as the Italian administrative law scholar Massimo Severo Giannini had observed as early as the 1950s (REFERENCE). However, the process-based element of the term "administration" – unlike that of both "constitution" and "construction" – does not imply the creation of something that was previously absent. In this sense, "administration" cannot perform the same rhetorical function we suggest that "constitution" does here.

⁶⁷ PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 116 (2nd ed. 2000).

⁶⁸ See, e.g., *id.* See also Nicholas Onuf, *The Constitution of International Society*, 5 EUR. J. INT'L L. 1 (1994); de Wet, *International Constitutional Order*, *supra* note 36.

⁶⁹ De Wet, *The Emergence of Value System*, *supra* note 57.

⁷⁰ See *id.* for perhaps the most pronounced example of this technique at work.

are grounds to assert that a global constitution is emerging, we can then evaluate global governance from a constitutionalist perspective. While, therefore, the analysis remains selectively empirical in the first stage of the argument, it becomes (equally selectively) normative in the second stage. In this way, aspects of global governance that could easily have been considered as empirical evidence *against* global constitutionalism are presented as normatively or logically flawed *because* of it.⁷¹

The third, and perhaps the most striking, manner in which the progressive narrative of constitutionalism is exploited actually results in potential counter-examples being presented as support for the global constitutionalist thesis. This proceeds through reliance upon sets of analogies, occasionally with national contexts⁷² but more frequently with those of the WTO and the EU, in order to provide evidence for the existence or emergence of an international constitution. Intuitively, however, we may feel that, far from supporting such a claim, the existence of regional polities or sectoral bodies in terms of which the use of constitutionalist rhetoric is un-(or certainly less-)controversial are indicative rather of the *absence* of any general, constituted global political community. It is only once we have been inscribed into the progress narrative of global constitutionalism, the idea that the embryo already present will inevitably, if not thwarted by reactionary forces, develop into a constituted international polity, that we can be asked to acquiesce in the claim that particular (regional or sectoral) “constitutional” bodies should be viewed “as a manifestation”⁷³ of (or, indeed, as a model for) a broader global whole.

ii) *The image of “unity” in global administrative law*

⁷¹ This technique is undoubtedly most clear in Fassbender’s work. For example, he considers the judgment of the ICJ in the *Nicaragua* case to be simply wrong, *on the basis that*, if the UN Charter is properly viewed as the constitution of the international community, there cannot be a body of law (“customary constitutional international law”) that runs parallel to the Charter, deals with the same issues, but is not exhausted by it. Fassbender goes so far as to simply assert that “there is no parallel existence of customary constitutional rules and Charter rules”, and that the ICJ was only able to decide to the contrary because it “[overlooked] the special case of constitutional rules expressly or implicitly codified in the Charter”. Fassbender, *U.N. Charter as Constitution*, *supra* n. 36, at 586-588.

⁷² *See, e.g., id.* at 557.

⁷³ *See generally* de Wet, *The Emergence of Value System*, *supra* note 57.

How, then, does this problem of unity impact upon the global administrative law project? Certainly, this issue speaks directly to a major tension that has been present in the GAL project since its inception: that it has arisen out of – indeed largely in response to – the conditions of radical plurality and fragmentation that currently characterize the field of global regulatory governance, while simultaneously envisaging the new field in fundamentally unitary terms (as is illustrated by the singular rhetoric not simply of one “Law”, but also of a unitary “global administrative space” within which it is to be applicable). Moreover, this fundamental unity is at once affirmed and deferred in the basic, ubiquitous claim that global administrative law is as yet only “emerging”. Does this approach too, then, of necessity fall into the trap of merely discursively creating unity where precious little – if any – actually exists?

Our view is that it does not, for the following reason. We noted at the outset that the insight that much global governance can be viewed as public administration represented, in effect, the basic argumentative platform upon which the entire global administrative law project rests. This claim can now be refined a little: that something that can accurately be termed “global administration” exists is a *sine qua non*, and the sole conceptual necessity, for the emergence of global administrative law. (It is worth recalling at this point that, as noted above, this presents one of the major differences between the administrative and constitutional approaches to the challenges of global governance: while the object of the former already exists, and it is merely the law regulating it that is emerging, it is the very object itself of the latter that is not – at least yet – in existence. It is also for this reason that, throughout this paper, we have juxtaposed global administrative law not to global constitutional law, but rather to global constitutionalism). If one of the basic premises of this paper – that both administrative law and constitutionalism should be divorced from their historical attachment to each other when transposed to the extra-state setting – then there appears to be no *prima facie* reason, conceptually at least, why it should not overall be as fragmented and heterarchical as the object – global administration – that it seeks to regulate.

Conceptually, perhaps. However, rhetorically, the decision to “name”⁷⁴ the project, and the empirical developments it identifies within global governance, as indicative of a “global administrative law” in the singular does, as noted above, create a legitimate expectation of some form of unity. What the decoupling of administrative law from constitutionalism in this context allows, however, as we will argue in more detail below, is for us to rethink what is meant by that unity outwith the confines imposed by the rigid systemic, exclusionary and hierarchical implications of the latter approach. A global administrative law does not, as yet, exist (a fact already acknowledged in the decision to characterize it as “emerging”); and precisely what form it might take when it has fully “emerged” remains up for grabs.

Very tentatively, we here propose three different elements of the “unity” of a fully emerged global administrative law, that justify the singular rhetoric used whilst safeguarding the “comparative advantage” of the administrative approach that it has been the purpose of this paper to illustrate. The justification for these will, we hope, become evident in the remaining sections of the paper. We suggest that we might expect to see this eventual unity manifest itself in three main ways: in a relative homogeneity of general, abstract principles that are then applied differently in different sectors; in a relative homogeneity in the more concrete rules and mechanisms applied within sectors both domestically and extranationally; and in the creation of a generalised “culture” of administrative law, in which it can be generally expected that some type of administrative law rules, some form of concretisation of the general principles, will attach to all exercises of public power in global governance.⁷⁵

iii) Challenging the fragmentation/unity dichotomy

In this section, then, and on the basis of the foregoing one, we will seek to show that the original framing dichotomy (postulating radical fragmentation on one hand, and constitutional unity on the other, as exhausting the possibilities for debate) is false, and

⁷⁴ Marks...

⁷⁵ One of the present authors has sought to advance and defend these ideas in a little more detail: see Euan MacDonald, *The “Emergence” of Global Administrative Law?*, paper presented at the Viterbo IV Global Administrative Law Seminar, June 13-14 2008 (on file with the authors).

the progress narrative that it encourages – and which plays such a crucial role in global constitutionalist discourse – misleading. Instead, adopting a global administrative law perspective opens up new possibilities for conceiving of the whole of global governance in a manner that escapes the poles of fragmentation and unity, and allows us to conceive of a relatively stable set of interactions between different sites of public power outwith any overarching constitutional framework. In order to draw this out, it may be useful to take one particular example from the field of global regulatory governance, which displays all of the argumentative features outlined above; and which can, in our view, function very much as a microcosm for the fragmentation/unity issue (and thus the global administrative law/global constitutionalism debate) as a whole: the global regulation of international investments.

The regulation of the field of international investment law has been constructed almost exclusively through the conclusion of bilateral investment treaties between states (usually, but not exclusively, between developed and developing countries). Three different aspects render this field of interest from a global administrative law perspective: firstly, these treaties always contain administrative law rules, placing obligations of transparency, notification, and above all “fair and equitable treatment” upon national administrative agencies *vis-à-vis* private investors.⁷⁶ Secondly, they all provide for compulsory international arbitration for the settlement of disputes; and allow, moreover, that claims can be brought by aggrieved private parties themselves, and not only by the states of which they are nationals. This in effect provides a global means of administrative review of the actions of domestic authorities. Thirdly, and perhaps most controversially, it has also been argued that, even although the arbitral tribunals are a private dispute settlement mechanism, made up of different people chosen by the parties, and bound by no formal doctrine of precedent with regard to the decisions of earlier tribunals, they have begun to develop a consistent jurisprudence in fleshing out the content of the administrative law provisions contained in BITs, meaning that they themselves have taken on a broader,

⁷⁶ See, e.g., Stephan W. Schill, *Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law*, IILJ Working Paper 2006/6 (Global Administrative Law Series), available at <http://www.iilj.org/publications/2006-6Schill.asp>.

norm-generating function and can thus themselves be viewed as a loose form of networked regulatory administration.⁷⁷

Despite the formal bilateralism around which it has been constructed, however, which – under normal circumstances at least – we would expect to lead to a profoundly fragmented regulatory framework, a relatively stable and homogenous set of international investment law rules has emerged, which in many ways successfully emulates multilateralism even as attempts to draft a formal multilateral framework on the issue have failed.⁷⁸ There are three main reasons for this: firstly, the widespread use of essentially similar model treaties by major developed countries has meant that, although there are currently around 2,500 BITs in force, these are all characterized by a very significant degree of homogeneity in terms of their concrete provisions. Secondly, one of the ever-present provisions in these treaties is a “Most Favoured Nation” clause, meaning that, even where differences in treaties do exist, all international investors are effectively guaranteed treatment equal to that afforded to the best treated among them. Lastly, as noted above, the emergence of a relatively homogenous jurisprudence in interpreting the common provisions of BITs – with some arbitral tribunals even citing the findings of previous tribunals ruling on similar issues – has contributed to the steady trend away from the fragmentation of international investment law that we would *prima facie* have expected from its bilateral beginnings.

At least one commentator has concluded on this basis that international investment law is in the process of being “constitutionalized”, moving from an initial state of fragmented obligation to a “uniform and universal” legal regime.⁷⁹ Certainly, there is ample evidence that “fragmentation” is not an appropriate term to describe the current realities of international investment law; and yet much of this evidence can also itself be enlisted against the suggestion that the regime is necessarily tending towards unity. For example, the fact that arbitral tribunals will, in most cases, follow the decisions of previous

⁷⁷ XX.

⁷⁸ On the failure of attempts within the OECD to draft a Multilateral Agreement on Investments, *see* Salzmänn, *loc. cit.* n. 10, at 196-200.

⁷⁹ *See* STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (forthcoming, Cambridge University Press).

tribunals on similar issues cannot disguise the fact that they need not – and, on occasions do not – do so.⁸⁰ Indeed, it would seem plausible to suggest that the system itself has in-built protections *against* the development of a general constitutional unity of the type suggested, given that, the more stable and predictable outcomes become, the greater incentives one party to a dispute will have to appoint an arbitrator that is known not to place great importance on the force of “precedent” in making findings in each case.⁸¹ Moreover, it is noteworthy in this regard that proposals for the establishment of a standing appeals tribunal have not met with much enthusiasm to date.⁸²

One of the key benefits of adopting the framework of global administrative law in this context is that, unlike constitutionalist perspectives, it provides us with the conceptual space to conceive of the current state of international investment law as neither essentially fragmented nor fundamentally unified, nor necessarily progressing (or regressing) from one state to the other. Rather, it can be simply accepted for what it is: a regime characterized by high degree of relative homogeneity, but in which the different “public” actors (in this case, the arbitral tribunals) exist in a relation not of hierarchy, but of heterarchy; with the overall configuration not one of unity, but rather of pluralism, in which the tribunals themselves are both aware of their unfettered jurisdiction to decide the case in hand, and conscious of the broader regulatory context in which their decision is inevitably embedded. In doing so, for many at least, the international investment regime can draw on the advantages of a public system (its stability and predictability) and those of private dispute resolution mechanisms (arbitration) without ever fully committing itself to either.

We suggest that the insights drawn from the capacity of a global administrative law framework to free analysis from the reductive possibilities of both fragmentation and unity can be generalized, allowing us to imagine, and indeed bring about, a genuine and sustainable pluralism at the level of global regulatory governance, characterized by

⁸⁰ XX.

⁸¹ Although it is common that both arbitrators find for the party that appointed them, and most decisions are made by the chair, appointed by both. Even given this, however, the ability to choose arbitrators would seem to provide an inherent structural element of destabilization.

⁸² XX.

relative stability of legal norms and relations, founded both on a willingness to pursue pragmatic accommodation between overlapping sites of public power and on the general application of certain formal legal principles.⁸³

iv) Towards a genuinely pluralist approach to global governance?

If the pluralism of global administration is to be distinguished from fragmentation on the basis of its capacity to maintain relatively stable relations between competing sites of public power, then global administrative law can play a key, indeed crucial, role in fostering the conditions under which this is likely to occur. It is in this sense, indeed, that – referring back to the tripartite institutional topology outlined at the outset⁸⁴ – global administrative law demonstrates most clearly its capacity to account not merely for the diverse institutional forms and novel administrative activities in contemporary global governance, but also for the manner in which these interact with each other. In particular, if there can be established a relative homogeneity of administrative law principles in each of these sites, ensuring in each that the exercise of public power has to meet certain criteria of “publicness”,⁸⁵ then the processes of inter-site co-operation and accommodation will be facilitated and thus progressively stabilized. Neil Walker has proposed an approach that is, in many ways, similar to that which we are advancing here, under the rubric of “constitutional pluralism” (understood, it should be stressed, as a plurality of constitutions coexisting, not a pluralism that is itself somehow “constituted”);⁸⁶ as should be clear from the previous section, however (and as Walker himself admits),⁸⁷ the institutional bias inherent in even more subtle deployments of constitutional rhetoric means that many very significant global regulatory bodies and

⁸³ For a reading of the European human rights regime in precisely these terms, see Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183 (2008); see also Krisch, *supra* note 62.

⁸⁴ See *supra*, section II.I

⁸⁵ XX.

⁸⁶ Walker, *supra* note 54, at XX (noting that “[m]eta-constitutionalism, then, palpably does not imply a fixed and overarching *meta-constitution*”). Walker’s analysis comes close to what we are suggesting here in terms of its basic pluralism, with the important difference that he is principally concerned with a pluralism of different *constitutional* sites (with a heavy focus on the European Union); as noted in the previous section, however, global administrative law provides a necessary complement to such approaches insofar as it encompasses all sites at which public power is exercised, not simply those that can be sensibly referred to as “constitutional”.

⁸⁷ *Id.* at 335 (“Not everything which meets the test of legal or other qualifying normative order... also qualifies as a constitutional discourse”).

regimes would simply fall outwith its scope (those, for example, that do not display an explicit “constitutional discourse”, or make claims to ultimate authority within their sphere of regulation).⁸⁸

If we are to present a general – if never perfect – framework for responding to the challenge of subjecting public power to public control in global governance, then we must extend the conceptual framework beyond the confines of constitutional discourse, and conceive of global administration rather as simply an *inter-public space*.⁸⁹ The relative stability of the pluralism that this entails, of the relations between different, heterachically arranged sites for the exercise of public power, can be both developed and sustained by the progressive application of the principles and rules of the emerging global administrative law, complemented – where appropriate – by constitutionalist frameworks for analysis, either in the “thick” sense of political community (such as states, and perhaps the EU), and in the “thinner” sense justifiable in relation to certain “partial” communities that display the key indices of “postnational constitutionalism”.⁹⁰

The most striking illustration of the ways in which global administrative law can foster and sustain relative stability in this inter-public space is, we think, to be found in what Stewart has defined as “bottom-up” approaches to global administrative law;⁹¹ particularly as expressed in the increasingly prevalent adoption by national and regional courts of variations of what might be termed the “*Solange* stance”.⁹² In essence, this stance is adopted wherever a court is prepared to either accept the decisions or apply the

⁸⁸ *Id.* at 341 (“There could be no polity without a constitutional discourse, just as there could be no constitutional discourse without a polity as its object of analysis and representation”).

⁸⁹ This draws on ideas developed first by Benedict Kingsbury. See, for example, Kingsbury, *A New Jus Gentium and International Law as Inter-Public Law*, both available at http://www1.law.nyu.edu/kingsburyb/fall06/globalization/papers/Kingsbury_NewJusGentiumandInter-Public11.pdf. See also *infra.*, section V.

⁹⁰ See Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27 (Joseph Weiler & Marlene Wind eds., 2003).

⁹¹ See generally Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63 (2005).

⁹² This is a reference, of course, to the famous *Solange* judgment of the German Constitutional Court (*Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (BVerfGE 37, 271; 1974 2 CMLR 540), decided on May 29, 1974), in which it held that the transfer of powers by Germany to the EC was constitutional “as long as” (“*solange*”) European institutions provided the same level of individual rights protection as did the German Basic Law.

rules of a global administrative body (or recognize as legitimate a domestic decision implementing these) only where and to the extent that the body in question provides certain administrative law protections (typically things like participation rights, reasoning and transparency obligations, and rights to impartial hearings and review) “equivalent to” those guaranteed by the legal system within which they operate.

There are a number of instances of this type of process already in operation. For example, domestic and regional courts are showing themselves ever more prepared to set aside both the immunities and the decisions of international organisations in internal staffing disputes where these organisations do not provide for effective alternative mechanisms for ensuring that the rights of private individuals are respected, such as international administrative tribunals.⁹³ Most significantly of all, however, the ECJ has recently handed down its judgment in the *Kadi* case,⁹⁴ which may well prove to be one of the most important to date in the short history of global administrative law.

The *Kadi* judgment involved a challenge to the legitimacy of an EU measure implementing a UN Security Council Resolution, itself passed on the basis of a decision of the Sanctions Committee to list Kadi as suspected of funding terrorist groups, and thus to freeze all of his assets. In his Opinion on the case, Advocate General Maduro made plain his view that the Court should adopt a *Solange* stance in the case:

Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists.⁹⁵

⁹³ See both the *Waite* judgment, and also the case of *Beer and Regan*, Application No. 28934/95, European Court of Human Rights, 18 February 1999, [1999] ECHR 6. For subsequent cases in which European national courts have followed this line of reasoning, see Reinisch, loc. cit. n. 25.

⁹⁴ *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case C-402/05 P. For the Court of First Instance judgment in this case (which found that laws implementing UN resolutions could not be challenged on human rights grounds before the Court, and which was overruled by the ECJ on appeal), see Case T-315/01 (2005). For some history and analysis of this and similar cases, see Chia Lenhardt, *European Court Rules on UN and EU Terrorist Suspect Blacklists*, 11 ASIL INSIGHT, Jan. 31, 2007, <http://www.asil.org/insights/2007/01/insights070131.html>.

⁹⁵ Opinion of the Advocate General in the *Kadi* case, C-402/05, delivered on the 16th of January, 2008, at paras. 51, 53. For a reading of this as analogous to the *Solange* position, see Global Administrative Law

In broad outline, the Court agreed, conducting a brief examination of the delisting procedure currently in place with regards to the Sanctions Committee, and finding them wanting in particular due to the fact that it “didn’t offer guarantees of judicial protection”; that the procedure was diplomatic, rather than a matter of individual right; that the Committee’s own guidelines make it clear that the suspect may not invoke any rights of defence during the procedure; and that there is no requirement to provide either reasons or evidence for the decision to list an individual, nor to give reasons as to any decision to refuse delisting.⁹⁶

This case is of real relevance here for a number of reasons. Firstly, and most obviously, in conducting the above evaluation of the UN procedure, the Court was clearly intimating that improved rights protection at that level could lead it to adopt a more deferential attitude towards Community implementing legislation – the very essence of the *Solange* stance. Perhaps even more importantly, however, this case demonstrates clearly the radical difference in interpretation that the adoption of an administrative or a constitutional approach to such judgments can lead to. A number of commentators have already likened the ECJ’s decision to that of the US Supreme Court in the *Medellin* case (in which it ruled that Texas could not be forced, by virtue of an ICJ decision, to stay the execution of a Mexican national on the grounds that he had not been made aware of his right to contact his consulate, as required by the Vienna Convention on Consular Relations);⁹⁷ and, from a constitutional law perspective, this seems a compelling analogy. Certainly, from such a perspective, the *Kadi* judgment cannot appear as anything but the clash of two constitutional orders, the fundamental rights provisions of the European legal order and the supremacy of Security Council-imposed obligations under Article 103 of the UN Charter; a zero sum game in which one and only one order could emerge victorious.

and the ECJ: The Advocate General and *Kadi*, Posting of Euan MacDonald to Global Administrative Law Blog, <http://globaladminlaw.blogspot.com/2008/02/global-administrative-law-and-ecj.html> (Feb. 8, 2008). The same reading has also been proposed in Aldo Sandulli, *Rapporti tra diritto europeo ed internazionale. Il caso Kadi: un nuovo caso Solange?*, 5 *GIORNALE DI DIRITTO AMMINISTRATIVO* 1 (2008).

⁹⁶ *Kadi* judgment, loc. cit. n. 81, paras. 322-326.

⁹⁷ *Medellin v. Texas*, 552 U.S. ____ (2008),

A global administrative law perspective, however, suggests an entirely different reading of the affair. Firstly, it would portray *Kadi* and *Medellin* as opposites rather than analogues: in each judgment, internationally established principles of “publicness”, of administrative law, were at stake: the ECJ chose to uphold these *vis-à-vis* the Security Council, while the Supreme Court instead upheld the right of Texas to ignore them. Secondly, the *Kadi* judgment itself contains a number of interesting passages that would seem to support the global administrative law interpretation: it does not simply assert the priority of European constitutional standards over obligations arising under the UN Charter, but instead engaged in an investigation of the relevant international law, concluding that the contested Community Regulation was not attributable under international law to the Security Council, and that

...it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.⁹⁸

The ECJ thus elected not to simply assert the supremacy of the regional legal order of which it is custodian, but instead, in a number of passages that acknowledged the important role of the Security Council in the maintenance of peace and security, and in the fight against international terrorism, it sought to situate its judgment within the wider juridical context in which it was embedded, creating a “third way” between the traditional poles of monism and dualism.⁹⁹ Lastly, and relatedly, the Court’s focus on the administrative law rights, combined with its open invitation to the Security Council to improve its procedures, can – and, we suggest, should – be read as an attempt to establish an inter-jurisdictional dialogue in the language of global administrative law, which, if reciprocated, would allow for a more accommodating, less conflictual result in any future controversy. This is a point to which we shall return, in more general terms, below.

⁹⁸ *Id.*, para. 299.

⁹⁹ We owe this insight to Professor Mattias Kumm.

In any event, the increasing use of this *Solange* stance by domestic and regional courts provides us with one powerful illustration of the way in which the application of global administrative law can help create the conditions in which different, overlapping sites of public power can begin to form relations based on cooperative dialogue rather than simple ignorance or intransigent belligerence, and thus help in the formation of an order that is pluralistic rather than fragmented. Through this and other mechanisms, then, global administrative law, detached from any putative global constitutionalism, can provide both the pragmatic architecture and the conceptual tools through which global governance can be properly understood as functioning as a pluralistic, rather than fragmented, inter-public space.

v) *Some normative considerations*

Even if the argument in this section until this point is accepted, however, it may well appear as deeply question-begging in one important sense: even if global administrative law is, as suggested, particularly well-calibrated to encapsulate the myriad different institutional forms, levels, and sectors at and through which public power is exercised within contemporary global governance, *is this necessarily a good thing?* Specifically, might not the unity promised by the constitutional framework, however transformative it would of necessity prove in terms of the *status quo*, be a more desirable alternative than simply seeking to contain fragmentation within a pluralist framework? At the most basic level, this objection is that the terms of the original framing dichotomy outlined at the outset of this section, between fragmentation and constitutional unity, are justified not in conceptual or analytic, but rather *normative* terms.

There are a number of different ways in which to respond to this type of objection. Perhaps the most obvious is also the most challenging: the argument that pluralism is, under current conditions, an ethically preferable alternative to the type of unity implied in global constitutionalist discourse. It is to this task that we turn in the next section of the paper. In concluding this one, however, we want to suggest three other responses to the normative objection to the pluralism of global administrative law.

Firstly, global administrative law provides us with a framework in which we can contemplate the subjection of public power to public control at the global level as a *realistic possibility*; indeed, in many cases, the rules and mechanisms are already in place, or at least are under serious discussion. Nowhere is this clearer than in relation to the *Kadi* judgment: given the ECJ's eventual decision on that matter, it now seems entirely likely that the Security Council will seek to institute "substantially equivalent" administrative procedures for its 1267 Listing Mechanism, for the simple reason that failure to secure EU compliance with anti-terrorism sanctions will significantly impair their effectiveness. In this regard, the application of administrative law controls in what is perhaps the least likely context imaginable – the Security Council's response to terrorism – appears to be an entirely plausible proposition in the very near future.

By comparison, global constitutionalism fares rather badly. Unlike global administrative law, which already has an object – global administration – to which it can attach, most accept that there is as yet no equivalent, fully-formed global constitution.¹⁰⁰ The object of the latter thus functions as at once premise and *telos* of the discourse, which alone is sufficient to make it a more speculative project. For some writing in the field, their work is explicitly utopian; others, such as Petersmann, openly declare their approach as "realistic" without confronting the apparent lack of any concerted political will to implement it.¹⁰¹ In any event, few would deny that currently, the possibility of implementing an overarching, unitary constitutional architecture for global governance is less realistic than efforts to constrain and direct it within a pluralistic framework.

The second response, related to the first, concerns the *facilitative* role of global administrative law in terms of legal and political relations in the inter-public space. In this regard, it is important to recall that global administrative law has the potential not simply to reflect fragmentation, but, through insisting upon certain basic requirements of

¹⁰⁰ Even Fassbender, who is perhaps the boldest of all global constitutionalists in proclaiming that such is already in existence, accepts at points that it is as yet only rudimentary. See Fassbender, *U.N. Charter as Constitution*, *supra* note. 36, at 576, 607.

¹⁰¹ See generally Petersmann, *How to Reform the UN*, *supra* note 35.

publicness, to stabilize it. In doing so, it creates the conditions in which inter-public cooperation and accommodation can supplant jurisdictional chauvinism – without ever, however, calling into question the integrity of each public site – and thus move from a state of radical fragmentation to one of effectively functioning pluralism.

The last point that should be made in response to the normative objection, before going on to confront the issue of ethics more directly, is that, as mentioned above,¹⁰² it should be recalled that many institutions and mechanisms of global governance have developed in the manner and form in which they have because it has brought some regulatory benefits; and that attempts to alter these institutional forms to bring them within the more limited conceptual space offered by the discourse of constitutionalism risks undermining, or losing altogether, these advantages. In this sense, it should be recalled that, in whichever field we care to speak about, regulatory efficacy is an important – normative – goal; particularly as very often global administration is born in response to the attempt to secure a genuinely global public good.¹⁰³ In providing us with both a framework and tools for apprehending these institutions largely as they are (or in any event, to change them in a less invasive manner than constitutionalist approaches of necessity must), global administrative law is better adapted to protect the regulatory gains that have come from institutional and functional specification; even as it provides, in theory at least, both a forum and a language in which political contestation over the correct balance of different normative ends (efficacy, rights protection, rule of law, etc.) in the specific regulatory context in question can be conducted.

IV. GLOBAL GOVERNANCE AND VALUE PLURALISM

That the concept of “constitution” and its relevant cognates are essentially contested is beyond doubt; yet this does not mean that they are purely empty signifiers that can be

¹⁰² See discussion *supra* Section II.

¹⁰³ XX.

applied or extended to fit any type of situation or polity.¹⁰⁴ Indeed, it is the symbolic force of the term itself – however indeterminate in detail – that alone can account for the widespread, and increasing, popularity of a concept that is used in so many different ways, and brings with it so much rhetorical baggage. Much of the argument of the previous two sections has focused on what might be termed the “relative determinacy” of the concept of constitutionalism, from which it draws its symbolic force, illustrating the manner in which this seems inextricably linked to certain institutional forms (even in its more nuanced iterations) and, above all, committed to an idea of unity (whether understood in external, inclusive terms, or in an internal manner, thus allowing for a pluralism of different constitutional sites). These elements of the rhetoric of constitutionalism, we suggest, are not (necessarily) present in that of global administrative law: and it is this, this capacity to encapsulate broad institutional diversity within a pluralistic rather than unitary framework, that makes the latter better suited – both functionally and conceptually – to confront the task of regulating contemporary global governance as a whole under the currently prevailing conditions.

There is, however, a third element that has not yet been considered: that of the relative *normative* desirability of global administrative law when compared to the framework suggested by global constitutionalist scholarship (again here understood in its variant that tends towards the universal). In many respects, however, it is to this issue that constitutionalist discourse appeals in drawing much of its authority: that, however fragmented and heterarchical the “system” of global governance might be at present, the move towards a unified, institutionalized and hierarchical structure represents a global public good towards which we should aspire. Indeed, this putatively desirable normative end plays a key role in inscribing audiences within the progress narratives, outlined in the previous section, that are crucial in justifying global constitutionalist discourse:

¹⁰⁴ See e.g. Walker, *supra* note 54, at 334 (“However radically the concept of constitutionalism has been transformed, there must remain a plausible and recoverable causal connection with its historical origins. Unless we can trace a lineage of historical use, adaptation and transmutation, we lack the contextual knowledge to make sociological sense of the different uses of constitutionalism in different times, places and circumstances, and for different purposes”). See also Fassbender’s criticism of Teubner’s “inflationary” use of constitutionalist rhetoric *supra* note 39.

[A] constitution of the international community stands a good chance of succeeding, especially as it does not even aim at imposing a specific form of government on nations. All it strives for is the establishment and preservation of an international order in which basic rights and interests of individuals and communities are acknowledged and conflicting claims peacefully settled. Given the diversity of our world, such order can only be based on a framework which we have come to label constitutional.¹⁰⁵

This claim – fairly typical of the type of global constitutionalism with which we have been centrally concerned here – provides a good example of this kind of normative justification in action: if the audience acquiesces in the claim that peace and the protection of basic individual rights requires a constitution, they are likely to be well-disposed to viewing certain developments – and in particular the advent of international human rights – as important steps on the path from a fragmented, Hobbesian *status quo* towards global constitutional cosmopolitanism.¹⁰⁶ The previous section sought to problematize, at a conceptual level, the idea that the dichotomy implied here, and the progress narrative leading from the former to the latter, exhausted the field of possibilities for responding to the challenges posed by global regulatory governance; here, we want to further cast doubt on the claim that – under current conditions at least – the type of unity presumed in much global constitutionalism is a normatively appropriate response to the fact of widespread and irreducible disagreement over ethical and moral norms. Global administrative law, even as it is better suited to a plurality of sites of public power (a functional and conceptual advantage), appears also better adapted to confront and respect value pluralism (a normative advantage).

i) *Constitutionalism's vanishing object*

We noted in the previous section that, unlike global administrative law, the object of a putative global constitutional law – a constituted polity – is not yet in existence; instead, it features as both premise and *telos* of such approaches, with “constitutionalism” offered

¹⁰⁵ Fassbender, *U.N. Charter as Constitution*, *supra* note 36, at 555.

¹⁰⁶ This dichotomy as it appears in the work of Fassbender and others was replaced by a similarly functioning trichotomy in the intervention in the global constitutionalist debate by Habermas, who portrays the alternatives as being a Hobbesian *status quo*, an American hegemony, and a global constitution. See generally JÜRGEN HABERMAS, *Does the Constitutionalisation of International Law Still Have a Chance?*, in *THE DIVIDED WEST* 115 (2006).

as the means for progressing from one to the other. In this section, we want to develop this idea a little further, for not only does this peculiarity of the discourse render “global constitutionalism a perpetually moving target, it also serves to highlight an important underlying issue: a general reluctance to define, in any clear way, precisely what the intended object of the “constitutional” process *is*.

As Walker notes, the term “constitution” when applied to the body politic, is a metaphorical use of a term that literally applies to the composition and health of the individual human body.¹⁰⁷ It is a metaphor, however, that seems long dead; its usage in that context is by now so common and familiar that we are no longer alive to the ways in which the non-literal application of the term can animate different possibilities for meaning. The situation in which metaphorical uses of words become so common as to be viewed as literal is one form of *catachresis*, commonly found, for example, in such figures of speech as the “mouth of the river”, the “foot of the hill” or the “hands of a clock”. In everyday expressions such as these, there is relatively little at stake, and so the literalisation of metaphor may be allowed to pass without comment. In works of social theory, on the other hand, such usage may have direct consequences for the development of the theory, and thus must be examined closely.¹⁰⁸

The death of the “constitution” *qua* metaphor has led, in our view, to the effective disappearance of the object of constitutionalism – the question of precisely *what* is being constituted – from the sphere of rigorous academic analysis, at the very least in its applications in the non-state setting. This, however, is profoundly problematic, as it goes directly to the heart of one of what might be termed the “constitutive ambiguities” of the term “constitution” the fact that it is frequently used to apply to a wide range of different

¹⁰⁷ See Walker, loc. cit. n. ??, at 13.

¹⁰⁸ Perelman makes this point in relation to the Cartesian method of philosophical enquiry: using the catachresis of a “chain of reasoning”, Descartes insisted that any argument was only as strong as its weakest link, and from there constructed his basic methodology of working back from any proposition, testing each stage in its argumentative construction, and invalidating any claim that was not compelled, directly and analytically, from indubitable premises. Perelman points out that, had Descartes conceived of the structure of argumentation rather like that of a piece of cloth, woven from many different individual strands but significantly stronger as a whole than any of them individually, his philosophy might have looked quite different. See CHAÏM PERELMAN, *THE REALM OF RHETORIC* (Notre Dame: University of Notre Dame, 1982) 122.

documents, norms and procedures instituting an equally wide range of societies, organizations or polities. Any society, indeed any more or less organized group of more than one individual, can be said to have a constitution if by that term we intend the basic rules, written or unwritten, which govern its makeup and its functioning.¹⁰⁹ This means that, depending on precisely what *type* of entity is putatively emerging at the international level, statements asserting that it has a “constitution” can fall anywhere on the scale from the utterly banal to the profoundly controversial.

Certainly, this is an ambiguity that is exploited – wittingly or otherwise – in a great deal of global constitutionalist literature. Consider, as an example, Fassbender’s work on this issue – who, it will be recalled, acknowledges that the “idea of a constitution is summoned as a symbol of (political) unity which eventually will be realized on a global scale”.¹¹⁰ In the same article, however, he makes the following statement:

“*Ubi societas, ibi jus*” goes a Roman maxim. Whether this is true or not will depend on how one defines “society” and “law”. Convinced that law requires the existence of a society as its substratum, generations of international lawyers have struggled to prove the existence of an international society in the face of war and hatred between nations... An inversion of the saying is at least as valid: *Ubi jus, ibi societas*. Where individuals or legal persons enter into legal relationships – whether bilateral, multilateral, or constitutional – legal communities come into being...¹¹¹

This suggestion, that the existence of law is a necessary and sufficient indicator of a legal community, appears more than once in Fassbender’s article. At another point, for example, he suggests that the “international legal community” is a “corollary of *any* international law”.¹¹² At this point, he goes on to pose the question of whether “the

¹⁰⁹ This is the broad meaning given to the term by, for example, Philip Allott. See generally Allott, *op. cit.* n. 4.

¹¹⁰ Fassbender, *U.N. Charter as Constitution*, *supra* .n ???

¹¹¹ *Ibid.*, at p. 562.

¹¹² *Ibid.*, at p. 564 (emphasis added). It is true that, at this point, Fassbender suggests that the introduction of the UN Charter meant that this community has taken on a new quality, expressing no longer a mere *volonté de tous* but now a *volonté generale*, and suggests that we may signify this difference by referring to the traditional order as international society and the new one as international community. The rhetoric of the piece, however, still serves to reinforce the impression that the existence of international law

present international community... can be referred to as a *constitutional* community”; at the beginning of the very next section, however, he opens with the observation that “[i]n principle, there cannot be a community, understood as a distinct legal entity, in the absence of a constitution providing for its own organs”.¹¹³ The image of constituted community that Fassbender’s rhetoric here implies is thus a decidedly weak one: where there is law, there is of necessity legal community; and where there is legal community, there is of necessity a constitution. The effect of this on persuading the reader of the existence of an international community should be obvious: whoever accepts the existence of international law is invited, by definitional fiat, to acquiesce in the contention that there is thus also an international constitution.

The same technique of the rhetorical elision of difference between different types of community is, if anything, at points less subtle in de Wet’s work. The author notes, for example, that she uses the term “constitution” to describe “an embryonic constitutional order in which the different national, regional and functional (sectoral) regimes form the building blocks of the international community (‘international polity’).”¹¹⁴ The crucial element here is, of course, the explicit equivalence that she asserts between the idea of “community” and that of “polity”: we can, of course, readily agree that all polities in some senses communities; is, however, the reverse equally clearly the case? We might, for example, think this question in terms of the European context, in that it is now common to refer to the European Union as a supranational polity; would, however, the same term have been as uncontroversially applicable to the European Coal and Steel Community?

At no point does de Wet do more than assert the identity of the two terms, using the curious technique of placing the term “international polity” in brackets and in inverted commas immediately after the term “international community”. In standard academic writing, this would normally suggest one of two things: either that the author is referring

necessarily implies the existence of an international legal community; in particular as Fassbender himself does not appear to use his own distinction in this regard in any systematic manner.

¹¹³ Ibid., at pp. 566-567.

¹¹⁴ EDW LJIL, at p. 612; an identical passage also appears in EDW ICLQ, at p. 53.

to the work of another in using the second term (but there is no reference here to suggest that this is the case); or that she will from this point on use the second term as a replacement, or shorthand, for the first. However, throughout the articles in question, it is to the vocabulary of “international community” that the author returns most often, with the term “polity” appearing only irregularly in this regard.¹¹⁵ The force of this elision seems clear: while references to the “international community” are by now entirely commonplace within international legal discourse, the rhetorical connection between the notion of “community” and that of “constitution” is less clear; the existence of an “international polity”, on the other hand, is deeply controversial – however, the idea of a necessary connection between such an entity and the existence of a correlative constitution of some kind is largely established. Through the construction of these essentially unargued equivalencies, then, de Wet can draw both on the familiarity of the term “international community” and the constitutional implications of the term “polity” without confronting the differences between the two.

Even if the object of global constitutionalism has largely vanished from an academic point of view, however, the rhetorical force of the term – and it remains considerable – surely retains much of its “thick” sense of constituting a shared moral and political community. The disappearance of the object of global constitutionalism has, in our view, some important ethical implications, which will be considered in more detail below. Before doing so, however, we want to pause briefly to reflect on what some of its strategic implications might be for the specific goal – shared by both administrative and constitutional approaches to global governance – might be.

ii) Strategic implications

The strategic implications of deploying a discourse as vague yet symbolically laden as that of constitutionalism – particularly where are more modest version than the constitution of a relatively thick political community at the global level is envisaged – should be readily evident. Nowhere are they brought out more clearly than in the failure

¹¹⁵ See for example EDW ICLQ, at p. 73, at which the author goes so far as to equate (in similar fashion, but this time without the quotation marks) the “international community”, the “international polity” and the “global demos”.

of the European Constitution – a document rejected by the French and Dutch electorates (which spared the UK Government the embarrassment of what would in all likelihood have been the same result there). The result of the choice to insert the institutional reforms necessary to ensure effective decision-making within an enlarged EU within a broader “constitutional settlement” was simply that no progress at all was made; indeed, even when the explicitly constitutional discourse was dropped in favour of a “mini-treaty” containing the institutional reforms (and which allowed many national leaders to sidestep the need for a referendum at all), the resulting text was rejected by the only state to hold a referendum on it. Incidentally, the European Union now presents us with the interesting question of whether, and to what extent, a supranational polity can “constitutionalize” even when a significant number of the putatively “constituent peoples” have openly declared their rejection of that idea in public referenda. At the very least, given the *Kadi* judgment outlined above, this episode illustrates the extent to which, even in democracies, the process of constitutionalization can be driven by political and judicial elites, the apparent reticence of democratic publics notwithstanding. The lesson to be drawn from this, however, is clear: even in a highly developed, and relatively homogenous, supranational polity such as the European Union, the deployment of constitutional discourse can turn the “perfect” into a genuine enemy of the good.

iii) Ethical implications

This brief consideration of the strategic implications of deploying constitutionalist discourse at the universal level points, however, to a more profound, and more serious, potential flaw in this strand of global constitutionalist thinking. If, as suggested above, the evasion of the issue of constitutionalism’s basic object – the question of *what* is being constituted – combined with the symbolic/rhetorical force of the term when used in a politico-legal context may well ultimately be more of a hindrance than a help in the endeavour to subject public power to public control in the global setting, the question remains of *why* this should be the case. Put simply, if even the relatively homogenous peoples of the European Union balk at the prospect of declaring themselves members of a single “constitutional” polity, before we even begin to ask the question of how we bring

about such a polity at the global level, we must confront the issue of whether it is an ethically defensible move.

The importance of a set of substantive values – and in particular *jus cogens* and human rights – that are shared universally to most current conceptions of global constitutionalism, and in particular to the (often implicit assumption) that their preferred *telos* is an ethically justifiable one under current conditions, cannot really be doubted.¹¹⁶ By way of analogy, we might consider that the existence of the European Convention of Human Rights and the “special status” accorded to the Convention within the EU legal order by the ECJ have been absolutely central components in the emergence of a constitutionalist discourse at the European level; and such rights-based considerations are also present to a large degree in many similar approaches to both the UN and the WTO. Erika de Wet goes so far as to define “constitutionalism” as entailing “a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community (“international polity”) that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement”.¹¹⁷ Of course, there have been a number of approaches using constitutionalist rhetoric that take pains not to make any strong claims in this regard; but there is an important sense in which this can only be done *against the force of the term itself*.¹¹⁸ Thus, we are told, constitutionalism can be “lite”¹¹⁹ or “compensatory”;¹²⁰ it can be present as a “mindset”¹²¹ or a “sensibility”;¹²² the use of these qualifying adjectives, however, is itself testament to the fact that such approaches

¹¹⁶ Fassbender, for example, argues that the “universal recognition of fundamental human rights, including the dignity of the individual human being”, is a “cornerstone of constitutionalism”. Fassbender, *U.N. Charter as Constitution*, *supra* note 36, at 554.

¹¹⁷ De Wet, *The Emergence of Value System*, *supra* note 57, at 612.

¹¹⁸ This argument is adapted from White’s criticism of the predominance of “conceptual talk” in contemporary academic thought and writing. See James Boyd White, *Thinking About Our Language*, 96 *YALE L.J.* 1960, 1969 (1986-1987).

¹¹⁹ Klabbers, *supra* note 37.

¹²⁰ Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *LEIDEN J. INT’L L.* 579 (2006).

¹²¹ Martti Koskeniemi, *Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 *THEORETICAL INQUIRIES IN LAW* 9 (2007).

¹²² Armin von Bogdandy, Philip Dann and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 *GERMAN L.J.* (forthcoming 2008).

are pulling against the symbolic or rhetorical force of the term, even as they seek to benefit from it.

The appeal to universal values is – when successful – one of the most powerful ways in which an author can seek to gain the adherence of his audience to his claims. The philosopher Chaïm Perelman defined such values as those that are the subject of agreement in the “universal audience”, normally because their abstract desirability is included in the definition of the word itself: terms such as, for example, “good”, “beautiful” and “just”.¹²³ In this manner, they act as powerful *topoi*, or commonplaces, in argumentation – points of abstract agreement upon which discussion of issues of common concern can be based. He insists, however, that our agreement here “lasts only so long as we remain on the level of generalities”;¹²⁴ the moment that we begin to concretize and apply these values, they become immediately controversial.

Certainly, it is one of the major achievements of the human rights movement that the norms it espouses can now plausibly be viewed as belonging to this category of universal values, of general *topoi* in terms of which argument on various (indeed, most) concrete problems can be structured in addressing the universal audience; and it is clear that this forms a crucial element of the project of global constitutionalism, at least in the form that has been the central focus here. Equally clear, however, is that these rights – often formulated in a very vague and abstract manner – cannot simply be unproblematically applied to any given concrete situation.¹²⁵ Rather, even where there is agreement at the general level (and even this should not be overstated: both the US and China, amongst others, have failed to even ratify one of the two 1966 Covenants that, together with the

¹²³ See, e.g., CHAÏM PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES* 102 (1979).

¹²⁴ CHAÏM PERELMAN, *JUSTICE, LAW AND ARGUMENT* 66 (1980).

¹²⁵ While human rights are indeed incapable of disposing of concrete controversies without interpretation (itself at least potentially controversial), an argument can be made that they have a greater degree of relative determinacy than do ideas such as “beautiful” and “just”; in some ways, then, they do perhaps limit the scope of issues in which controversy can legitimately take place. This limitation is, however, itself profoundly limited, not least due to the fact that the open-textured and abstract formulation of a number of potentially conflicting rights creates the possibility for framing most if not all positions in terms of one or another competing rights-claim (the starkest example of which can be found in the fact that, of the 1966 Covenants, while the US is a party only to the ICCPR, China has ratified only the ICESCR). This fact alone is sufficient to make the idea of “consensus” on human rights in the absence of legitimate and authoritative interpretative mechanisms extremely suspect.

Universal Declaration of Human Rights, form the so-called “international Bill of Rights”, even as much of the rest of the world is committed to the idea that the rights they contain are “interdependent and indivisible”), the application of the rights concerned in particular contexts very often remains profoundly controversial. Consider, for example, the following suggestion from Petersmann, which illustrates well the move from the accepted general to the contested particular:

The limitation of all government powers through inalienable fundamental rights has become the foundation stone of constitutional democracies... The limitation of government powers through legal guarantees of freedom and non-discrimination is also the major purpose of the international GATT/WTO and IMF guarantees of liberal trade in goods and services and of non-discriminatory conditions of competition.¹²⁶

If, as seems to be the case, agreement on a core set of substantive values is presented as central to the existence of a global constitution, then it seems plausible to suggest that some authoritative mechanism for interpreting and applying those values in concrete situations is required. It is useful, in this regard, to refer back to the European setting: it is difficult to imagine that the constitutionalist discourse would have emerged at all in that setting without the compulsory and binding jurisdiction of both the ECtHR and the ECJ in dealing with human rights controversies. Likewise, at no point was constitutionalism mentioned with reference to the GATT regime until after the Uruguay Round, and its creation of the WTO and its compulsory Dispute Settlement Mechanism. It is important to stress further that what we are dealing with at the global level is not simply the usual allegation of a lack of effective enforcement mechanisms within international law (although this is not an irrelevant factor): rather, the absence of an authoritative interpretative body or mechanism for concretizing the putatively “universal” values expressed in human rights norms (and the apparent absence of any political will to

¹²⁶ Petersmann, *How to Reform the UN*, *supra* note 35, at 428. Indeed, the very idea that the global trade regime is a simple instantiation of international human rights norms would be surprising to most; however, it is precisely this impression that Petersmann seeks to convey time and again, in particular through the frequent equation of human rights to trade norms: “[f]rom a citizens perspective, international guarantees of freedom, non-discrimination and rule-of-law (e.g. in human rights conventions, GATT/WTO law and IMF law) serve ‘constitutional functions’ for extending and protecting individual freedom and non-discrimination across frontiers.” *Id.* at 442-443.

create one) is itself evidence of the absence of a unitary “interpretative community” at the global level.¹²⁷ Put simply, the problem is not merely the standard international lawyer’s lament that human rights are not enforced, but rather that they do not – yet – *mean* the same thing for all constituent members of the putative “global polity”.

What is perhaps surprising, then, is that in none of these works is the stark absence of any general international tribunal for the interpretation and application of the shared, universal values (or, indeed, the equally stark absence of any real state support for the establishment of such a body) considered as possible evidence that constitutionalist rhetoric is as yet inappropriate on the international stage. Instead, the existence of widespread agreement at the most general level is accepted as sufficient:

...there is a significant overlap in content between the international and domestic value systems. This is particularly the case in the area of human rights norms where most modern constitutions in various parts of the world – and notably those drafted by democratically elected constitutional assemblies – contain human rights standards closely resembling those of the international and regional human rights instruments. The fact that this overlap exists despite the lack of democracy on the international level, would defy arguments that a representative value system can only be produced within a democratic process.¹²⁸

Here, the fact that the vast range of different possible interpretations of these norms and ways of balancing between them has not yet been entrusted by states to a single body with universal jurisdiction is treated as simply proof of the “embryonic” nature of the international or global constitution; and the existence of regional and sectoral tribunals are, of course, enlisted in support of, rather than considered as contrary to, this position – a view that, as argued above, can only really appear persuasive to one already inscribed within the relevant progress narrative.

It is in this sense that simple affirmations of widespread agreement on a set of basic rights seems inadequate to the task of confronting the very real, indeed apparently irreducible – value pluralism that characterizes the global sphere; and it is thus in this sense that the

¹²⁷ Fassbender, *U.N. Charter as Constitution*, *supra* note 36, at 597.

¹²⁸ De Wet, *International Constitutional Order*, *supra* note 36, at 74.

specters of cultural imperialism and of hegemonic domination continue loom large over the global constitutionalist project(s). Of course, were we to assume that the grand questions of moral, political and economic theory had already been largely settled – as, for example, Petersmann in particular seems to do – then this is concern is significantly lessened: it is not the question of *what* the relevant shared values are, but only of *how* to best implement them, that is of any real importance.¹²⁹ Most scholars, however, maintain some form of a constructivist stance towards these questions, avoiding crude normative relativism yet at the same time deeply suspicious of any proposed “objective” solutions to the problems to which they give rise. Even those who do not may still feel uneasy at Petersmann’s blunt proposal that the UN Charter should be renegotiated from scratch, following the example set by the development of the WTO, with all of those not prepared to sign up to the new obligations eventually barred from any Charter protections.¹³⁰ These are to become not global, but rather “club” benefits (after a transition period in which Petersmann suggests that the old and new Charters could coexist in tandem),¹³¹ with this itself functioning as one of the main “carrots” to encourage reluctant states to sign up to the new regime.¹³² Moreover, Petersmann insists, it is the wealthy Western states that must, as with the reform of the international trading system, take the lead in forcing through – and directing – the negotiations on a new Charter. Why we might trust these states to do so in a manner that reflected the interests of all, rather than merely entrenching their own already-dominant positions over others (a criticism that has, of course, been frequently leveled at Petersmann’s model, the WTO¹³³), is simply not addressed.

Within genuinely global constitutionalist discourse, then, the putative “consensus” on a set of shared substantive values appears to be discursively created rather than empirically verified at the level of practice; and the desirability of that discursive act is ultimately justified only by reference to the desirability of the outcome – a global constitution –

¹²⁹ Despite her apparently pluralistic approach, this ultimately presents itself as the central concern of de Wet’s work; see generally de Wet, *The Emergence of Value System*, *supra* note 57.

¹³⁰ Petersmann, *supra* note 35, at 451-452, 455-456.

¹³¹ *Id.* at 468.

¹³² *Id.* at 456.

¹³³ See, e.g., Benvenisti & Downs, *supra* note 29; see also Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT’L L. 815 (2002).

itself. It is extremely doubtful, however, whether this type of essentially circular argumentation is sufficient to the task of overcoming value pluralism in the name of unity, however central to the overall project that might be. The key point here is that, as things currently stand, global constitutionalist rhetoric of the type we are focusing on here ultimately enacts an image of community in which fundamental differences are elided and hidden rather than confronted and respected.

iv) Contrasting global administrative law

In strategic terms, the contrast between global administrative law and global constitutionalism appears readily evident. The former carries little if any of the rhetorical baggage that so encumbers the latter; indeed, far from inciting controversy, the familiarity of its goals and mechanisms from the national setting is more likely to both reassure actors and encourage them to utilize it. The difference between the idealism of global constitutionalism and the comparatively quotidian nature of administrative law mechanisms is brought out nicely by a recent article in the *New York Times*, which reported that, in the wake of criticisms over the way in which a Microsoft-backed standard had been “fast-tracked” to acceptance at the ISO, its major competitor IBM issued a press release threatening to withdraw from any standard-setting organizations that did not establish reliable and effective procedures to ensure transparency and guard against undue influence.¹³⁴ This suggests that an administrative law sensibility is already becoming part of public discourse in global governance (even if it may be deployed somewhat strategically).

Moreover, and at least as importantly, the potential offered by a global administrative law framework remains in our view preferable even in the normative (ethical) sense to that of a genuinely global constitutionalism. As we illustrated in the previous section, global administrative law contains no inherent tendency to unity (at least in the strong sense implied in constitutionalist rhetoric). Indeed, unlike global constitutionalism, the ends global administrative law are not contained within its own discourse; rather, it can be harnessed to a whole host of different – and not always compatible – projects. In this

¹³⁴ Jeremy Kirk, *IBM threatens to leave standards bodies*, *New York Times*, 23rd September 2008.

sense, global administrative law is best viewed as *essentially instrumental*; it can, for the most part, only be as “good” as the ends it is intended to serve, be they constitutional, democratic, rights-based or, indeed, efficiency-enhancing.¹³⁵ From this perspective, in ideal terms at least, global administrative law provides both a site and a toolbox for active and ongoing political contestation in each and every site of global governance over which interests should be represented to what extent, and to the degree of responsiveness thereto required of the regulatory body in question.

Three further points must be made in relation to this last claim. Firstly, as should be clear from the foregoing, a central focus of global administrative law is to provide for mechanisms of public control within the various, specific sites in which public power is exercised in the contemporary global sphere, in particular through the diffusion of rules and mechanisms that concretize the principles of accountability, participation and transparency, broadly understood. It also, however, can play a key role in addressing some of the dangers of conceiving of global governance, as outlined in the last section, as an inter-public space: by providing sets of procedural rules for constraining and directing not only the actions of global administrative bodies, but also their *interactions* with each other, and with national and regional administrative agencies, global administrative law can contribute to the creation of a regulated – if not “constituted” – pluralism of public sites, in which the dangers of fragmentation, such as the potential for individual bodies to “overreach” or to “underachieve” in the fulfillment of their respective mandates,¹³⁶ can be confronted through the use of different mechanisms that encourage cooperation and coordination between the relevant sites. Examples of this would include, for example, the WTO’s insistence that any trade restrictions that a Member seeks to implement must be based upon reasoned justification, with particular and explicit deference being given to standards developed in other (often private) regulatory bodies, such as the Codex

¹³⁵ This is not to suggest, of course, that the establishment and application of global administrative law principles, rules and mechanisms is in itself entirely devoid of normative content; or that it can’t have unforeseen effects that either enhance, or detract from, some other goals.

¹³⁶ See Kingsbury, *supra* note 30, at 98.

Alimentarius Commission¹³⁷ or the International Organization for Standardization.¹³⁸ Indeed, global administrative law can, in this regard, be properly viewed as central in justifying the unitary rhetoric of one “space” in this characterization, rather than simply a fragmented mass of public spaces.

Secondly, it would be naïve and misleading to suggest that global administrative law does not presuppose some values of its own: the desirability of accountability, participation, transparency, even the rule of law itself – these are all normative questions, the answer to which is simply assumed within the global administrative law project. By remaining only very lightly sketched in the abstract, however, and rejecting the conceptual necessity (or practical desirability) of anything like an “Administrative Procedures Act” at the global level,¹³⁹ the particular configuration of these in each concrete governance sector (trade, security, environment, etc.) remains very much up for grabs.

Thirdly, and relatedly, it is worth emphasizing that global administrative law – for the most part at least – focuses largely on formal and procedural, rather than substantive, requirements. These are intended not to definitively condition any substantive regulatory outcome, but rather to ensure, to the greatest degree possible, that all affected by public power have a say in the manner in which it is exercised, and that no interests – and in particular those of weaker or more marginalized actors – are disregarded in the process.¹⁴⁰ Moreover, global administrative law does contain the conceptual space for more substantive requirements to be developed (through, for example, the application of standards of reasonableness, fairness, equity and proportionality) should they be appropriate to the governance regime in question. The current, general focus on

¹³⁷ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments–Results of the Uruguay Round, Article 12.3, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement].

¹³⁸ For more detail on the structure and functioning of ISO, see Shamir-Borer, loc. cit. n. 14.

¹³⁹ For an account rejecting a move towards a global Administrative Procedures Act, see Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

¹⁴⁰ See generally Richard B. Stewart, *Accountability, Participation, and the Problem of Disregard in Contemporary Global Governance* (forthcoming 2008). As a number of scholars have pointed out, however, there are no guarantees that procedural mechanisms will alone be equal to this task; a constant vigilance is thus necessary. See, e.g., B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 799 (2005).

procedural rules is emphatically not, however, intended as an expression of any crude hope that they can function in a manner somehow “objective” or “apolitical”; and neither is it based upon any kind of Habermasian proceduralism in which the creation of proper formal rules and structures will automatically generate substantively “good” outcomes. In many ways, it is much less ambitious than either, justified instead on the basis of an ethical (and thus never absolute) commitment to formalism in law as the best available means of responding to the realities of value pluralism in an age of ethical post-foundationalism:

In such a situation, insistence on rules, processes, and the whole culture of formalism now turns into a strategy of resistance, and of democratic hope. Why? Because formalism is precisely about setting limits to the impulses – “moral” or not – of those in decision-making positions in order to fulfil general, instead of particular interests; and because it recognises the claims made by other members of that community and creates the expectation that they will be taken account of. Of course, the door to a formalism that would determine the substance of political outcomes is no longer open. There is no neutral terrain. But against the particularity of the ethical decision, formalism constitutes a *horizon* of universality, embedded in a *culture* of restraint, a *commitment* to listening to others claims and seeking to take them into account.¹⁴¹

v) *The abstract ambivalence of global administrative law*

A few words of caution in conclusion to this section. In dealing with hugely complex social issues, such as the one we have sought to confront in this paper, it is almost always inaccurate to present proposals as “solutions”; in reality, what is being offered is – at best – a persuasive argument about which problem-set it would be better to confront. Our advocacy of global administrative law here should be understood in this manner. It is particularly important to acknowledge that the previous two considerations outlined above, which we have argued create the normative potential within a global administrative law framework to respond in an ethical manner to the fact of apparently irreducible value pluralism, also create an – at least – equal potential for harm. The risks are many, and readily evident: that global administrative law simply provides new tools for the pursuit of hegemonic interests; or that it will be constructed and applied in a

¹⁴¹ Martti Koskeniemi, ‘*The Lady Doth Protest Too Much*’: *Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 174 (2002).

manner that provides nothing more than a façade of legitimacy to, but in doing so further entrenching, the relations of domination already in existence in the global sphere. The basic *instrumentality* of global administrative law should thus also be read at one and the same time as its fundamental *ambivalence*; Its very advantages of flexibility and adaptability themselves imply that it can be flexed and adapted in thoroughly inappropriate – not to mention unethical – ways. In contending, therefore, that global administrative law is a normatively preferable option to a genuinely global constitutionalism at the abstract, general level, we acknowledge that the potential it contains that makes this so will by no means be unproblematically or uncontroversially translated into each, or indeed any, concrete governance context; that battle must be joined – and fought continuously – at each and every site at which public power is exercised beyond the nation-state. Almost paradoxically, however, we contend that, for the reasons outlined above, it is the very abstract ambivalence of global administrative law that renders it particularly well suited to confronting difference in a general context of irreducible value pluralism.

V. CONCLUSION: GLOBAL GOVERNANCE AS AN INTER-PUBLIC SPACE

In essence, in this paper we have made three basic points: firstly, that constitutionalist discourse – even taking into account its most subtle and nuanced deployments – remains overly limited in the institutional forms to which it can be usefully applied to be able to furnish an overall framework for responding to the challenge of regulating global governance; secondly, that – when applied at a global level – the inherent tendency of constitutionalist discourse towards unity is ill-equipped to deal with the evident pluralism of the global administrative space; and thirdly that this same tendency to unity – largely discursively created rather than empirically verified – tends to hide or elide, rather than confront and respect – legitimate value pluralism. The first point speaks to the inadequacy of applying a “constitutionalist framework” even to individual governance regimes, suggesting that, in any event, global administrative law will be a necessary complement to such an endeavour if it is to achieve its goal of bringing the exercise of public power generally back under public control; the second and third, on the other hand, call into question the conceptual and normative appropriateness of a truly “global”

constitutionalism (that is, implying a single, unitary polity at the global level), and the progress narrative from which it draws its authority, for achieving that goal.

On this basis, we have suggested that global governance is best conceived of as having been transformed from an international into an inter-public space,¹⁴² populated by a dizzying array of different regulatory sites and processes. Some of these sites are, of course, clearly constitutional in a “thick”, political sense (the ongoing importance of nation-states cannot, of course, be underestimated; and the European Union does seem – present controversies notwithstanding – to have a reasonable claim to constitutional status along similar lines); while a number of regimes (principally the WTO, and perhaps also aspects of the UN) do exist to which the rhetoric of constitutionalism can, at least arguably, be justifiably applied – if only when suitably pared down in scope and chastened in ambition. There remain, however, many others still that cannot be described as “constitutional” in any meaningful – or at least analytically useful – sense. And – crucially – there exists at present no overarching constitutional framework unifying all of these within one single, hierarchical system, nor does there appear to be any real political will to create one in the foreseeable future. Rather, “thick”, “thin” and “non-” constitutional sites will continue to co-exist in a heterarchical structure; and the nature of the relations between them will be the determining factor of how best the overall nature of global governance should be described. If relations between these sites are characterized predominantly by conflict and normative incoherence, then we seem compelled to talk of fragmentation; if, on the other hand, a high degree of relative stability is achieved within this heterarchical structure, with each site largely complementing rather than contradicting those that overlap, then we can justifiably claim to have progressed to a situation of genuine pluralism.

As argued in the previous section, the potential of adopting a global administrative law framework in confronting the challenges posed by this complex configuration of global regulatory governance is not exhausted by the fact that, unlike constitutionalism, it can address – to varying degrees and with context-calibrated norms and mechanisms – all of

¹⁴² See Kingsbury, *loc. cit.* n. 89.

the various public sites that make up this space; it can also play a crucial role in facilitating interactions between them, enabling complementarity and thus laying the basis for the progression from a conflictual fragmentation to a relatively stable pluralism. By insisting on certain standards of “publicness”, global administrative law can provide a basic common language through which regulatory dialogue can proceed, and a set of standards for critically appraising the functioning of extra-state governance and ensuring – in part at least – that it remains responsive to those upon whose interests it impacts.

It may seem tempting simply to assimilate the various mechanisms of administrative law – relating to participation, transparency, legality and review – to a “constitutionalist sensibility”, thus effecting a *rapprochement* between the two projects.¹⁴³ We would resist this temptation, for the following three related reasons. Firstly, to describe any and all rules of this type – any and all limitations on the exercise of public power – as “constitutional”, regardless of the institutional setting to which they are applied, seems misleading: nothing is being “constituted” in the sense that this term normally implies in a legal setting (can we really suggest, for example, that the establishment of an inspection panel at the World Bank, or a notice-and-comment procedure at the Basel Banking Committee, provides evidence that these bodies are becoming “constitutionalised”?). Secondly, following Fassbender, the attempt to extend the discourse in this manner does appear to be a rhetorical excess, with a real risk of “inflationary” consequences, devaluing, perhaps irrevocably, what remains – and should remain – a powerful symbolic and political term. Lastly, the strength of this very symbolism – upon which all proponents of global constitutionalism seek, to a greater or lesser degree, to draw – is itself very much a double edged sword: deploying the emotive discourse of constitutionalism, and all of the rhetorical baggage that this implies, can itself be a fatal strategic error for those seeking institutional improvements, as the ongoing controversy over the “European Constitution” amply demonstrates.

It is important to emphasize in this regard what we have *not* argued in this paper: specifically, we have not sought to suggest that constitutionalist discourse cannot be

¹⁴³ See von Bogdandy, Dann & Goldmann, *supra* note 122.

extended beyond the state; only that, even in its more subtle iterations, it remains committed to a certain limited range of institutional forms that simply cannot account for the myriad and complex ways in which public power is now exercised in the global sphere; and we have not sought to suggest that the broader, genuinely “global” constitutionalist project is either a conceptual impossibility or necessarily normatively undesirable, but rather that, *under the conditions prevailing now and for the foreseeable future*, it is both conceptually and ethically inappropriate to the structural and value pluralism of contemporary global governance.

Global administrative law is, of course, no simple panacea to the complex and difficult challenges posed by contemporary global governance. It is, for example, limited to administrative activity, and so cannot speak to the vitally important issue of how to regulate the behaviour of states when they act, in negotiating treaties or in formulating custom, in their primary capacity as international legislators. It is here, indeed, that the potentially complementary nature between global administrative law and an eventual global constitutionalism presents itself most clearly; however, excepting discussion of a relatively vague and heavily circumscribed set of *jus cogens* norms, constitutionalist discourse does not yet appear to confront this issue in any great detail. In any event, it seems clear that, as in the context of the nation state, the increased reliance on “delegating” forms of public power through a wide array of international structures will require an administrative law to regulate it; our contention here is simply that, contrary to the national setting, administrative law at the global level is preceding any constitutional counterpart; and, moreover, will continue to operate even if the latter does not – ever – materialize.

Nor is global administrative law any kind of unproblematic solution to the problems arising in those many and varied fields to which it is, at least conceptually, applicable. The dangers have already been flagged above, and by a number of other scholarly works on the subject: that, for example, the focus on procedural rather than substantive rules may well be insufficient to compel the powerful to respect the interests of the marginalized; that providing a legitimating discourse to institutions that are already

structured around vast inequalities in wealth and power may only serve to entrench existing relations of domination rather than providing a means for subverting them;¹⁴⁴ and that the embrace of a plurality of different sites of public power simply grants the powerful more opportunities to shop for a forum that will best further their own interests.¹⁴⁵

These two important caveats – the conceptual limitations and the normative dangers – must be constantly borne in mind by those seeking to advance and to operationalise the emerging global administrative law. The former seem unavoidable if we are to approach realistically the task in hand; the latter speak to the extremely hard, but equally unavoidable, task of moving from the abstract potential of global administrative law to a normatively justifiable practice. In this sense, the really hard work has only just begun.

¹⁴⁴ These first two critiques, amongst others, can be found in Chimni, *supra* note 140.

¹⁴⁵ On this point, see generally Benvenisti & Downs, *supra* note 29.