

January 2011

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Recommended Citation

James A. R. Nafziger, *The Future of International Law in Its Administrative Mode*, 40 *Denv. J. Int'l L. & Pol'y* 64 (2011).

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The Future of International Law in Its Administrative Mode

Keywords

International Law: History, Organizations

THE FUTURE OF INTERNATIONAL LAW IN ITS ADMINISTRATIVE MODE

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I. INTRODUCTION

Thinking about the future of international law, as an authoritative process, all but requires us to identify its functions in global society. A key function in the future will be its management of transnational administrative activity, itself organized on a functional basis. Of course, projecting trends of any sort to forty years from now — a biblical-sounding span of time, to be sure — borders on pure speculation.¹ Still, such ambitious forecasting can help reveal the evolving reality and breadth of international law in its administrative mode,² fresh ways of defining it, and the options for improving it.

Exactly forty years ago, two proponents of the transnationalist approach to the study of international relations urged “[s]tudents of international law and organizations . . . [to] become involved in the study of transnational relations not merely for the sake of understanding reality, but also in order to help change reality.”³ How true that still is!

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1. This essay, which I was invited to write as a “lightly footnoted think piece” concerning the next forty years of international law, pays tribute to the forty-year history of the *Denver Journal of International Law and Policy*, on whose Board of Advisors I have had the privilege to serve. I also wish to congratulate and honor the founder and prime mover of the *Journal*, my esteemed and dear friend, Professor Ved P. Nanda. Although Ved still has the appearance and energy of a 39-year-old, it is now clear from this fortieth anniversary commemoration that outward appearances can be deceiving.

2. I have chosen this phrase, awkward as it may seem, advisedly. The terms “international administrative law” or “transnational administrative law,” as currently understood, do not seem broad enough insofar as they usually refer to limited regulation and dispute resolution within confined, rather formal organizational structures. Nor am I even certain that such a distinct body of law exists as yet. On the other hand, international law in a general sense does in fact govern a broad range of transnational administrative activity, and I foresee a robust future not only for the growth of this regime, but also — and this is worth emphasizing — for the increasing prominence of this particular mode of international law in the future.

3. Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, in TRANSNATIONAL RELATIONS AND WORLD POLITICS, 25 INT’L ORG. 329, 349 (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1971). Transnationalism

During the past forty years, the international (or, if you will, transnational) legal system has expanded substantially beyond traditional nation-state relationships, including those within intergovernmental organizations (“IGOs”) such as the United Nations and its specialized agencies. The growing democratization and, with it, pluralization of civic society has necessitated that development. Most spectacularly, the individual, only recently endowed with legal personality, has assumed a primary role on the global stage, particularly in the context of human rights. Less visibly, some nongovernmental organizations (“NGOs”) have also acquired a limited measure of international legal personality. Countless other NGOs have joined the supporting cast of these international legal actors by initiating international legislation, lobbying within IGOs, interpreting international law, serving as *amici curiae*, and promoting state compliance with international obligations.⁴

The resulting complex of communication channels, specialized fora, decision-making bodies, and tribunals for resolving disputes is almost mind-boggling — so much so that considerable attention has been lavished on problems of overlapping and sometimes conflicting legal authority⁵ and tribunals.⁶ The aspirations for a neat, federalized world, universal collective security, and highly centralized socioeconomic cooperation — as in the original design for the United Nations — are largely gone, as are the aesthetic and therapeutic virtues of simplicity and centrality in the international system. The system is messier than it was forty years ago, but perhaps also more promising.

The promise of international law will lie in its capacity to fit within the contours of the messy, complex global society based on, but transcending, the traditional nation-state framework of governance. The international legal system will therefore need to be cosmopolitan and capable of productively coordinating public and private processes.

was a particularly prominent approach in the 1960s and 1970s, reappearing as the civic society movement in the 1990s and, since then, being partially absorbed within the concept of globalization.

4. See Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 348, 352-53 (2006) (providing an informative historical and analytical survey).

5. See, e.g., *Joined Cases C-402/05P & C-415/05P, Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. I-06351 (2008) (quashing the European Union’s Council’s implementation of an initiative by the Al Qaeda and Taliban Sanctions Committee that had been established by the United Nations Security Council and holding that the Security Council-based procedures for that implementation, involving the freezing of assets owned by designated terrorists, violated regional law).

6. See, e.g., Barton Legum, *Focus: Emerging Fora for International Litigation (Part I): The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT’L L.J. 531 (2002); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003).

In keeping with democratic and egalitarian values, these processes will need to be transparent and closely attuned to basic human needs.

Today, efforts are underway to remap an international system left incomplete by Rand McNalley and GPS devices. Nation-states and IGOs are no longer the only pieces in the global puzzle. Instead, for reasons of convenience, budgetary restrictions, lack of expertise and otherwise, governments and IGOs have designated, deferred to or co-opted a broad range of NGO and other private entities to manage important transnational activities and the issues and disputes they generate. These activities range from utilities, postal service, and banking to humanitarian relief, sports, and arbitration of commercial disputes. The consequential growth of a “global *civil* society”⁷ is not so much an instance of “privatization” as it is a sensible redeployment of expertise and administrative competence in public-private partnerships.

Forty years ago, the indispensable role of functional NGOs within the international system had already become apparent.⁸ Even earlier, in the immediate aftermath of the First World War, the tripartite structure of the new International Labor Organization enabled representatives of labor unions and management to join governments in the initiation, drafting, and supervision of international social legislation. After the Second World War, several studies highlighted the emergence of functional organizations in the new world order and forecast a robust role for them.⁹ These organizations included public international utility corporations with limited international legal personality such as the Scandinavian Airlines System (“SAS”), the Basel-Mulhouse Airport, the Franco-Ethiopian Railway Company, the International Moselle Company, and the Central African Power Corporation. A leading international law scholar observed as follows:

Post-war developments have clearly demonstrated that such progress as the nations have achieved towards cooperation for common purposes and objectives have overwhelmingly occurred on the functional level, i.e., by the establishment of specific — bilateral or multilateral — institutions and organizations for

7. See, e.g., JOHN KEANE, *GLOBAL CIVIL SOCIETY* 8 (2003) (emphasis added).

8. See, e.g., Kjell Skjelsbaek, *The Growth of International Nongovernmental Organization in the Twentieth Century*, in NYE, *supra* note 3, at 345.

9. See, e.g., DAVID MITRANY, *A WORKING PEACE SYSTEM* (1966); ERNST B. HAAS, *BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* 133-34, 442-43 (1964) (concerning the work of the International Labor Organization); and J.J. LADOR-LEDERER, *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS* 104-07 (1963).

defined purposes, rather than by general constitutional transfers from national to international sovereignty.¹⁰

During the last forty years, several significant NGOs have acquired a limited measure of international legal personality. These include, for example, the International Committee of the Red Cross, a Swiss corporation charged with responsibilities under the Geneva Conventions of 1949 (particularly under Common Article 3); the Olympic Movement, also Swiss-based, as the core family of institutions in the organization of international sports with evolving responsibilities that extend far beyond the quadrennial Olympic Games; and the institutes that serve as surrogates for governments in conducting diplomacy and normal relations with Taiwan. These NGOs, as well as others with or without international legal personality, have indeed “come to assume an enormously important role, not only at the domestic level, but also in global regulation.”¹¹

External developments, normally beyond the control of governments, are increasingly instrumental in shaping the global civil society and its expectations. The most important of these developments has been the extraordinary profusion and diffusion of electronic data, new internet technologies, the emergence of the social media, and a resulting informality of transnational decision-making in civic and political affairs.

Meanwhile, despite the efforts to remap the international system, the portrayal of its formal structure is still old-fashioned. The more things change, the more they are viewed in the same way. This is understandable, both because the adjustment of our view of the global order is always gradual and because the Westphalian system of nation-states remains fundamental. Unfortunately, the formal legal structure, as we are apt to envisage it, does not conform to the complex, pluralistic social system that we can almost see growing by the day, and it cannot be relied upon to deal with the serious challenges that confront global society.

We are therefore struggling to define a new legal structure that is equipped to meet challenges beyond the competence of established doctrines, institutions, and jurisdictional limitations. We need to be keenly aware of significant trends in the normative order. One such

10. See Wolfgang G. Friedmann, *Introduction*, in G.O. ZACHARIAS SUNDSTRÖM, PUBLIC INTERNATIONAL UTILITY CORPORATIONS xi (1972); G.O. ZACHARIAS SUNDSTRÖM, THE PUBLIC INTERNATIONAL UTILITY CORPORATION (1971) (serving as an earlier, more extensive version of the book).

11. Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 870 (2011) (referring to the “many self-regulatory and public-private schemes that have blossomed at the international level”).

trend that we will need to acknowledge in forecasting international law forty years from now is the steady growth in its administrative mode.

II. THE ADMINISTRATIVE FUNCTIONS OF INTERNATIONAL LAW

A. The Formal Structure

The concept and science of international (or transnational) administrative law, as currently understood, is at least one hundred years old.¹² In practice, however, this regime of law has expanded only modestly, cabined as it is by the formal structure of international law. A few leading examples of this regime will suffice to define its limited scope. Employment-related disputes are resolved within the United Nations, its specialized agencies, and other IGOs by administrative tribunals and appellate mechanisms, tempered by advisory opinions of the International Court of Justice. The Appellate Bodies of the World Trade Organization review administrative decisions in disputes among member states. And the exhaustion-of-remedies requirement, as a construct of administrative procedure, may require the pursuit of local administrative remedies by investors and other private parties before they may properly claim the diplomatic protection of their national states against other states.

For the most part, this constricted view of international administrative law fails to include the myriad claims and counterclaims within the purview of often low-level administrative decision-making within IGOs, NGOs, and transnational networks. By and large, the major controversies that beset the global community — armed conflict, environmental damage, climate change, human rights, and so on — escape our blinkered vision of international law in its administrative mode. This is entirely understandable given the strict limitations we impose on the formal structure of international legal authority, the reluctance of governments to expand that authority, and the unwillingness of IGOs to expose their units and individuals to scrutiny, let alone liability, within the international legal process.

The shallowness of the traditional regime of international administrative law is also understandable as a reflection of domestic practices. They, too, formally rely on an outmoded framework that is

12. See, e.g., Paul S. Reinsch, *International Administrative Law and National Sovereignty*, 3 AM. J. INT'L L. 1, 5-6 (1909); MITRANY, *supra* note 9, at 145-46 (forecasting (perhaps too optimistically) that the working, and especially the co-ordination, of functional activities would build up not only sectors of international administration but gradually also a body of international administrative law, which in the end might do more toward unifying the ways of the world than attempts at codifying abstract juridical rules and principles. International society will acquire a living body not by our pledging each other in solemn pacts and charters but by our working together in the humble tasks of everyday life).

defined largely in terms of administrative organization and review. The fact remains, however, that the actual scope of administrative authority has expanded greatly at both domestic and international levels.¹³ At the international level, this is primarily because of both the external factors noted earlier, globalization, and an increasingly pluralist global society. If so, simple justice would seem to call for more attention by the global community to administrative processes below the level of national governments and beyond an exclusively public domain.¹⁴

B. A New Model

As we have seen, the formal structure that defines the role of administrative law in the international legal system is inadequate and unrealistic because it fails to embrace the emerging pluralism and breadth of global authority, with its mix of private and public institutions. A realistic portrayal of that role would depict a more complex process by which international law is routinely brought to bear on the process of discrete and often low-level decisions and dispute resolution. This is an empirical observation. Just as important is a normative observation that, in looking to the future, a broader, more realistic concept of international law in its administrative mode will better serve global society in addressing the big issues of the day at their grass roots.

A proposed new model of domestic administrative law, based on comparative insights, recasts it as “an accountability network of rules and procedures through which civil servants are embedded in their liberal democratic societies.”¹⁵ This model, though still more or less

13. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 746 (2011) (concluding a persuasive commentary on the internationalization of citizenship and acknowledging that this “is not to say that international law now delivers a comprehensive regulatory regime. States will retain important discretionary powers into the future. But no function of governance will be shielded from international law as a categorical matter, membership decisions included.”). The same observations would seem to apply in the context of international law in its administrative mode.

14. See EDWARD W. SOJA, *SEEKING SPATIAL JUSTICE* 22-23 (2010) (observing that, “[g]lobalization has also been associated with state restructuring and challenges to the political domination of the nation-state as the exclusive political space for defining citizenship, legal systems, and hence justice itself. Struggles for justice, more than ever before, stretch across political scales, from the global to the local . . . [T]he theory of justice needs to be reconstituted in a “post-Westphalian” world, referring to the origins of the now outdated nation-state system. All struggles over democracy, solidarity, and the public sphere revolve around rethinking the concept of justice.”).

15. Bignami, *supra* note 11, at 860-61 (elaborating on the purpose of recognizing the new model by noting that

Theories of administration and administrative law have changed dramatically in recent times. The traditional hierarchical image of state bureaucracy has been confronted by an increasingly disaggregated reality of autonomous service-delivery bodies, independent regulatory agencies, newly

political, would replace the orthodox but antiquated model that reposes confidence in expert bureaucracy to accomplish public purposes and therefore focuses largely on formal aspects of administrative organization and review.

In redefining administrative law, this shift from a hierarchical concept, based simply on administrative organization and review, toward an ethically-based approach of accountability to the general public would seem to encourage the best practices of international law in its administrative mode forty years hence. In fact, the architect of the new model of domestic administrative law has noted its potential applicability within the international legal system of administrative governance.¹⁶ After all, the correspondence between domestic and international systems is well-established. For example, the European Court of Justice and the European Court of Human Rights have adopted German doctrines of administrative law such as proportionality, equality, and legitimate expectations. The judicial decisions based on these doctrines have been influential throughout Europe, thanks to their dissemination in regional networks of legal elites.¹⁷ Why not global networks? A dichotomy between the pluralist tradition for representing interests in such countries as the United States, and a contrasting neo-corporatist tradition in continental Europe, would not seem to be an impediment. Transnational management would necessarily defer to different structures in different states for the representation of interests so long as accountability for transnational administrative actions is the controlling principle.

powerful local governments, and a plethora of transnational and international regulatory bodies. Private actors, ranging from industry, self-regulatory bodies, to individual firms, to public interest groups, are now recognized as vital participants in the administrative process, sometimes as substitutes for public administration, sometimes as critical collaborators. A number of procedural innovations have rendered the administrative process more transparent, participatory, and flexible than before, thereby empowering the expanded constellation of public and private actors to actively shape and check administrative action. Fittingly, in the work of legal and public policy scholars focused on domestic and, increasingly, transnational administrative systems, the old notion of an expert bureaucracy swiftly carrying out the democratic will has been replaced by a networked understanding of how public and private actors combine to accomplish administrative purposes.

16. *Id.* at 860, 906 (offering valuable insights into how the new paradigm that she proposes fits within the international legal system by asking, "How should political accountability, interest group representation, judicial review, and diffuse accountability be organized in the European Union, the World Trade Organization, transnational networks of banking regulators, and other sites of global governance? The natural first place to look is to domestic systems of administrative law, with their numerous legal variations, long histories, and rich experience.").

17. *Id.* at 900.

It has been said that administrative law, however defined, is constitutional law made concrete. Broad requirements are brought down to earth. Transposed to the international level, this observation suggests, similarly, that foundational regimes — “the law of the sea,” “human rights law,” “the law of armed conflict,” and so on — become concrete when they are reduced to specific exercises of administrative authority and discretion. A focus on the accountability of such derivative decision-making, whether public or private, would surely broaden our understanding and use of international law in its administrative mode.

III. THE RELATIONSHIP BETWEEN NGOs AND INTERNATIONAL LAW IN ITS ADMINISTRATIVE MODE

It is well-established that “[a]dministrative law is implicitly functional law, and so is administrative practice.”¹⁸ It does not follow, however, that all NGOs, merely by performing a desirable function in global society, need to be integrated into a workable system of international administrative law. Indeed, for reasons of manageability and coherence, the administrative regime should be selective.

Although hundreds of NGOs are experienced actors in international governance — a few with limited international legal personality — their legal status generally is uncertain, as it always has been in the modern era.¹⁹ NGO claims to be acting on behalf of what has been called “global stakeholder communities”²⁰ have raised endless issues of legitimacy and representativeness.²¹

Some of the skepticism about the legal status of many NGOs is well founded. Although many NGOs have observer status in the Economic and Social Council (ECOSOC)²² and enjoy other forms of recognition,

18. MITRANY, *supra* note 9, at 19, 201 (explaining the growth of administrative law by stating, “Every functional link helps to build up a common legal order — specific but also concrete and cumulative, one which does not stay aloof in the atmosphere of diplomatic and juridical pacts but which enters everywhere into the daily life of the peoples themselves.”).

19. Of course, in a bygone era, the “legal” status was never in doubt of such extraordinary NGOs as the Hanseatic League, medieval guilds, and the Dutch East Indies Company. Interestingly, all of these entities relied on combinations of governmental chartering, recognition, and funding or transactional support.

20. See TERRY MACDONALD, *GLOBAL STAKEHOLDER DEMOCRACY: POWER AND REPRESSION BEYOND LIBERAL STATES* 40-41 (2008).

21. See, e.g., Kenneth Anderson & David Rieff, *Global Civil Society: A Skeptical View*, in *GLOBAL CIVIL SOCIETY* 2004/5, at 26, 30, 36-38 (Helmut Anheier et al. eds., 2005).

22. U.N. Charter art. 71 (“The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”); Consultative Relationship Between the United Nations and Non-Governmental Organizations, E.S.C. Res. 1996/31 (July 25, 1996), <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (defining the rather relaxed terms of this relationship).

the strength of their functional competence is often dubious, as is the claim of some of them to be acting on behalf of a constructed, global civic society. Moreover, NGOs are not always blameless, for example, when they have fomented disorderly, physically injurious protests.²³ Much of the skepticism about the legal status of NGOs, however, is because they are typically lumped together and analyzed uniformly. This analysis is not only overgeneralized, but often backward. Instead of asking whether NGOs as a whole bear certain constructed characteristics of legitimacy and representativeness, each NGO should be independently analyzed in terms of the normal expectations for recognition by states under international law, such as effective, self-regulatory control. Moreover, short of anointing a particular NGO as a whole with limited international legal personality, states and IGOs could recognize the legal status of discrete mechanisms within NGOs in order more fully to portray international law in its administrative mode.

A current trend that we may expect to continue during the next forty years is toward a litmus of accountability rather than legitimacy and representativeness to define the status of NGOs with the international legal system.²⁴ We should ask whether a particular NGO, or a discrete unit of it, in performing its recognized function or functions, truly benefits a community of stakeholders and perhaps the larger global community. Is the NGO adequately regulating itself? Is it performing its designated functions according to its own charter? What is it really accomplishing administratively? Posing these questions brings NGOs squarely within the new model of administrative law based on the principle of accountability to the public.

Another trend has been described as “the most striking recent turn of the governance debate . . . at the forward intellectual margin.”²⁵ It involves the inclusion within the ambit of international law of technocrats linked by intergovernmental networks. Their legitimacy is

23. See *Sins of the Secular Missionaries*, ECONOMIST, Jan. 27, 2000, at 25, available at <http://www.economist.com/node/276931>.

24. See, e.g., NGO ACCOUNTABILITY: POLITICS, PRINCIPLES & INNOVATIONS 196, 208-09 (Lisa Jordan & Peter van Tuijl eds., 2006).

25. Kenneth Anderson, *What NGO Accountability Means — and Does Not Mean* (Review Essay), 103 AM. J. INT'L L. 170, 176 n.30 (2009) (“The growth of global administrative governance, technocratically legitimate forms of global governance arise in which NGOs are curiously left aside in favor of the technocrats of intergovernmental networks. The question of political legitimacy proffered by NGOs, as global civil society, is no longer an interesting issue. Neither, for that matter, is the legitimacy of international organizations as political organizations as such. ‘Legitimacy,’ in the new administrative-technocratic model, comes therefore not from any genuinely ‘political’ source at all, but is instead simply a by-product of the competent provision of administrative services. Legitimacy, in such case, is no longer a matter of representativeness but merely a matter of who is able to make the internet run on time.”).

defined by their competence in providing administrative services. Again, we should ask whether such a network is truly accountable to the public in providing such services.

IV. CONCLUSION

It is a cliché to say that we will all be living increasingly in a diffuse, pluralist world. This trend means that international law in its administrative mode must take myriad administrative practices into account, as they evolve in our cybernetic era of mixed private and public decision-making and dispute resolution. The law must therefore capture the significance of public-private networking and nongovernmental authority, realities that are easily overlooked when we rely on an antiquated concept of administrative law that is limited to formally established structures of organization and review.

A new model of administrative law, based on accountability rather than a hierarchy of formal organization and review, is certainly an idea whose time has come. This new model for the application of international law in its administrative mode can readily embrace both “private” (often NGO) and “public” (often IGO) entities. Although an intergovernmental structure of international law will remain essential, it is likely that a more pluralistic definition of administrative law, couched in requirements of accountability, will substantially expand the horizons, excite the imaginations, and tax the skills of international lawyers during the next forty years.