

Introduction: ‘All is forgiven’: administrative decision-making without administrative law

It is no doubt ironic that administrative law, which by its title alone appears the least humanistic area of law, facilitates our most intimate relationship with the State.¹ State executives make decisions about the most private aspects of our lives on a daily basis. Bureaucrats decide whether we are part of a couple, where we can live, if we can be compensated for an injury, if we are to remain solvent and if we are ill enough to receive help. We may resent the way that administrative law facilitates an often-unwelcome intimacy with a ‘faceless’ system, but surely we cannot reject its regulation of it. Administrative law provides accountability oversight to ensure that administrative decisions, which are made pursuant to the exercise of formal power (that is, legislative or executive) in a way that directly affects the rights, interests or obligations of individuals or groups in our society, are both substantively correct and procedurally fair. The role and importance of administrative law in accountability becomes pronounced when the intimate relationship between individual and State shifts to a relationship between the individual and someone or something else entirely. When administrative decision-making is removed from the domestic context and placed into a context where no framework for administrative law exists, how can we assure that our rights are protected and the rule of law is respected?

Administrative law does not exist doctrinally outside of the domestic context, yet administrative decision-making still occurs in the ‘global space’. Beyond the boundaries of sovereignty and international law exists

¹ See Lorne Sossin, ‘An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law’ (2002) 27 (2) *Queen’s Law Journal* 809.

a space where transnational administration² transcends traditional treaty-based diplomacy and multilateral cooperation. The global space is not, according to Kingsbury, Krisch and Stewart, ‘the space of inter-state relations governed by international law’, nor ‘the domestic regulatory space governed by domestic administrative law’.³ Instead, it is ‘international administration’,⁴ which encompasses elements of each.⁵ Diverse actors, which are collectively known as global decision-making bodies, are responsible for governance in this space. Regardless of their form, which includes international organisations (IOs), international courts and tribunals, transnational agreements or networks made between State executives, hybrid public/private organisations, non-governmental organisations (NGOs) and multinational corporations, these bodies carry out decision-making and regulation in the place, or on behalf, of sovereign States. Like domestic contexts, decision-making in the global space can be regulatory, policy, judicial (or quasi-judicial) or administrative in nature. Administrative decision-making in the global space can be understood as those decisions that are made by international institutions in the exercise of their formal power (however defined), which create, amend or affect the rights, interests or obligations of individuals or groups, in contrast to the interests of States. Indeed, ‘global administrative decisions’ bypass State sovereignty to engage with individuals directly.⁶

A proliferation of decision-making and regulation that is unbounded by traditional concepts of State sovereignty has propelled accountability towards increasing prominence in global governance discourse. Global decision-making bodies engage in administration and governance in ways that are simultaneously innovative and concerning. These bodies possess the ability to engage in standard setting and decision-making in dynamic, flexible ways, yet make decisions that affect the rights and obligations of States, intergovernmental bodies and private actors without the accountability oversight inherent in comparable domestic decision-making. When the ability to ensure that decisions that affect private citizens are

² Benedict Kingsbury, Nico Krisch and Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 (3&4) *Law and Contemporary Problems* 15, 16.

³ *Ibid.*, 18.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Stefano Battini, ‘International Organizations and Private Subjects: A Move Toward a Global Administrative Law?’ Working Paper No. 2005/3 (Institute for International Law and Justice (NYU), 2005) 21.

fair, lawful, transparent and allow for participation is not available, or only in a diminished capacity, an *accountability deficit* is said to emerge.⁷ An accountability deficit stems from the notion of a democracy deficit, which is the idea that increased privatisation, deregulation and outsourcing, often linked with globalisation,⁸ tends ‘to reduce the democratic public sphere’ in favour of regulation and administration that is less likely to reflect values of public law such as transparency, participation and fairness.⁹ Administrative decision-making in the global space is of particular concern to this global accountability conundrum because the ability of administrative decisions to impact the rights of individuals *directly* places the subjects of those decisions in an especially vulnerable position. At worst, without the protection of accountability oversight, administrative decision-making can infringe fundamental human rights.¹⁰

Administrative decision-making in the sense described above regularly occurs within the United Nations (UN), which is the largest and most complex global decision-making body that operates outside of the domestic context. The purpose of this book is to consider accountability in the context of the administrative decision-making that takes place within the UN and to explore how the accountability concerns that typically accompany administrative decision-making in the global space manifest within the UN system.

I THE UN, ACCOUNTABILITY AND ADMINISTRATIVE DECISION-MAKING

If the UN is anything, it is an early adopter. As an intergovernmental organisation, it embraced the institutional language of accountability, transparency and responsibility well before multinationals were scrambling to adjust to the post-Enron era of corporate responsibility. In 1993 the UN General Assembly (UNGA) called for the establishment of ‘a

⁷ Kingsbury, Krisch and Stewart, above n 2, 18.

⁸ Alfred C. Aman Jr argues that globalisation means that governments must increasingly engage with entities that decentralise their boundaries and the global economy is an incentive to partner with international or ‘non-State’ entities: Alfred C. Aman Jr, ‘Globalization, Democracy and the Need for a New Administrative Law’ (2003) 10 (1) *Indiana Journal of Global Legal Studies* 125, 129–130.

⁹ *Ibid.*, 131–136.

¹⁰ Niamh Kinchin, ‘The Implied Human Rights Obligations of UNHCR’ (2016) 28 (2) *International Journal of Refugee Law* 251.

transparent and effective system of accountability and responsibility' that would establish clear responsibility for UN programme delivery, ensure that programme managers are accountable for 'the effective management of the personnel and financial resources allocated to them', evaluate the performance of all officials and provide effective training of staff in financial and management responsibilities.¹¹ A commitment to accountability has been maintained throughout the years via a number of means, including reviews of the efficiency and accountability of the overall administration of the UN,¹² reports on accountability and oversight mechanisms¹³ and the creation and strengthening of internal accountability mechanisms, such as the Office of Internal Oversight Services and the Independent Audit Advisory Committee.

Watching from the wings are various actors for whom UN accountability means something else entirely. Accountability for human rights breaches, such as sexual assault committed by UN peacekeepers¹⁴ or spreading cholera to vulnerable populations following a natural catastrophe,¹⁵ are common concerns. For others, UN accountability means 'the just application of UN Charter principles' in management reform, interactions with civil society and the equal treatment of member States – objectives that are underscored by a campaign against perceived anti-Semitism¹⁶ or 'accountability and citizen participation in decisions on peace and security, social justice and international law', which translates to a focus on transparency in UN partnerships with philanthropists.¹⁷

If accountability can mean different things within the same institution depending upon perspective, has accountability been relegated to a mere buzzword? It is easy to be cynical about accountability if it is reduced to

¹¹ *Review of the efficiency of the administrative and financial functioning of the United Nations* UN GAOR, 87th plenary meeting, UN Doc A/RES/48/218, 23 December 1993, [E].

¹² See *Towards an accountability system in the United Nations Secretariat*, A/64/640, 29 January 2010.

¹³ See M. Mounir Zahran, *Accountability Frameworks in the United Nations System* (Joint Inspection Unit, JIU/REP/2011/5), June 2011.

¹⁴ See J. Peck, 'The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable' (1995) 21 *Syracuse Journal of International Law & Commerce* 283.

¹⁵ See Kristen E. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2015–2016) 16 *Chinese Journal of International Law* 341.

¹⁶ UN Watch <<https://www.unwatch.org/about-us/mission-history/>> (accessed 2 November 2017).

¹⁷ Global Policy Forum <<https://www.globalpolicy.org/about-gpf-mm/introduction.html>> (accessed 2 November 2017).

management-speak and political jargon, but if we recall that its true worth is as a fundamental value of democracy, we acknowledge that accountability is a vessel within which our expectations for an inclusive, fair and libertarian community are placed. 'Achieving accountability' in the UN should start with an acknowledgement that it is not an organisation at all, but a complex system of interconnecting parts, meaning that accountability is best understood in relation to its parts and not its whole. Where the UN's 'parts' make administrative decisions that affect the rights, interests and obligations of individuals and groups, accountability should be framed not as some lofty but amorphous aspiration to be grafted onto a monolith, but as a responsive and adaptable concept that can meet the challenges posed by decision-makers within the UN.

The obvious follow-up question to a claim that the UN requires accountability for its administrative decisions, is: what makes a UN decision *administrative*? Administrative decisions made in the global context should be distinguished from policy decisions or 'regulatory-type' decisions in order to be understood as those decisions that are made by international institutions in the exercise of their formal power, which create, amend or affect the rights, interests or obligations of individuals or groups, in contrast to the interests of States. For the UN, the 'formal power' and the impact of the exercise of that power will differ according to the particular decision-making 'mechanism', which may be an organ of the UN, a special agency, a programme or a part of the Secretariat. Decision-making mechanisms will also differ in form and process. Some are part of a complex integrated system where the decision-making is undertaken by a different body than the one that conducted the administrative investigation or applied rules to individual circumstances in a recommendatory capacity. In other cases, administrative procedure and decision-making will be integrated into the one body. The form of the decision-making may also be affected by whether the mechanism impacts individuals and groups within the organisation (that is, staff and contractors) or those who are external to the UN. In other words, some mechanisms deal with 'internal accountability' and others address 'external accountability'. Whatever the form of the decision-making mechanism may be, all UN administrative decisions share the commonality of creating, amending or affecting the rights, interests or obligations of individuals or groups.

Is the UN 'accountable' for its administrative decision-making? It is this question that is at the heart of this book. The following discussion lays the foundations for a discussion on UN accountability by considering a question posed earlier in the context of a global accountability deficit: 'When administrative decision-making is removed from the

domestic context and placed into a context where no framework for administrative law exists, how can we assure that our rights are protected and that the rule of law is respected?'

II SEARCHING FOR SOLUTIONS TO THE GLOBAL ACCOUNTABILITY DEFICIT

Recognition of an accountability deficit in the global space has meant that attention has turned to how accountability concerns might be conceptualised and challenged in innovative ways. International law, the traditional 'gatekeeper' in the international context, is restricted in its capacity to influence decision-making that occurs outside of its sphere because it has a limited ability to address the actions of all of the global decision-making bodies that occupy the global space. When questions about accountability arise within the traditional scope of international law, the issues that are raised, such as democracy, good governance and 'fairness', are often amorphous, highly contextual and not conducive to rule-making or traditional adjudicatory techniques. Whilst international law does have a role to play in global accountability¹⁸ the search for 'accountability solutions' must extend beyond its limits. However, to speak of 'global accountability' without acknowledging the fluidity in the meaning of accountability would be to proceed upon a deceit. The existence of a global accountability deficit may be largely accepted but the meaning and scope of accountability is not.

Accountability has been described as 'complex and chameleon like',¹⁹ 'a placeholder for multiple contemporary anxieties'²⁰ and 'a synonym for many loosely defined political desiderata, such as good governance, transparency, equity, democracy, efficiency, responsiveness, responsibility, and integrity'.²¹ Problematising global governance in terms of

¹⁸ Note, however, Julian Arato, who identifies the 'lacunae in the codified rules of treaty interpretation' as an approach to better guide interpretation in international institutions in a way that responds to accountability and legitimacy: Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 *Yale Journal of International Law* 289, 356.

¹⁹ Richard Mulgan, "'Accountability": an Ever-Expanding Concept?' (2000) 78 *Public Administration* 555.

²⁰ Jerry Mashaw, 'Structuring a "Dense Complexity"; Accountability and the Project of Administrative Law' (2005) *Issues in Legal Scholarship* 1, 15.

²¹ Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 *Western European Politics* 946.

accountability is a double-edged sword. On the one hand, it identifies a problem, that is, 'decision-making in the global space lacks accountability', and on the other it creates a conversation that lacks clear parameters. Part of an explanation for this duality may be that the global space has inherited an extended and therefore less precise version of accountability from the domestic context. Richard Mulgan laments an apparent shift in the meaning of accountability within domestic governance from its 'core' or original sense of 'being called to account' to include wider implications of individual responsibility, concern for the public interest and institutional checks and balances. He cites a catalyst for the change as being academic pursuance of personal intellectual agenda, rather than shifts in everyday usage.²² Responsibility, control, responsiveness and even deliberative democracy are all concepts that Mulgan argues have become intertwined with, and to some degree co-opted by, accountability. Mark Bovens also advocates for a 'narrow' conception of accountability, which he defines as something to be determined by the social relationships it operates within rather than by a broad conceptualisation that incorporates other values, such as participation, transparency and responsiveness. As he states, '[s]uch broad conceptualisation makes it difficult empirically to determine if one body is being accountable'.²³ The amorphousness of the global space naturally attracts the broadest conception of accountability possible, which has arguably weakened and stripped it of its straightforwardness.²⁴

Central to Bovens' theory of accountability is the idea that a relationship between an actor and an 'accountability forum', which is based upon an obligation to explain and justify conduct, will determine how and if accountability is to apply. Accountability forums include political, legal, administrative, professional and social accountability. Each forum demands different kinds of information and applies different criteria to what constitutes responsible conduct.²⁵ Similarly, Jerry Mashaw claims that there is a need to 'unpack accountability' so that common problems across multiple domains can be discussed in different contexts.²⁶ According to Mashaw, once accountability is 'unpacked' the repertoire of accountability regimes through which accountability can be operationalised may be understood. Accountability regimes are the ways that

²² Mulgan, above n 19, 571.

²³ Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 450.

²⁴ Mulgan, above n 19, 571.

²⁵ Bovens, above n 23, 455.

²⁶ Mashaw, above n 20, 15.

different people, groups and institutions in our lives call us to account. Mashaw groups regimes into three general ‘family groups’, which are public governance, accountability in the market and social accountability. Each group is inhabited by a number of genus or species of accountability regimes. Within the family group of public governance are the genera of political, administrative and legal accountability, whilst the genus of accountability in the market will depend on the type of market in question. Social accountability depends on ‘community and culture’, societal and internally generated norms.²⁷

Ordering accountability through forums or regimes means that its nature and to whom it is to be rendered will differ according to the forum in question. Accountability forums are difficult to conceptualise in the global space. What, for example, does political accountability mean in this context? Might it refer to interactions that take place within the confines of international law and relations, or does it refer to a State’s responsibility to act on behalf of its citizens? How do we identify the ‘community and culture’ that Mashaw argues is the basis of social accountability? Perhaps market accountability will fare the best amongst porous borders, but without the clarity of accountability forums, it is difficult to identify to whom accountability is to be rendered. Focussing upon accountability at the nation-state level (that is, ‘world politics’) Ruth Grant and Robert Keohane offer a potential solution – defining accountability not by a forum but by the relationships of the participants. Grant and Keohane suggest that there are two primary models of accountability, *delegation* and *participation*.²⁸ A participatory model of accountability is defined as relationships where ‘the performance of power-wielders is evaluated by those who are affected by their actions’.²⁹ Those affected by the actions of a ‘power-wielder’ include individuals who are the subject of decision-making³⁰ and individuals whose rights have been impacted by the actions of a global decision-making body.³¹

²⁷ Ibid, 17–26.

²⁸ Ruth W. Grant and Robert O. Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *American Political Science Review* 1, 5.

²⁹ Ibid.

³⁰ E.g. asylum seekers whose claims for refugee status are processed by the UN High Commissioner for Refugees (UNHCR).

³¹ E.g. individuals whose human rights have been impacted by the actions and/or decisions of the World Trade Organization (WTO). See Susan Ariel Aaronson and M. Rodwan Abouharb, ‘Is more trade always better? The WTO and human rights in conflict zones’ (2013) 47 (5) *Journal of World Trade* 1091.

Grant and Keohane's delegation model of accountability describes obligations that arise from a relationship where the power-wielder is accountable to the power-delegator for the way it exercises the power that has been delegated to it.³² Within each model are seven types of accountability mechanisms. Four of these mechanisms – legal, fiscal, hierarchical and supervisory accountability – rely on delegation. The remaining three mechanisms – market, peer and reputational accountability – involve forms of participation.³³

The potential for the inherent amorphousness within accountability to invite instability into any 'solution' to the global accountability deficit must be acknowledged. Accordingly, it is crucial that what is meant by accountability is established at the outset. The focus of this book is on accountability for administrative decision-making within the UN. Administrative decision-making falls within the purview of legal and administrative accountability because it involves the exercise of formal power, which is either law or 'law-like'. It follows that *law* will likely provide the solutions within the realm of legal accountability. In the domestic space, this is the job of administrative law. If there is no doctrinal administrative law in the global space, does it follow that we create it?

A. Administrative Law as a Solution to a Global Accountability Deficit?

Although administrative law institutions and principles differ from place to place, most democratic nations have accountability mechanisms that strive for lawfulness, transparency, participation and fairness. The potential for existing administrative law principles to contribute to the development of global administration is one of the primary normative enquiries of Global Administrative Law (GAL).

GAL has its origins in scholarship dating from the 1990s, which sought to address challenges to the rule of law and democracy posed by deregulation, privatisation and globalisation.³⁴ GAL found a name and an agenda for conceptual reflection, empirical study and institutional re-design³⁵ through NYU's Global Administrative Law Project, which is

³² Grant and Keohane, above n 28, 5.

³³ Ibid, 16.

³⁴ Alfred C. Aman Jr, 'Administrative Law for a New Century' in Michael Taggart (ed.), *Province of Administrative Law* (Hart Publishing, 1997) 90.

³⁵ Susan Marks, 'Naming Global Administrative Law' (2005) 37 *New York University Journal of International Law and Politics* 995, 995.

part of the School of Law's Institute for International Law and Justice.³⁶ As well as providing an anchor for scholarship, the project, along with similar projects such as that undertaken by the Institute of Research of Public Administration,³⁷ has sought to define what GAL seeks to achieve and the challenges that it faces. In their seminal paper, Kingsbury, Krisch and Stuart define GAL as:

comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.³⁸

The authors identify accountability as being central to GAL and conceive a global administrative space where the criteria for accountable decision-making are transparency, participation, reasoned decisions and legality.³⁹ Kingsbury et al recognise a number of conceptual and practical challenges for GAL, which include identifying doctrinal features, sources of law and institutional design. The relative newness of the scholarship means that research to date has not only focused on the potential application of domestic accountability mechanisms to global regulatory regimes⁴⁰ but also on threshold questions such as GAL's relation to the rule of law⁴¹ and the values and principles that underlie or subvert it.⁴²

Whether by extending domestic administrative law to decision-making in the global space that affects States or through the development of new mechanisms of administrative law to address decisions and rules made within global decision-making bodies,⁴³ GAL suggests that the global accountability deficit can be addressed by a transposition of administrative law to a space where it did not exist previously. Law will not only impose 'rules'; it will provide principles that can carry normative values

³⁶ Global Administrative Law Project <<http://www.iilj.org/GAL/>> (accessed 8 December 2017).

³⁷ Istituto di Ricerche Sulla Pubblica Amministrazione <<http://www.irpa.eu/gal-section/>> (accessed 8 December 2017).

³⁸ Kingsbury, Krisch, and Stewart, above n 2, 17.

³⁹ Ibid, 18.

⁴⁰ Richard B. Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 (3&4) *Law and Contemporary Problems* 63, 69.

⁴¹ David Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2005) 68 *Law and Contemporary Problems* 127, 140.

⁴² Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187, 188.

⁴³ Kingsbury, Krisch and Stewart, above n 2, 16.

that will be shaped according to the decision-maker and the nature and subject of the decision.

This is not to say that GAL is its own ‘body of law’. GAL does not possess a doctrinal framework; and without an underpinning philosophy, an ability to set and apply rules and a history of precedent,⁴⁴ law remains in the theoretical realm. Institutions that support recognisable jurisdictions and test legality are a clear, although not mandatory, indicator of doctrinal law.⁴⁵ As a simple rule, legal theory cannot be elevated to a body of law without having its legality questioned and proven, which means that theories developed to support that body of law need to conform to its precedents and established legal principles. It is evident that without institutional support and an opportunity to develop precedent, GAL cannot qualify as a recognisable body of law – yet. However, GAL does not need to be a body of law to impose legal principles, influence institutional design and extend existing domestic legal frameworks.

The purpose of the following discussion is to recognise that the key to GAL’s development, and to the future of theories, hypotheses and standards developed under its framework, lies in how well it can address the assumptions and challenges that have the potential to undermine its development and its ability to produce unified, workable and flexible solutions to the global accountability deficit.

(i) Challenge: legal fragmentation and juridification

No single legal order can claim exclusivity in the global space and although it is not a lawless frontier by any means, the contribution of many and varied domestic legal systems, along with the presence of international law, leaves a global legal order that is fragmented, at best. Without a unified legal ontology with which to shape GAL, a need to define what ‘law’ might mean beyond traditional and international legal orders⁴⁶ becomes a significant part of its ambition.

⁴⁴ International law is generally considered doctrinal yet lacks some of the characteristics of domestic doctrinal law.

⁴⁵ This definition of law is, admittedly, a positivist one. It is not, however, an attempt to identify an answer to the perennial question, ‘what is law?’ Instead, it acts on the assumption that law is already defined within a particular context and concentrates on what constitutes an identifiable ‘body of law’.

⁴⁶ See Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ Working Paper No. 2009/1 (Institute for International Law and Justice (NYU), 2009); and Ming-Kuo Sun’s reply in Ming-Sung Kuo, ‘The Concept of

Law does not possess the ability to address all of the issues that arise within the global space. Once accountability mechanisms emerge to manifest legal principles⁴⁷ there is a risk that the bureaucratisation that inevitably accompanies increased regulation will ‘ossify’⁴⁸ those mechanisms and impact their ability to react appropriately in a dynamic context. If global decision-making bodies become juridified and, thus, formalised, they may become removed from community-based forums. Formality and legality can actively prevent citizens’ access to justice and discourage participation in global decision-making. Harlow warns against the creation of ‘a global space in which citizens no longer have the freedom – and forums – to maximise opportunities for experiment and change’.⁴⁹ As the lack of citizen participation in the global space is a contributing factor to the global accountability deficit, to create a space that prevents meaningful participation seems counter-intuitive.

It may be that accountability is equally, or better, addressed through political discourse and decision-making.⁵⁰ Unlike law, ‘politics’ is not so closely tied to substantive rules and the inherent flexibility of political discussion may mean that it is a more effective way to address the different systems and values that exist in the global space. At the very least, the drawbacks of juridification will be somewhat ameliorated if the important contribution political and economic science can make to global governance discourse is not ignored.⁵¹

(ii) Assumption: Whose law? Which values?

If administrative law is to be ‘implanted’ in the global space, it will take with it the assumption that it will perform a similar function to its domestic role.⁵² Domestic administrative law will serve as an important

“Law” in *Global Administrative Law: A Reply to Benedict Kingsbury* (2009) 20 *European Journal of International Law* 9.

⁴⁷ Examples may include adjudicatory mechanisms such as tribunals or complaint-based bodies like ombudsman offices.

⁴⁸ Mark Pallis, ‘The Operation of UNHCR’s Accountability Mechanisms’ (2005) 37 *International Law and Politics* 869, 874, 876.

⁴⁹ Harlow, above n 42, 213, quoting Alfred C. Aman Jr, *The Democracy Deficit: Taming Globalization through Law Reform* (New York University Press, 2004) 138.

⁵⁰ Marks, above n 35, 995. Marks warns of the danger of treating as technical that which should be political.

⁵¹ See e.g. Grant and Keohane, above n 28, 9; and John Ferejohn, ‘Accountability in a Global Context’ Working Paper No. 2007/5 (Institute for International Law and Justice (NYU), 2007).

⁵² Dyzenhaus, above n 41, 147.

tool in the institutional design of GAL in the global space as it will provide prototypes for procedural standards and the principles upon which values will be based. But *whose* administrative law is to have prominence?⁵³

When we place GAL within the broader global accountability agenda it becomes evident that much of the discussion comes from an Anglo-American or a continental European point of view.⁵⁴ Inevitably, it is coloured by the perspectives of the cultures that dominate its development and is imbued with the assumptions and principles of the administrative law systems of those countries. For example, commentators from common law countries tend to conceive administrative law as comprising the institutional checks and balances that uphold responsible government⁵⁵ and will likely expect adjudication procedures (that is, administrative and judicial review) to be adversarial and ‘party-led’. In contrast, those from civil law countries such as France and Germany will likely understand adjudication to require a high level of involvement by judges in evidence collection and policy-making, and an inquisitorial participation in the decision-making process.⁵⁶

The imposition of one nation’s administrative law principles on a politically and economically weaker nation has been described as ‘double colonisation’,⁵⁷ meaning that the weaker nation first absorbs as a principle background values such as human rights, democracy and accountability and then, as a separate process, has legal principles transplanted upon it through other administrative law systems.⁵⁸ In

⁵³ Kingsbury, Krisch and Stewart, above n 2, 29.

⁵⁴ Until 2014 an annual GAL conference was held in Viterbo, Italy and was organised by primarily Italian academics. In June 2011 a colloquium titled *Un droit administratif global?* (‘A Global Administrative Law?’) was held in Paris. GAL is also increasingly being discussed from the South American perspective. In October 2007 the NYU-San Andrés GAL Conference was held in Buenos Aires.

⁵⁵ See e.g. Paul Finn, ‘Public Trust and Public Accountability’ (1994) 3 *Griffith Law Review* 224; J. Goldring, ‘Accountability of Commonwealth Statutory Authorities and “Responsible Government”’ (1980) 11 *Federal Law Review* 353.

⁵⁶ See Bernard Schwartz, *French Administrative Law and the Common Law World* (The Law Book Exchange Ltd, 2006) 132–135.

⁵⁷ Harlow, above n 42, 209.

⁵⁸ *Ibid.* This can be equated with transnational juristocracy, which Harlow describes as ‘principles borrowed from one system – notably the German principle of proportionality – are applied in others, and “fed back with a difference” into the donor system’.

addition, the assumption that GAL is to reflect the values and legal principles of developed nations fails to acknowledge the weaknesses that are inherent in the administrative law systems of those countries. Although most western nations base their rule of law on democratic and inclusive principles, the legal systems of western nations also contain elements that exclude the poor and disadvantaged, which in western nations are biased towards those who can afford it.⁵⁹ Access to courts, due process and stable principles are integral elements of administrative law systems, but so too are prohibitive costs of litigation, applicant fatigue, power imbalances and other access to justice issues.

It is largely assumed that accountability in the global space is to be based on *public* values.⁶⁰ Public values may transfer well to organisations that are structured on State memberships (that is, IOs) but hybrid public-private organisations are not particularly receptive to the imposition of the public values that tend to inform GAL, such as information transparency, policy participation and legality of decision-making. In hybrid public-private organisations, both government representatives and private parties play a role in policy design and decision-making. To impose expectations of accountability that are modelled upon public or 'citizen' participation and transparency may fail to recognise the competing interests of the private participants in the organisation. For example, the Internet Corporation for Assigned Names and Numbers (ICANN) promotes competition and develops policy in relation to domain names. Whilst ICANN does have a Public Participation Committee whose aim is to increase the participation of 'stakeholders'⁶¹ via public consultations and forums and accountability and transparency reviews,⁶² the nature of the private actors in the organisation, and the fact that they represent business interests, means that they have duties of

⁵⁹ Ibid, 211.

⁶⁰ Kingsbury, above n 46.

⁶¹ ICANN defines stakeholders as either 'Non-directly participating stakeholders who are aware of ICANN' or 'Non-ICANN stakeholders who are in target groups for participation': ICANN <<https://archive.icann.org/en/meetings/nairobi2010/bitcache/Overview%20of%20the%20Work%20Programme%20of%20the%20Public%20Participation%20Committee%20for%202010-vid=9174&disposition=attachment&op=download.pdf>> page 4 (accessed 11 December 2017).

⁶² ICANN <<https://www.icann.org/resources/reviews/specific-reviews/atrt>> (accessed 11 December 2017).

commercial confidentiality that may conflict with the interests of the government representatives.⁶³

Human rights discourse provides a strong normative basis for much of the commentary on global accountability.⁶⁴ Kingsbury et al argue that protecting rights is a normative goal of GAL ‘especially in cases in which global administration directly acts on individuals’.⁶⁵ However, advocating for accountability on grounds of individual rights protection presupposes a priority of liberal values, which the authors argue may only ‘be realized perhaps in a cosmopolitan global society that is based on the centrality of the individual’.⁶⁶ Harlow warns of an ulterior motive when she states that ‘the best way to constitutionalize due process values or present them as “universal” is in the guise of human rights’.⁶⁷

Like human rights, democratic values are a commonly assumed element of accountability in the global space. In her examination of the accountability of government networks, Anne-Marie Slaughter acknowledges that accountability is a complex concept that can mean different things in different contexts and according to ‘different political theories’.⁶⁸ At the same time she claims that ‘determining how to hold these officials [in relation to officials of networks of government agencies] *democratically* accountable becomes a paramount concern’.⁶⁹ The influence of differing political theories is acknowledged, yet the connection between democracy and accountability is presumed. A presumption that democracy and accountability are inextricably linked may result in a failure to consider how administrative law might adapt to spaces where

⁶³ Kingsbury, Krisch and Stewart, above n 2, 23.

⁶⁴ See e.g. Marc Lion, ‘Human Rights Obligations and Accountability in the Face of Climate Change’ (2010) 38 *Georgia Journal of International and Comparative Law* 543; Pallis, above n 48, 874. Jan Wouters, Eva Brems, Stefaan Smis and Pierre Scmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010); Jeanne M. Woods, ‘A Human Rights Framework for Corporate Accountability’ (2011) 17 *ISLA Journal of International and Comparative Law* 321; Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics & International Affairs* 405, 406.

⁶⁵ Kingsbury, Krisch and Stewart, above n 2, 46.

⁶⁶ *Ibid.*

⁶⁷ Harlow, above n 42, 206.

⁶⁸ Anne-Marie Slaughter, ‘The Accountability of Government Networks’ (2000–2001) 8 *Indiana Journal of Global Legal Studies* 347, 360.

⁶⁹ *Ibid.*, 348 (emphasis added).

there is no democracy as it is understood in its traditional sense.⁷⁰ This is not an argument that democratic theory has no place in global accountability discourse. Where democracy is a foundational element of a society it provides the normative base on which accountability of all types rests. To measure accountability against democratic criteria in the global space, however, is to risk misunderstanding the individual accountability concerns of global decision-making bodies, many of which have little to do with democracy.

B. Locating Procedural Standards for Global Administrative Decision-making

It may not be appropriate, or even possible, for GAL to be imposed as *law* in the global space. The assumptions and challenges discussed above threaten to weaken the imposition of a legal framework upon administrative decision-making in a context that is fundamentally plural. In her important critique of GAL, Harlow questions how effective GAL can be if the principles and values that underlie it are so disparate.⁷¹ But might GAL act as a framework or ‘toolkit’ under which procedural standards may be harnessed as accountability mechanisms that could be shaped to suit individual global regulatory structures?⁷²

The obvious contender for global procedural standards is due process. Due process is widely understood to be the expectation that impartial decision-makers will adhere to fair procedures and that those affected by a decision will have an opportunity to be heard. An ability to summarise the meaning of due process so succinctly is symptomatic of its universality, and its limitations. The universality of due process has a tendency to

⁷⁰ David Dyzenhaus uses the following argument to illustrate this point:

Consider for example, the plausible claim that a monarchical legal order where the most important political lines are missing ... can have administrative law, properly so called ... Even in a bare monarchical legal order in which there is administrative law, one assumes that there is accountability to the law of the state.

David Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law’ (2009) *Acta Juridica* 2, 6.

⁷¹ Harlow, above n 42, 185.

⁷² Euan Macdonald and Eran Shamir-Borer, ‘Meeting the Challenges of Global Governance; Administrative and Constitutional Approaches’ in Héléne Ruiz Fabri, Rüdiger Wolfrum and Jana Gogolin (eds), *Select Proceedings of the European Society of International Law*, Volume 2, 2008 (Bloomsbury Publishing, 2010) 222.

encourage a ‘one-size approach’ to its meaning based on procedural *rights* (that is, the right to be heard, the right to judicial review), which usually leads to suggestions of a judicial remedy.⁷³ However, a lack of normativity in traditional ideas of due process is limiting for the global space. As Devika Hovell points out, at the international level procedural standards are generally formed by international lawyers drawing upon ‘universally recognised’ procedural standards from customary international law or ‘general principles of civilised nations’.⁷⁴ Universalising procedural standards and values ignores key questions. How can decision-making be standardised in a context that is characterised by its plurality? How can the pitfalls in assuming that legal standards or law are always the ‘answer’ be addressed? In particular, does due process possess the ability to tackle the difficult conceptual questions that arise in the global space, such as the meaning of law and the identity of community?

If we take a step back to remind ourselves that the ‘end game’ is accountability, we inevitably return to administrative law. To affect genuine procedural reform in the global space, procedural standards must apply cohesively and responsively to varying global decision-making bodies and at the same time, allow the decision-maker to create its own accountability mechanisms. Administrative law already contains the appropriate vessel for global procedural standards – *administrative justice*. Administrative justice relates to decision-making based on legal principles and procedural values, both of which are to be determined by what accountability requires in a specific administrative decision-making forum. The final part of this chapter introduces the concept of administrative justice, which will provide the frame for global procedural standards that will both facilitate tailored accountability mechanisms and measure the existing accountability of administrative decision-making within the UN.

(i) Administrative justice: a brief introduction

The name: What does one call this? What does one understand under the name of name? And what occurs when one gives a name? What does one give then? One does not offer a thing, one delivers nothing, and still something comes to be, which comes down to giving that which one does not have, as Plotinus said of the Good.

Jacques Derrida, *On the Name*⁷⁵

⁷³ Devika Hovell, ‘Due Process in the United Nations’ (2016) 110 *American Journal of International Law* 1, 2.

⁷⁴ *Ibid.*

⁷⁵ Jacques Derrida, *On the Name* (Stanford University Press, 1995) xiv.

Administrative justice has long had a name but has never enjoyed the conceptual coherence that a name implies. In 1983 Jerry Mashaw described administrative justice as '[t]he qualities of a decision process that provide arguments for the acceptability of its decisions'.⁷⁶ The beauty of this seemingly simple definition is that it conceptualises an aspiration yet leaves discretion for how that concept is to be applied. However, Mashaw's description invariably generates further questions. He refers to 'a decision process'; what, how and by whom are these decisions made? What are the qualities that decision processes should imbue in order to be acceptable? And by whom are these decision processes to be deemed acceptable? Administrative justice may have a name but will that name deliver nothing if it begets more questions than it can answer?

As its name suggests, administrative justice is *at least* 'justice within the administrative law system'.⁷⁷ However, administrative justice is as aspirational as it is elusive and its name is a signal of its duality. It is situated within systems of administrative law and, at the same time, is evocative of normative justice-based values such as rights protection and good governance. Its meaning can be shaped according to the governance framework of a particular jurisdiction, meaning that it can be responsive to the values within. That same ability, however, can mean that its objectives become so closely tied to a State's institutional structure that its purpose may become fractured on jurisdictional lines. What administrative justice means is as much dependent on 'conflicting (and legitimate) interests'⁷⁸ as it is on the jurisdiction in which it is situated. As Michael Adler warns:

Administrative justice is no less a contested concept than social justice in that, although it can be defined in a relatively uncontroversial or uncontentious way (as 'a proper balance between competing claims to procedural protection'), the terms in which it is defined (i.e., what constitutes 'a proper balance' and even what are to count as 'claims') are the subject of considerable disagreement.⁷⁹

⁷⁶ Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 2003) 24.

⁷⁷ Robin Creyke, 'Administrative Justice in Context – Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705.

⁷⁸ Robin Creyke and John McMillan, 'Administrative Justice – The Concept Emerges' in Robin Creyke and John McMillan (eds), *Administrative Justice – The Core and the Fringe* (Australian Institute of Administrative Law, 2000) 1, 3.

⁷⁹ Michael Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) 25 *Law and Policy* 323, 344.

Locating cohesion in the concept of administrative justice may well be a futile aim, one that is best left to individual jurisdictions to define. The attempt to solidify a name (or label) might, as Susan Marks warns, 'bring an object into being, with a solidity and even a monumentality that risks putting in the shade disputes over process, agency, and orientation'.⁸⁰ Discounting administrative justice as the potential basis for global procedural standards for administrative decision-making, however, ignores its greatest benefit – it already exists. Administrative justice is already entrenched in administrative law, which means that it is designed to be responsive to *administrative* decision-making. Once we understand that administrative decision-making takes place within the global context, then we realise that the right tools to respond to it must be identified or created.

In the first two chapters of this book, commonalities across existing understandings of administrative justice are identified and linked to form a model of global administrative justice that reflects the law and values of the international community and allows for the creation of responsive accountability mechanisms.

III OVERVIEW OF THE BOOK

This book was conceived as a response to the fundamental dilemma that is intrinsic to global governance; increased global governance inevitably carries and perpetuates an accountability deficit. The shape-shifting nature of the manifestation of this 'dilemma' necessitated a response that could be contextualised. The UN, which is the most significant 'global player', was the natural subject. Coming from a public law perspective, this book was never going to be about 'UN accountability' in a broad sense. Public law principles, particularly those of administrative law, have been drawn upon to focus on procedural protections and gaps in decision-making that take place within the UN. Accountability, therefore, is conceived in the 'legal' sense and what emerges is the need for a standard that can provide cohesion as well as receptivity to the plurality in the global space. It was decided that administrative justice, a concept based in administrative law, could provide that standard for the global space because it offered an objective to 'achieve', and a substantive ambiguity that allowed for interpretation about how that might happen. In a process that involved a comparative analysis, two 'elements' or

⁸⁰ Marks, above n 35, 995.

requirements of administrative justice have been identified: administrative decisions must be made *according to law* and *according to values the community accepts as just*. Applying that model to four administrative decision-making mechanisms within the UN confirms that whilst the UN is generally aware of its obligations around procedural protections and ‘due process’ broadly conceived, it is by no means a unified system procedurally or functionally and where there are protections, there are also gaps.

Chapters 1 and 2 of this book develop the theoretical basis for a model of global administrative justice that could be used to create accountability mechanisms that will measure the procedural protections within UN decision-making and allow for necessary proposals for reform. Chapter 1 examines prevailing functional understandings of administrative justice in order to explain how it contains a procedural standard that administrative decisions be made ‘according to existing law’. The way that existing law in the global space, which is defined as international law, domestic law, institutional law and global law, intersect with the UN to create obligations that are relevant to its administrative decision-making is the primary focus of this chapter.

In Chapter 2 current conceptions of administrative justice that are based on rights protection and good governance form the foundation for the second procedural standard contained within administrative justice, which is that administrative decisions must be made ‘according to values the community accepts as just’. These values, which are broadly defined as rationality, fairness, transparency and participation, will manifest in the global space as divergent accountability mechanisms according to the functions and objectives of a particular global decision-making body.

The purpose of the remainder of the book is to apply the global administrative justice model developed in Chapters 1 and 2 to administrative decision-making in the UN so that gaps in procedural protections may be identified and recommendations for reform may be made. In Chapters 3 and 4 decision-making mechanisms that are primarily concerned with ‘internal accountability’, meaning that the subjects of decisions are individuals or groups that are internal to the UN, such as staff and contractors, are considered. Chapter 3 examines the Formal Internal Justice System of the UN, focussing on the UN Dispute and Appeals Tribunals. The Formal Internal Justice System is the UN’s primary forum for dispute resolution regarding employees’ contracts and conditions of employment. A judicial model that borrows heavily from various domestic systems ensures that the UN tribunals are governed by appropriate procedural rules and regulations and have a significant body of case law to draw upon. However, such regulations can be complex

which, along with issues of location and inclusivity (that is, the system is not available to all individuals employed within the UN), can diminish accessibility. Further, the independence and impartiality of the tribunals, which is essential to the judicial system, can be compromised by their position within the larger UN system.

Chapter 4 considers the Investigations Division of the Office of the Internal Oversight Services (OIOS), which is an internal oversight body that investigates allegations of misconduct by UN staff and affiliated personnel, such as UN peacekeepers. Although, unlike the UN Tribunals OIOS is primarily an investigatory body, it is not excluded from making or contributing to administrative decisions that affect the rights, interests and obligations of individuals. OIOS's investigatory functions mean that many of the issues surrounding fairness, transparency and participation relate to interviews, rather than hearings, which can create challenges regarding appropriate standards of proof and representation. However, OIOS shares with the Formal Internal Justice System issues about independence and impartiality that arise within an institutional context.

The remaining two chapters consider decision-making that relates to external accountability, meaning that those affected by the decision-making are external to the organisation. Chapter 5 examines the Refugee Status Determination (RSD) procedures of the UN High Commissioner for Refugees (UNHCR). UNHCR is a UN special programme that is tasked with the function of international protection for refugees. As part of its role UNHCR undertakes, along with States, the process of determining whether an asylum seeker should be declared a refugee for the purpose of international law (that is, refugee status determination). UNHCR has been proactive in identifying and following clear procedural standards and is largely successful in providing procedural protections around an asylum seeker's right to be heard. However, the vulnerability of the subjects of its decisions, the 'sensitivity' of the subject matter and the difficulties of dealing with States that often act in their perceived self-interest (that is, 'anti-refugee') have contributed to procedural gaps around transparency and a lack of independent and impartial review.

Chapter 6 considers the practice of targeted sanctions by the UN Security Council (UNSC), with a focus upon listing decisions made by the 1267 Committee, which identifies individuals suspected of financing terrorism. Much has been written about the lack of procedural protections, particularly of judicial review, in the UNSC's targeted sanctions regime. Applying the model of global administrative justice to the UNSC as an administrative decision-maker afforded an opportunity to reconceive well-acknowledged issues through a new lens. What is discovered is that whilst there have been improvements in recent times, significant

issues still remain around fairness and transparency, which are largely political in nature.

What emerges with the most clarity from the research and analysis in this book is that accountability standards in the global space must be cohesive, but not in the sense that they impose prescribed standards on decision-makers. Broad expectations, such as administrative decisions having to be made according to law, and broad values (that is, rationality, fairness, transparency and participation) reflect universal expectations of legitimacy. Crucially, such expectations allow for various manifestations. For example, fairness as a procedural value is revealed as divergent and convergent across the administrative decision-making mechanisms studied in this book. In UNHCR RSD, fairness is defined as including expeditious decision-making, whilst in the OIOS it is about protection for whistleblowers. However, fairness means a right to be heard and independence and impartiality in all of the decision-makers, with differing detail. It is not professed that framing accountability in terms of administrative justice is a panacea for broader concerns about a global accountability deficit. But if accountability is understood in regards to whom is accountable to whom, and for what, the creation of directed standards that can respond to the global context may be encouraged. This is ultimately what was hoped for in framing administrative justice as consisting of procedural standards that can be applied both generally and specifically in the context of global administrative decision-making.