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Cooption and Resistance: Two Faces of Global
Administrative Law

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Abstract

This paper critiques the Global Administrative Law (GAL) initiative from a Third World perspective. The paper argues that, in the absence of a simultaneous critique and reform of substantive law, GAL has only limited potential to contribute to justice in the international system, and indeed may legitimize unjust laws and institutions. Existing international institutions are not, for the most part, being made more participatory and responsive to the concerns of developing countries and its peoples. Nevertheless, GAL may serve as a valuable instrument of change, much as administrative law has done through its use by social movements in some cases in India. This argument forms the basis for an analysis of the problems of increasing participation, transparency, and accountability in the Codex Alimentarius and in UNHCR refugee status determination. In situations of such unequal power, social movements and concerned NGOs must play key roles, and administrative mechanisms of information disclosure, participation, and review can facilitate this. Thus GAL can act as an instrument of resistance and change, but only in highly specific conditions, and only where GAL does not entail a complete separation between substantive and procedural/administrative rules.

COOPTION AND RESISTANCE: TWO FACES OF GLOBAL ADMINISTRATIVE LAW

B.S. Chimni*

I

Introduction

This paper is written from a third world perspective to address some issues relating to ‘the emergence of global administrative law’¹. The essential idea is to determine the nature, character and limits of an evolving “global administrative law” (GAL)². In order to do so the paper departs from a formalistic and narrow definition of “global administrative law” that entirely excludes from its ambit the content of substantive rules, confining it to ‘the operation of existing or possible principles, procedural rules and reviewing and other mechanisms relating to accountability, participation, and assurance of legality in global governance’³. The paper instead seeks to assign GAL a more inclusive meaning in the context of the changes that are transforming the nature and character of international law and institutions in the era of globalization. The argument is that a strict separation of the content of substantive rules and GAL is not tenable as states slowly evolve into administrative agencies of international institutions (as, for example, in the case of WTO), and further because the operation of GAL can impact the content of substantive rules or be co-opted and subverted by them. The principal aim of the paper however is to explore the conditions in which GAL can act, in however limited a way, as a tool of resistance and change in the international system.

Part II of the paper argues that evolving GAL is an inextricable part of contemporary international law and institutions that have an imperial character. Therefore, in the absence of a simultaneous critique and reform of substantive law, GAL has only a limited potential to further

* Vice-Chancellor. W.B. National University of Juridical Sciences, Kolkata. I would like to thank Nico Krisch and Benedict Kingsbury for their insightful comments. The usual caveat applies.

¹ On a third world perspective see generally B.S.Chimni, "Third World Approaches to International Law: A Manifesto" in Antony Anghie, Bhupinder Chimni, Obiora Okafor and Karen Mickelson eds., *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* (2003) 47; B.S.Chimni, *Towards a Radical Third World Approach to Contemporary International Law*, 5 ICCLP Review, October (2002) 16.

² On global administrative law see the seminal article of Benedict Kingsbury, Nico Krisch, and Richard B Stewart, *The Emergence of Global Administrative Law* 2004/1 IILJ Working Paper, 21-22 (2004) http://www.iilj.org/publications/wp_globadminlaw.htm.

³ Kingsbury, Krisch and Stewart, *supra* note 2, 14.

the cause of democracy and justice in the international system. Indeed, without a concurrent concern with substantive law GAL may merely go to legitimize unjust laws and institutions. For by focusing on GAL the false impression may be given that existing international institutions are being made more participatory and responsive to the concerns of developing countries and its peoples. Therefore GAL needs to be conceptualized in a manner that does not dictate the complete separation between substantive and procedural/administrative rules.

Part III of the paper explores the conditions in which GAL can advance the global democratization and justice agenda by looking at the national experience of a developing country like India with the functioning of administrative law. The experience tends to confirm the intuitive understanding that power plays a key role in the framing, invocation, and implementation of administrative law; for the disadvantaged and marginal sections of the population the use of administrative law is most often a theoretical possibility. However, the experience also suggests that there are conditions in which administrative law principles can serve as an instrument of change. These conditions include the designing of appropriate participatory structures of administrative bodies, the presence of social movements and non-governmental organizations that take up the cause of ordinary citizens, and the existence of a right to information law that can be used to compel transparency and accountability of administrative bodies.

What is true of the disadvantaged and marginal sections in India is true of third world states on the international plane. Part IV of the paper illustrates the need for an appropriate participatory structure with reference to Codex Alimentarius Commission that sets international food standards with implications for the trade of third world countries. The case study *inter alia* reveals that at the international level a participatory structure has meaning only if third world states, as also their relevant non-governmental organizations, are provided with necessary financial and technical assistance, to effectively participate in the work of an international body.

Part V of the paper looks at the case of refugee status determination conducted by UNHCR to suggest that GAL can most effectively serve as an instrument of resistance and change if the relevant substantive regime has a progressive character and possesses a human rights dimension that can be deployed to critique decision making by an international body. It is also contended that GAL can in such contexts be effectively implemented only if a watchdog role is played by Global Social Movements (GSMs) or concerned NGOs. Thus, the lesson from the implementation of administrative law at both the domestic and international levels is that in

the face of unequal power it is left to social movements and concerned NGOs to demand transparency, accountability and responsiveness from states and global agencies. This is especially true on the international plane where judicial intervention is not normally available.

Part VI of the paper contains some final reflections and lists the conditions in which GAL can act as an instrument of resistance and change.

II

Emerging Imperial Global State and Law: The Limits of GAL as a Tool of Resistance and Change

Character of contemporary international law and institutions

I have argued elsewhere that contemporary international law and institutions have an imperial character; a transnational capitalist class (TCC) has emerged which shapes international laws and institutions to its advantage⁴. This characterization *inter alia* rests on an evaluation of recent developments in the field of international economic law, the laws relating to the use of force, and international migration and refugee law. These developments have together laid the foundation of a world order in which the north-south divide continues to grow, the powerful states are less constrained in the use of force against third world states, and have constructed fortress Europe and America to keep out both economic migrants and asylum seekers.

If there is a core of truth to the thesis that contemporary international law and institutions have an imperial character it is easy to overstate the role that GAL, as an integral part of these laws and institutions, can play in their democratization and progressive transformation. While it is important not to take a nihilist view of GAL, for any advance towards the latter goals is worthwhile, it is equally significant to recognize the limits of GAL.

The emerging global state

At the national level the nature and content of “rule of law”, and thereby administrative law, is *inter alia* shaped by the nature and character of the state. For instance, administrative law has a different content in liberal democratic states than in states that are not democracies; in the

⁴ B.S.Chimni, *Marxism and International Law: A Contemporary Analysis*, February 6 Economic and Political Weekly 337 (1999); B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 European Journal of International Law, 1 (2004).

latter instance administrative law is somewhat underdeveloped⁵. For non-democracies do not take seriously the administrative law principles of transparency, accountability and responsiveness⁶. In short, an understanding of the working of *administrative law anticipates a theory of state and law*.

This is equally true at the global level. GAL can, in other words, assume different shape depending on the nature and character of international law and institutions. Today, in the era of globalization international law and institutions are increasingly playing a more significant and intrusive role than ever in the past, in particular vis-à-vis third world states. The latter are compelled to cede sovereign economic, social and political space to international institutions⁷. Arguably then *a global state is in the process of emerging* constituted by a range of international institutions that regulate social, economic and political life of states⁸. In fact *the emergence of GAL is evidence of the evolution of a nascent global state*.

What then needs to be theorized is the character of the emerging global state and law. If, as suggested, the emerging global state and law has an imperial character this fact naturally shapes and colors GAL. To put it differently, an imperial global state cannot easily coexist with the principles of GAL. More precisely, characterizing the global state and identifying the classes that exercise influence over it is important in the context of GAL for at least two reasons: first, it points to the fact that the dominant global classes will exercise the maximum influence on the evolution of GAL. Second, it helps stress the reality that some actors are in a better position to use GAL in defense of their interests. Thus, for example, a key agency of the TCC, the transnational corporation is better situated, given its huge resources, to use GAL to its advantage.

Conceptualizing GAL: Narrow vs. Broad definition

But most significantly, the character of the emerging global state is important from the standpoint of conceptualizing GAL. GAL can be defined either in a narrow or a broad manner depending on the political theory used to give meaning to developments in the area of

⁵ As Craig writes, 'concepts such as accountability, participation and rights do not possess only one meaning' and therefore 'differ depending upon the type of democratic regime within which they subsist'. P.P. Craig, ADMINISTRATIVE LAW (2003) Fifth edition p.3.

⁶ This understanding is, for example, implicitly embodied in the WTO Appellate Body report in the *EC Hormones* case wherein a legal link was established between democratic sentiment, in the form of "consumer anxiety" and trade law. See generally Oren Perez, *Reconstructing Science: The Hormone Conflict between the EU and the United States*, 1 European Foreign Affairs Review 563, 572 (1998); B.S.Chimni, *WTO and Environment: The Shrimp-Turtle and EC-Hormone cases*, May 13 Economic and Political Weekly, 1752 (2000).

⁷ Chimni, *supra* note 4, 1-39; Kingsbury, Krisch, and Stewart, *supra* note 2, 21-22.

⁸ Chimni, *supra* note 4.

international law and institutions in the era of globalization⁹. Kingsbury, Krisch and Stewart offer a narrow definition of GAL on the basis of a dualistic understanding of international law viz., that international law does not directly address private entities and individuals. According to Kingsbury, Krisch and Stewart, ‘we may identify global administrative action as all rule-making and adjudications or other decisions of particular matters that are neither treaty-making nor simple dispute settlement between disputing parties’¹⁰.

The narrow definition of GAL thus incorporates the understanding that GAL represents merely an early departure from the continuing dualistic understanding of international law. It searches for examples of such departures to see if certain principles and best practices of administrative law can be brought to bear on them. Thus, for example, we can look at the work of the Codex Alimentarius Commission or that of the Basel Committee or the World Bank’s Inspection Panel. The idea is to identify all those agencies and mechanisms that should be subject to principles and good practices that should/are coming to form part of GAL.

But the dualistic understanding of international law that dictates a strict separation between substantive law and administrative law is difficult to sustain at a time when globalization has transformed the nature of international law and institutions. Recent developments have, among other things, turned nation states into administrative agencies (as in the case of the WTO¹¹) compelling consideration of the idea of global democracy and global citizenship. What is therefore called for is a broad definition of GAL that goes beyond a dualistic understanding and takes into account the emergence of a nascent global state. This theoretical matrix is much more demanding in terms of conceptualizing GAL. The broader definition of GAL does not, in the face of democracy deficit that characterizes international institutions and bodies, accept the strict separation between substantive law and administrative law.

For, among other things, there is no unique way of classifying developments as representing GAL. Thus, for example, the *Shrimp Turtle II (United States- Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia)* report of the WTO AB may either be seen as an important positive administrative law development, as

⁹ In his well known book on *Administrative Law* Craig draws attention to the fact that ‘an adequate understanding of the nature and purpose of administrative law requires us to probe further into the way in which our society is ordered. At the most basic level it requires us to articulate more specifically the type of democratic society in which we live and to have some vision of the political theory which that society espouses’. Craig, *supra* note 5, p.3.

¹⁰ Kingsbury, Krisch and Stewart, *supra* note 2, 5.

¹¹ Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law* IILJ 2005/7, p.42. http://www.iilj.org/publications/wp_globadminlaw.htm

Kingsbury et al do, or as an interpretation which transforms substantive rules to the disadvantage of the third world countries in the name of ensuring transparency, accountability and deliberative democracy¹². I have argued elsewhere that the WTO AB Report in the *Shrimp Turtle II* case legitimizes unilateral trade measures to realize domestic environmental goals through linking it to a consultative process ignoring the fact that this process is subject to power dynamics¹³. More significantly, on my reading of *Shrimp Turtle II* case, the affected state cannot in the final analysis prevent a state taking a unilateral trade measure, as the obligation on the state taking the measure is only to negotiate and not to arrive at a mutually acceptable agreement¹⁴. The idea of a prior due process should also be given meaning in the background of the fact that the *Shrimp-Turtle* case represents a radical departure from the *Tuna Dolphin* cases in accepting the validity of unilateral trade measures for environmental protection¹⁵.

To sum up, emerging GAL is an integral part of international law and institutions that have an imperial character. As in the case of a non-democratic nation-state, non-democratic international laws and institutions, or the imperial nascent global state, cannot tolerate a robust application of principles of administrative law. GAL is today being shaped by a TCC that seeks to legitimize unequal laws and institutions and deploy it to its advantage. But even if we were to reject this understanding there are questions as to whether GAL can serve as a tool of resistance and change. It is useful in this regard to look at the national experience of a

¹² Kingsbury et al observe: 'A striking effort to promote forum state protection of the interests of the affected states is the first WTO Appellate Body ruling in the Shrimp/Turtle case. In order for process-based import restrictions to be admissible under GATT, the Appellate Body ruled, prior multilateral negotiations were necessary and the countries affected were entitled to some form of due process as well as consideration of their interests and local circumstances in specific decisions applying such restrictions taken by US administrative authorities', Kingsbury, Krisch and Stewart, *supra* note 2, 21.

¹³ B.S.Chimni, *WTO and Environment: The Legitimization of Unilateral Trade Sanctions*, January 12-18 Economic and Political Weekly (2002) 133; As Shaffer has noted :

...process-based review also raises serious concerns, in particular, because processes can be manipulated to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome. Even if international case-by-case review were possible (which it is not), it will be difficult, if not impossible, for an international body to determine the extent to which a national agency actually takes account of foreign interests. Powerful actors can thus go through the formal steps of due process without meaningfully considering the views of the affected parties. In the shrimp-turtle case, the U.S. Department of State simply revised its procedural rules to comply with the Appellate Body's criteria, while still requiring developing country shrimpers to use U.S.- mandated "turtle excluder devices" if they wish to sell their shrimp in the U.S. market'

Greg Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, in Michael Barnett and Bud Duvall eds., *POWER AND GLOBAL GOVERNANCE* (2005) 130-161.

¹⁴ Chimni, *supra* note 13.

¹⁵ *Ibid*.

third world country like India with respect to the development and enforcement of administrative law.

III

Implementing GAL: The Experience of Administrative Law in India

The experience of India is of relevance as access to judicial review of administrative decisions, more or less ruled out on the international plane, is not practicable for a vast majority of its people. It is only a theoretical possibility. The Indian experience is also relevant because despite being a democratic country the development and enforcement of administrative law is determined by power dynamics. Baxi has thus observed that ‘administrative law in India is an archive of violent social juridical exclusion of suffering of the Indian “masses” and a saga of solicitude for the Indian “classes”’¹⁶:

We have to realize that the great utterances of courts on fairness, freedom from arbitrariness and natural justice have little or no relevance for the untouchables, adivasis, landless laborers, bonded labor, casual and contract labor, undertrials and prisoners, beggars and ‘vagrants’, mentally sick (‘lunatics’) and many other allied groups of underprivileged and deprived¹⁷.

Baxi talks about the ‘boundless manipulability’ of administrative law by the “middle classes” to stop it from realizing its ‘benign potential’¹⁸. Therefore the central question in his view is ‘how do we re-imagine, refashion, retool administrative law doctrines and methods (technologies) in ways which will truly begin to protect and promote the rights and interest of the impoverished masses of India?’¹⁹.

Baxi suggests that ‘we ought to bear in mind that courts are not the only agencies for combating and controlling excesses of public power’²⁰. Indeed, according to him, ‘it is doubtful that courts have been the decisive instrumentalities of generating an ethic of power anywhere in the world’²¹. At one point he goes on to say that ‘taken in its entire context, the appearance and reality of judicial arbitrariness presents a grave threat to the development and impact of

¹⁶ Upendra Baxi, *Introduction* in I.P.Massey ADMINISTRATIVE LAW Fifth edition, (2001) xiii.

¹⁷ Ibid, p.xxiv. “The insensitivity of the administrative system to the needs of the poor, even to prevent starvation, has been confirmed by first-hand surveys and reports by journalists and non-governmental organizations’. Bimal Jalan, THE FUTURE OF INDIA: POLITICS, ECONOMICS AND GOVERNANCE (2005) p.108.

¹⁸ Baxi, *supra* note 16, xiv-xv.

¹⁹ Ibid, xxvii

²⁰ Ibid, xxxiv

²¹ Ibid, xxxv

administrative law jurisprudence towards the growth of an ethic of public power'²². He suggests exploring feasible alternative options for the development and implementation of administrative law²³. This suggestion has even greater relevance on the global plane where judicial intervention is unavailable.

The alternative options to judicial intervention for the development and enforcement of administrative law can be threefold. The first option of course is that the state administration takes the initiative and responds to the concerns of ordinary citizens by introducing greater transparency, accountability and responsiveness in its work. A possible example of this is the Delhi “Bhagidari” Scheme that recently won the UN Public Service Award, 2005 for improving transparency accountability and responsiveness in public service²⁴. The “Bhagidari” scheme has been implemented in the National Capital Territory of Delhi with its own legislative assembly and chief minister ²⁵. Among the criteria for giving the award in the UN Public Service Award category is the promotion of social equity:

Promotes equity. This criterion involves extending government service delivery to vulnerable groups and/or enables service delivery to a wider population, particularly through mechanisms that promote social inclusion relating to gender equality, cultural diversity, the youth, elderly, disabled and other vulnerable populations²⁶.

The scheme should also have promoted transparency and accountability, professionalism, and represented a ‘radical departure in design’²⁷.

The official website of the Delhi Government describes the “Bhagidari” scheme thus:

“**Bhagidari**”, the Citizen’s Partnership in Governance -

- * is a means for facilitating citywide changes in Delhi,
- * utilises processes and principles of multi-stakeholders (citizen groups, NGOs, the Government ...) collaboration,
- * applies the method of Large Group Interactive Events,

²² Ibid, xxxvii-xxxviii

²³ Ibid: xxxviii

²⁴ For the list of winners see: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020145.pdf>

²⁵ For details see <http://delhiassembly.nic.in/index.asp>

²⁶ For the criteria in giving the awards see <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan018419.pdf>

²⁷ Ibid.

* aims to develop ‘joint ownership’ by the citizens and government of the change process,

* facilitates people’s participation in governance²⁸.

The “Bhagidari” scheme has been implemented in relation to different public services and activities, resulting in the award for public service by the UN²⁹.

A second option for the non-judicial development and implementation of administrative law principles is that social movements (or concerned NGOs) play a watchdog role. It is most often social movements/NGOs that initiate struggles to compel administrative bodies to function in a transparent, responsive, and accountable manner. This is the case even when administrative bodies are required to abide by core administrative law principles of participation, transparency and accountability. To take a recent example, in August 2005 Resident Welfare Associations (RWAs), NGOs and citizen forum’s in Delhi agitated to get the Delhi government to withdraw a ten per cent increase in power tariff in urban areas. These organizations complained of the absence of transparency and participation in the taking of the decision by the Delhi government. In the absence of sufficient justification the Chief Minister of Delhi was compelled to withdraw the increase in power tariff. The power agitation underlines the critical role of social movements even where an appropriate administrative structure such as the “Bhagidari” scheme has been put in place³⁰.

A third non-judicial option that can facilitate the implementation of administrative law principles is a proactive right to information law. It can go a long way to making the functioning of administrative bodies transparent and accountable and thereby make the task of social movements easier. The passage of the Right to Information Act, 2005 in India is a step in this direction; it will come into force on October 12, 2005. The act seeks ‘to promote transparency and accountability in the working of every public authority’. It has been enacted in the belief that ‘an informed citizenry and transparency of information’ is vital in any democracy ‘to hold governments and their instrumentalities accountable to the governed’. Its enactment holds out the

²⁸ “Bhagidari” <http://delhigovt.nic.in/bhagi.asp>

²⁹ For details see *ibid*.

³⁰ See Delhi Resident Welfare Association Joint Front launches protest action against power and water charges <http://www.geocities.com/lokrajsangathan/pages2/rRWA5806.htm>; Delhi power hike to be rolled back in its entirety http://www.ciionline.org/news/newsMain.asp?news_id=8312005103655AM; Aman Sethi, *The price of reforms* Frontline, September 23, 2005, p.37.

serious hope that social movements can now access information necessary to promote social and administrative justice.

The hope is sustained by the experience of social movements with the right to information act legislated in Rajasthan, a state of the Indian Union, in the year 2000³¹. The Rajasthan Right to Information Act, 2000 has, among other things, been used by NGOs to check corruption in rural works. Well known activists Aruna Roy and Nikhil Dey refer to two such incidents:

In 1998 (...) the Sarpanches [local officials] of Kukarkhada (Rajsamand district), Rawatmala and Surajpura (Ajmer district) apologized for committing fraud and publicly returned money after being confronted with incontrovertible public evidence at a public hearing. In 2001, in Janawad panchayat (Rajsamand district) the information of public works expenditure painted on a panchayat wall led to the people to mobilize and protest exposing fraud and ghost works amounting Rs.70 lakh, at a public hearing. This was later substantiated by a special government investigation leading to a number of institutionalized measures of transparency and accountability. Landmark events like these, facilitated by people's use of the right to information, have had a profound impact in the whole State. Slowly but surely, corruption in public works has been curtailed³².

The Indian experience shows that the role of social movements can prove particularly critical at the global level given the fact that judicial intervention is often not a possibility. GSMs can be alert to violation of the right to administrative justice and insist on transparency, accountability and responsiveness in international institutions that suffer from serious democracy deficit. GSMs have already played an important role, for example, in relation to incorporation of environment related criteria in World Bank supported projects (albeit it cannot be said that GSMs have made a substantial difference to the basic role the Bank plays in international economic relations)³³. GSMs in order to be effective need, like at the national level, a global right to information convention so as to allow NGOs and ordinary citizens access to information about the working of international administrative bodies. In playing their watch dog role GSMs

³¹ The text of the act is available at <http://www.rajasthan.gov.in/ACTS%20AND%20RULES.SHTM>

³² Aruna Roy and Nikhil Dey, *Guaranteeing action for employment*, The Hindu August 15, 2005. See also Aruna Roy and Nikhil Dey, *The Right to Information: Facilitating People's Participation and State Accountability* http://64.233.187.104/search?q=cache:rLC5oRJOqoAJ:www.undp.org/governance/docsaccess/right_to_informatio_n.pdf+Aruna+Roy+and+Nikhil+Dey%2BRight+to+Information&hl=e; Neelabh Mishra, *People's Right to Information Movement: Lessons from Rajasthan* Discussion Paper Series-4 UNDP, New Delhi, 2003.

³³ The World Bank's 'opening to civil society can be traced to its need to respond to its demands from funders for increased transparency and responsiveness'. R. O'Brien, A.M.Goetz, J.A. Scholte and M. Williams *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* (2000) 218.

can consider the formation of *global teams* of eminent individuals and concerned NGOs to monitor administrative decision-making in specific institutions. It would allow a sustained monitoring of appropriate bodies.

IV

Implementing GAL I: The Case of Codex Alimentarius Commission

Be that as it may, international bodies need to adopt measures to strengthen their participatory structure, transparent functioning and accountability. The need for a more participatory structure may be illustrated with reference to the workings of the Codex Alimentarius Commission (hereafter Codex).

Established in 1963 by FAO and WHO Codex is the foremost international body to set food standards³⁴. It has acquired an added edge and salience after being referred to in the WTO Agreement on Sanitary and Phyto-Sanitary Measures (SPS)³⁵. From the standpoint of developing countries ‘building a roster of objective, scientifically based food-safety standards’ is ‘a potential safeguard [...] against developed nation efforts to disguise trade barriers as safety standards’³⁶. Arriving at appropriate standards is also significant from the point of view of consumer interests and for environmental protection both in the first and third worlds.

³⁴ Its functions are stated in Article 1, Statutes of the Codex Alimentarius Commission: ‘The Codex Alimentarius Commission shall ... be responsible for making proposals to, and shall be consulted by, the Directors-General of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme, the purpose of which is:

(a) protecting the health of consumers and ensuring fair practices in the food trade;

(b) promoting coordination of all food standards work undertaken by international governmental and non-governmental organizations;

(c) determining priorities and initiating and guiding the preparation of draft standards through and with the aid of appropriate organizations;

(d) finalizing standards elaborated under (a) above and, after acceptance by governments, publishing them in a Codex Alimentarius either as regional or world wide standards, together with international standards already finalized by other bodies under (b) above, wherever this is practicable;

(e) amending published standards, after appropriate survey in the light of developments’

http://www.fao.org/documents/show_cdr.asp?url_file=//docrep/w9114e/W9114e04.htm

³⁵ See Article 3 paragraph 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1995) p.71; Frode Veggeland and Svein Ole Borgen, *Changing the Codex: The Role of International Institutions*, Working paper 2002–16, NILF Norwegian Agricultural Economics Research Institute (2002) 15, 26, http://www.ecolomics-international.org/caa_veggeland_borgen_changing_codex_nilf_oslo_02.pdf The reason is that while Codex standards ‘do not have the force of international law’ there is ‘the risk of ending up in trade disputes in the WTO is increased when states choose to implement measures that deviate from Codex standards and principles’ *ibid*, p.15.

³⁶ James Steinberg, and Michael Mazarr, *Developing Country Participation in Transnational Decision Making: Lessons for IT Governance*. Codex ‘follows an eight step procedure for the elaboration of its standards, guidelines and other texts which provides time and opportunity to all interested members/organizations to interact on the draft stage and to have their comments heard before a new standard is adopted by the Commission’, <http://codexindia.nic.in/upecs.htm> . For further details see <http://www.fao.org/codex/manual/Manual12ce.pdf>

The objectives of Codex have not been realized in practice for a variety of reasons. First, while the industry (of the developed world) actively participates in formulating Codex standards ‘consumers, public health advocates, and environmental organizations have been relative latecomers, and still comprise a very minor voice’³⁷. Although in recent years, ‘some consumer and environmental organizations have attended Codex meetings and have sought to make Codex more open and participatory’ such representation has ‘remained sporadic and Codex has not yet significantly reformed its processes to ensure more meaningful public participation’³⁸. This is even more the case for consumer and environmental representation of developing countries as they are poorly organized and lack the resources and expertise for effective intervention. While some third world states (for instance, India, Republic of Korea, Thailand, Malaysia and Sri Lanka in Asia) are taking steps to consult consumer organizations at the national level the extent of consultation and participation is not known³⁹. This situation is to be contrasted with the fact that transnational corporations play an important role in framing standards. It led some delegations and observers to the Twenty-Fifth Extraordinary Session of the Codex to express the view that:

...contributions from the private sector, and especially the food industry and related sectors, should not be accepted as it might unduly influence the Codex process⁴⁰.

Second, the overall participation of developing countries themselves is inadequate and ineffective. Steinberg and Mazarr have cited the following reasons for the weak influence of developing countries in the Codex: (1) developing countries most often do not participate in the meetings given the inability to meet the travel and other expenses of participants⁴¹; (2) members from developing countries have received little support from their governments⁴²; (3) developing

³⁷ ‘Comments of Public Citizen, Inc. Regarding FDA’s Consideration of Codex Alimentarius Standards’ (1997) http://www.citizen.org/litigation/briefs/HealthSafety/_harmonize_/articles.cfm?ID=5212

³⁸ ALINORM 03/25/5, February 2003 Report: Codex Alimentarius Commission Twenty-Fifth (Extraordinary) Session Geneva (Switzerland), 13-15 February 2003, para 44.

³⁹ Alinorm 05/28/15, Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, Twenty-eighth Session Rome, Italy, 4-9 July 2005: Report of the Fourteenth Session of the FAO/WHO Coordinating Committee for Asia, Jeju-Do, Republic of Korea, 7-10 September 2004, paras 95-101.

⁴⁰ ALINORM 03/25/5, February 2003 Report: Codex Alimentarius Commission Twenty-Fifth (Extraordinary) Session Geneva (Switzerland), 13-15 February 2003, para 44.

⁴¹ Steinberg and Mazarr, *supra* note 36, 6 http://www.markle.org/downloadable_assets/lessons_it_governance.pdf

⁴² ‘...developing state members of Codex have often received *little meaningful support from their home countries*, in the form of technical information, financial assistance, or coalition-building efforts. The lack of effective civil society institutions supporting and/or critiquing government policy on food-safety issues is a striking gap’, Steinberg and Mazarr, *supra* note 36, 6.

countries have held few leadership positions in the primary committees⁴³; and (4) the complexities involved in ‘tracking implementation requirements’⁴⁴.

A Codex Trust Fund to finance the greater participation of developing countries was launched and became operational on 1 March 2004⁴⁵. How well has the Trust Fund worked in practice? According to the official report of the administrator of the Trust Fund it ‘meets a real need’:

The Trust Fund has already funded 37 countries: 40% are least developed countries, and 19% participated for the first time in Codex activities. By the end of 2004, it is expected that around 90 countries will have benefited from the support of the Trust Fund⁴⁶.

While the Trust Fund is certainly a step in the right direction it remains to be seen whether it will have enough resources to meet its objectives. India, for instance, has expressed concern that the widened ambit of the Trust Fund that seeks also to transform domestic practices rather than simply promote greater participation of developing countries may, given its meager resources, mean that the objective of promoting greater participation may suffer⁴⁷. Furthermore, the strong presence of the

⁴³ ‘Developing states hold few leadership positions. Of the primary committees listed on the Codex Web site, only two are hosted by developing or transition economies, and these are upper-middle tier nations—Hungary and Mexico. This pattern is common to standard-setting bodies. In the related case of ISO, for example, in recent years developing countries comprised about 75 percent of membership but held only about 2 or 3 percent of the secretariat positions and committee chairs’, Steinberg and Mazarr, *supra* note 36, 6.

⁴⁴ ‘Tracking implementation requirements has proven to be difficult, partly because of the great complexity of a system in which international Codex standards sit uneasily on top of dozens of conflicting national ones. The Codex itself might demand 20 yearly committee meetings, held all over the world, each with its own highly technical information to be digested and decisions to be made, Steinberg and Mazarr, *supra* note 36, 6.

⁴⁵ For the detailed objectives of the Fund see Codex Trust Fund: <http://www.who.int/foodsafety/codex/trustfund/en/index1.html> For detailed statement see FAO/WHO Cooperative Programme Multi-donor Project, Project Document, 17 June 2003, FAO/WHO Project and Fund for Enhanced Participation in Codex <http://www.who.int/foodsafety/codex/trustfund/en/index2.html>

⁴⁶ CAC/27 INF.9, Agenda Item 15, Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Twenty-seventh Session, International Conference Centre, Geneva (Switzerland), 28 June – 3 July 2004* FAO/WHO Project and Fund for Enhanced Participation in Codex: Report of the Administrator, paras 4- 5. The Report is available at <http://www.who.int/foodsafety/codex/trustfund/en/>

⁴⁷ India has strongly objected to the enlargement of the “original objectives” for setting up the trust fund. It has gone on record stating:

The main objective for which the developing countries have been requesting for setting up of a separate Trust Fund was to provide support and enhance the capacity of the developing and least developed countries to participate in the Codex work, may it be the meetings of the CAC or its Committees or the Task Forces or Working Groups for increased credibility and legitimacy of the Codex process.

Considering the needs in this regard, enhancing the goals and objective for *extending the support to all areas of world to participate in international standards- setting work in the framework of Codex and enhancing their capacity to establish effective food safety and quality standards and fair trade practices in*

private industry, the absence of serious expertise of developing countries and their consumer and environment organizations, and the lack of development of national codex committees pose a major hurdle to the effective participation of developing countries and their consumer and environment organizations in the Codex work.

There are other obstacles in ensuring the *effective* participation of developing countries in the work of Codex. First, there is the problem of the process followed in the Commission. As one report explains: ‘Codex can ensure its claim to global status only through full participation of developing countries as Commission members, a condition that depends on the consensus model in decision making. However, the repeated instances of chairs of committees and working groups declaring consensus when its absence is obvious threatens to erode the confidence of member countries as well as the public in the commitment of Codex to protecting health’⁴⁸.

Second, there is the related issue that ‘once a standard is agreed upon, it tends to be difficult to carry out significant changes to it. This ‘irreversible’ nature of Codex decisions relates to the principle of consensus-based decision-making, which is well established and anchored within the Codex system...Once a negotiated order is attained, dramatic and quick changes are unlikely to be initiated...’⁴⁹. Therefore, the participation of developing countries in future work may not bring the results it desires for it calls for renegotiating standards not favorable to the interests of the developed countries and transnational corporations.

Third, developing countries will incur substantial costs to implement the WTO Agreement on SPS measures⁵⁰. Thus, for example,

...a government analysis of the compliance costs with the SPS Agreement and Codex standards for Sri Lankan cocoa and spice exports estimates that training costs alone for

food trade, both in the framework of Codex and in their own countries or strengthening of capacity of developing countries and countries with economies in transition to build strong and compatible food control system through exchanges, knowledge transfer and professional development through Codex and to help all Codex Members benefit from the knowledge base and control systems that will emerge as a result of activities of the Project, which requires huge budget, will substantially reduce the proportion of the funds that could be available to the developing countries for participation in Codex work and hence, India strongly opposes the revised goals and objectives and urges that the propose enlarged goals and objectives should be deleted and this should be restricted to the basis objective for supporting the developing and least developed countries for participation in the Codex work and process and the support for capacity building and other activities should be totally excluded (Emphasis in original).

Agenda Item 4 CX/MPH 03/4 Add..., Joint FAO/WHO Food Standards Programme, Executive Committee of the Codex Alimentarius Commission, Fifty-first (Extraordinary) Session Geneva, Switzerland, 13-15 February 2003, India’s Comments: Trust Fund for Participation of Developing Countries and Countries in Transition in the Work of the Codex Alimentarius Commission, <http://codexindia.nic.in/ipcac.htm#> On the terms of reference of the National Codex Committee see *Codex India*, <http://codexindia.nic.in/comm.htm>

⁴⁸ Ibid

⁴⁹ Vegeeland and Ole Borgen, *supra* note 33, 16.

⁵⁰ Steven Suppan and Rod Leonard *Comments Submitted to the Independent Evaluation of the Codex Alimentarius and Other FAO-WHO Work on Food Standard* <http://www.agobservatory.org/library.cfm?refID=30278>

the country's 70,000 spice traders would be about U.S.\$1.95 million. The government has a budget of just U.S.\$24,000 for such training. Then, for the training in Codex standards to result, in theory, in greater exports and export revenues, Sri Lanka would have to acquire better storage facilities and drying and processing technology, to avoid microbial contamination.⁵¹

Members have also drawn attention to problems relating to the ability of developing countries to meet traceability requirements, as also the cost implications, with potentially negative impact on trade⁵². In short, the relationship of cost and benefits in relation to Codex standards needs to be worked out⁵³.

Finally, the WTO AB has held that higher than international standards (i.e., Codex standards) can be used by states as long as it meets the pre-conditions in the WTO SPS agreement. The use of a higher than international standard is not to be viewed as an exception to the use of international standards, but as a right of member states; the right is however subject to providing scientific justification and undertaking appropriate risk assessment⁵⁴. In the circumstances the participation of developing countries in the work of the Codex is no longer as significant as it is often made out to be. It goes to show the limits of GAL where the substantive law is flexible enough to accommodate the interests of powerful states.

The work of the Codex has in recent years been appraised by a FAO/WHO evaluation committee and a group of independent consultants⁵⁵. Some changes have been recommended by way of rationalizing its work and ensuring greater participation of developing countries in the

⁵¹ Ibid. Suppan and Leonard further note:

... the proposed fund to facilitate LDC participation in Codex negotiations, even if it is financed, does not address the greater developing country concern that they have not been able to implement and enforce existing Codex standards and the WTO SPS Agreement, much less implement an accelerated schedule of standards. This lack of capacity for implementing standards is a subset of the greater capacity building crisis in public health that WHO is addressing through its Commission on Macroeconomics and Health. Referring to the work of the Commission, Deepak Gupta has written that developing country public health expenditure averages just U.S.\$4 per capita, so that giving food safety a priority in public health is a great political, technical and financial challenge. Dr. Gupta might have added that for many developing countries, structural adjustment demands on developing country government budgets often entail cuts to public health programs. Given such demands, perhaps only privately exported foods might meet Codex standards, with no or extremely little national public health benefit.

Steven Suppan and Rod Leonard, *supra* note 50.

⁵² "Traceability", <http://codexindia.nic.in/keytrace.htm>

⁵³ Suppan and Leonard, *supra* note 49.

⁵⁴ WT/DS 26/AB/R and WT/DS48/AB/R, January 16, 1998: EC Measures Concerning Meat and Meat products: Report of the Appellate Body, para 104.

⁵⁵ For a brief statement on the evaluation of Codex by FAO and WHO see http://www.codexalimentarius.net/web/evaluation_en.jsp. For the report of the independent committee see CX/EXEC 05/55/2 Part III Rev., December 2004, Agenda Item 2 (c), Joint FAO/WHO Food Standards Programme Executive Committee of the Codex Alimentarius Commission, Fifty-fifth Session, FAO Headquarters Rome (Italy), 9 – 11 February 2005: Review of Codex Committee Structure and Mandates of Codex Committees and Task Forces.

work of Codex. However, what is necessary in the light of the above analysis is a more extensive review of how developing countries, their consumer and environmental organizations, and ordinary citizens (both of the first and third worlds) can effectively participate in the work of Codex.

In sum, GAL can be a limited tool of resistance and change so far as Codex is concerned. It can ensure that Codex standards are formulated taking into account the concerns of developing countries, its consumer and environment organizations, and ordinary citizens. But this is unlikely at present given the widened ambit of the Codex Trust Fund, the inadequate expertise of the consumer and environment organizations in the developing world, the working procedures in place, and the “irreversible” nature of the standards. More significantly, the ambiguities in the SPS text has meant that the gains that may accrue to developing countries from implementing first principles of administrative law to Codex can be negated through interpretations of the substantive law. It emphasizes once again the limitations of a narrow and formalistic definition of GAL.

V

Implementing GAL II: UNHCR and Refugee Status

Determination

I now turn to an area of administrative decision making by an international agency—the UNHCR-- that has been ‘little studied’⁵⁶. The UNHCR carries out refugee status determination (RSD) with grave implications for the life and liberty of an individual⁵⁷. The numbers for which RSD is conducted has steadily grown:

The number of individual RSD applications received by UNHCR offices worldwide nearly doubled from 1997 to 2001. UNHCR performed RSD in at least 60 countries in 2001, nearly all in the developing world, and received approximately 66,000 individual refugee claims, more than the United States, five times more than Australia, and about as many as Austria, Belgium, Denmark, Greece and Spain combined. UNHCR RSD

⁵⁶ Michael Kagan, *The Beleaguered Gatekeeper: the Protection Challenges Posed by UNHCR Refugee Status Determination*, International Journal of Refugee Law (forthcoming) (on file with the author). I am indebted to Kagan for both ideas and for guidance with regard to literature in the field.

⁵⁷ ‘The stakes in refugee cases are grave; an incorrect decision can lead a person to detention, torture, execution, or other severe human rights violations. Unstructured and unreviewable credibility assessments lead to inconsistent decision-making and great risks of mistaken refusals to protect people in danger’ Michael Kagan, *Is Truth in the Eye of the Beholder: Objective Credibility Assessment in Refugee Status Determination*, Georgetown Immigration Law Journal (forthcoming); See also Mark Pallis, *The Operation of UNHCR’s Accountability Mechanisms* (on file with the author) p.5.

predominantly affects urban refugee populations, and is particularly common in the Middle East⁵⁸.

Today, UNHCR is undertaking RSD under its mandate in some 80 countries (two-thirds of which are State Parties to the 1951 Refugee Convention) and therefore there is good ground to believe the numbers of RSD applications received are larger⁵⁹.

Most of the RSD of UNHCR, as has been noted, is done in third world states⁶⁰. The UNHCR steps in only when a government is 'unwilling or unable to do so'⁶¹. The UNHCR may be either solely responsible for RSD or the government may be taking decisions but relying often on UNHCR assessment of cases⁶². UNHCR RSD facilitates protection for refugees in three principal ways: promoting respect for the principle of *non-refoulement*, helping in the promotion of durable solutions, and identifying refugees in need of social and economic assistance⁶³.

In the last decade some studies have appeared that have pointed to the lapses in the conduct of RSD by UNHCR. In a pioneering article Alexander noted the problems in the UNHCR RSD process and detailed the standards that 'a fair and open' RSD process should meet to 'bring itself into clear compliance with international human rights law':

- publication and wide availability of clear guidelines or rules for UNHCR staff working in refugee status determination,
- provision to all asylum seekers of standardized clear written information - in their own languages- on the criteria for refugee status and procedure used by UNHCR field offices,
- providing free access to independent legal advice and representation in relation to refugee status determination,
- encouraging and facilitating the presence of legal representatives or other advisers at all interviews and appeal hearings
- permitting asylum seekers to have access to all materials or information on which decisions are based,

⁵⁸ 'Backlogs of pending cases at UNHCR offices have grown as well, with more than 70,000 people waiting for UNHCR to decide their cases at the end of 2001' Kagan, *supra* note 56; Pallis, *supra* note 57, p.5.

⁵⁹ UNHCR Global Report 2004, p.89. The text is available at <http://www.unhcr.ch/cgi-bin/texis/vtx/template?page=publ&src=static/gr2004/gr2004toc.htm>

⁶⁰ 'Although most of this activity has been in the geopolitical south, UNHCR has also occasionally offered its RSD services as a means of resolving refugee protection conflicts in wealthy countries. In one of the most controversial recent examples, UNHCR performed RSD in Nauru to resolve the crisis over the Australia-bound asylum-seekers who were rescued at sea by the Tampa in 2001. UNHCR also offered to perform RSD to help resolve the British-French dispute over the Sangette camp near Calais in 2002, though in that case the governments did not accept'. Kagan, *supra* note 56.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid. Through RSD 'the U.N.'s refugee agency effectively decides among asylum-seekers who can be saved from deportation and in some cases released from detention, who can get humanitarian assistance, and often who can apply to resettle to third countries'. Ibid.

- provisions of transcripts of interviews to asylum seekers and their representatives,
- full written decisions including reasons for any decisions, particularly here claims are rejected,
- the establishment of an independent and impartial body to decide appeals, outside the branch office structure,
- appeals to involve a full review of the merits of the decision,
- appeals to be conducted as hearings with the right of appearance and representation,
- appeal decisions to be publicized and widely available,
- publication of detailed statistics on rates of recognition/rejection and appeals⁶⁴.

Kagan has likewise suggested that ‘clear standards of transparency’ should be established⁶⁵. UNHCR could, among other steps, establish ‘an independent UNHCR RSD Appeal Tribunal staffed by independent refugee law experts to publish rulings on selected cases emanating from field offices that raise important legal issues’⁶⁶.

At a more general level, over and beyond RSD activities, the UNHCR as a provider of humanitarian assistance needs to be accountable to its beneficiaries. Existing internal accountability mechanisms are inadequate as ‘they neither offer adequate sanctions nor remedies when fundamental rights of refugees and stateless persons have been directly violated by an act or omission of the UNHCR’⁶⁷. But UNHCR officers tend to respond like government officers

⁶⁴ Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 International Journal of Refugee Law (1999) 286-87. On the possible need to meet the obligations under international human rights law see also Pallis, *supra* note 57, 6.

⁶⁵ The ‘UNHCR can take several steps to improve the standards and transparency of its RSD work’:

- Publish clear guidelines for field office mandating them to follow procedural standards advocated by UNHCR for states.
- Publish all currently internal policies and procedures (whether local or global) concerning RSD, unless there are compelling reasons to keep a particular section internal.
- Create UNHCR RSD ombudsman office, and publish an annual or biannual report assessing and detailing RSD procedures used at its various offices.

Kagan, *supra* note 56.

⁶⁶ ‘All rejected asylum-seekers would continue to enjoy an appeal of right in local field offices. This tribunal would be a tertiary appeal level (rather than an automatic appeal) that would select cases from field offices that raise important issues. Its decisions would be binding on UNHCR offices, allowing UNHCR to develop an evolving body of jurisprudence from real cases. It would be similar to having an international refugee court, but since this tribunal would only hear appeals from U.N. offices, it would lack the political downsides implied in having a U.N. agency reviewing decisions by governments. Nevertheless, its precedents could be persuasive guidance for domestic courts hearing refugee cases’. Kagan, *supra* note 56.

⁶⁷ Hoi Trinh, *UNHCR and Accountability: The Non-Reviewability of UNHCR Decisions* in Andrzej Bolesta ed., *FORCED MIGRATION AND THE CONTEMPORARY WORLD: CHALLENGES TO THE INTERNATIONAL SYSTEM* (2003) 51. Later Trinh adds:

...the concept of accountability currently underpinning UNHCR (and the UN) internal mechanisms of oversight needs to be expanded to indicate a rights based approach. Presently, administrative reports seldom result in sanctions on the officials responsible for the guilty conduct. Nor do they address the crucial question of remedies to the aggrieved parties. For anyone to take the UNHCR’s claim seriously that

and may argue that ‘...introduction of modern administrative law principles will increase workloads, leading to increased staff requirements, and more expense’⁶⁸. Another obstacle is its defensive institutional culture: ‘... the UNHCR sometimes acts as if its above criticism and normal measures of accountability’⁶⁹. On the other hand, the refugee constituency ‘lacks not only the leverage and the expertise but also the means and the resources’⁷⁰. According to Trinh ‘advocacy and media pressure’ are perhaps ‘the only effective course of action available to those whose lives may be short-changed by the UNHCR’⁷¹.

In this context the role of NGOs becomes significant. At the 55th annual session of the UNHCR Executive Committee meeting in Geneva in October 2004, a joint statement by NGOs noted its concern with the fairness of RSD practices of UNHCR in Africa, Middle East, and Asia. They particularly mentioned ‘the use of secret evidence; failure to provide reasons for rejection to unsuccessful applicants; the lack of independent appeals processes; denial of the right to legal counsel; and the use of untrained interpreters’⁷². The NGOs also called on

it is accountable to the people it serves, the existing internal mechanism should and must be expanded to include a Refugee Review Tribunal set up as it has already existed in most Western countries dealing with issues of asylum and refugee protection (Ibid, pp. 52-53).

For a detailed analysis of the internal accountability mechanisms see Pallis, *supra* note 56.

⁶⁸ Alexander, *supra* note 64, 286.

⁶⁹ As Loescher elaborates:

The UNHCR possesses a self-contained culture that focusses largely on protecting the agency’s reputation and cultivating the largesse of its patrons-the donor and host state community. The office is jealous and protective of its turf. It is extremely sensitive to external criticism and it is largely unaccountable to the populations it is mandated to protect. It also suffers from a lack of internal openness and defensiveness on the part of senior management. The UNHCR’s culture of defensiveness impedes learning and innovation in the policy process. It also causes the office to make the same costly mistakes repeatedly, sometimes doing more harm than good to refugee populations.

Gil Loescher, THE UNHCR AND WORLD POLITICS: A PERILOUS PATH (2001) 358.

⁷⁰ Trinh, *supra* note 67, 47-48.

⁷¹ Ibid, 45.

⁷² NGO Statement on International Protection, UNHCR’s Executive Committee, 4-8 October 2004, 8 October 2004. In a study done by Human Rights Watch that *inter alia* looked at UNHCR RSD in Nairobi it made the following recommendations:

- UNHCR should provide all asylum seekers with written information in their own language on: i) the legal standards to be applied; ii) a realistic indicative timetable for each stage of the determination process; and iii) when applicable, detailed reasons for rejection. For purposes of accountability, both the asylum seeker and the officer conducting the interview should sign this written information indicating that it was transmitted and received.
- UNHCR should post a notice board indicating by case number as made known to each asylum seeker (individual identities should not be disclosed) the progress of processing for each asylum seeker’s file. If confidentiality concerns still prevent being able to post individualized tracking systems aligned with each asylum seekers’ case number, then at least a generalized tracking system should be posted, indicating the progress of all files submitted on a given day.

‘UNHCR to initiate public consultations on the new draft refugee status determination procedures’⁷³. In a separate joint statement about UNHCR’s Evaluation and inspection program, NGOs called for an independent assessment of UNHCR’s RSD work and suggested that such an evaluation ‘be carried out by a team that includes international human rights lawyers, international and national NGOs working on refugee issues, academics, and legal aid practitioners’⁷⁴. The evaluation would ‘recommend rights-based RSD procedures to be followed consistently by all field protection officers with a mechanism to ensure their implementation’⁷⁵.

Faced with academic and NGO criticism, UNHCR has repeatedly announced a commitment to improve its RSD activities⁷⁶. The UNHCR has now indicated that a new Handbook governing its RSD work has been drafted⁷⁷. Further, the UNHCR’s Department of International Protection (DIP) continues to work to make RSD procedures more effective through a RSD project⁷⁸.

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- UNHCR offices should have adequate personnel and resources so that status determinations are fair and efficient, keeping in mind the particular difficulties and needs of applicants

Human Rights Watch, HIDDEN IN PLAIN VIEW: REFUGEES LIVING WITHOUT PROTECTION IN NAIROBI AND KAMPALA (2002).

⁷³ Ibid.

⁷⁴ NGO Statement on Evaluation and Inspection Activities, UNHCR’s Executive Committee, 4-8 October 2004, 10 October 2004.

⁷⁵ Ibid

⁷⁶ RSDwatch.org http://www.rsdwatch.org/index_files/Page441.htm

⁷⁷ In October 2003, UNHCR’s Director of International Protection Erika Feller told the UNHCR Executive Committee:

This autumn, the Department will issue a procedural standards directive for refugee status determination under UNHCR’s mandate. The purpose of the latter is to promote greater harmonization in UNHCR’s RSD procedures and to improve standards of due process, integrity and oversight.

On October 7, 2004, Feller told the Executive Committee:

DIP [Department of International Protection] has also increased its operational support to the field on RSD-related matters, even while it is assessing the results of the field testing of the Procedural Standards for RSD Under UNHCR’s Mandate, which were issued at the end of last year and distributed for initial implementation among Field Offices. We are also undertaking a concerted analysis of the role of RSD in UNHCR’s global protection strategies, with a view to seeing where we should be strengthening our efforts, as well as where RSD might not be the correct response.

http://www.rsdwatch.org/index_files/Page441.htm

⁷⁸ The RSD Project aims at improving the quality, integrity and efficiency of RSD procedures worldwide by providing advice on procedural issues, developing appropriate standard operating procedures in RSD operations, coordinating the implementation of these procedural standards and evaluating UNHCR’s RSD operations. The project also assists in designing and delivering RSD training to UNHCR staff. Seventeen international consultants and 12 United Nations Volunteers (UNVs) were deployed through this project to assist UNHCR field offices and governments in 19 countries to undertake RSD. The deployees assisted in reducing backlogs of asylum applications. Some 6,000 cases were processed, comprising over 14,000 applicants. They helped to develop and implement RSD procedures and in training UNHCR and NGO staff.

A RSD Unit has also been established within the Protection Capacity Section of DIP in order to enhance UNHCR's capacity in RSD operations. In particular, the RSD Unit is providing advice to Field Offices on procedural as well as substantial issues pertaining to RSD; facilitating the development of appropriate standard operating procedures in RSD operations; coordinating the design and delivery of comprehensive training to staff who are performing RSD; evaluating UNHCR RSD operations, and participating in oversight/investigation missions in significant RSD operations⁷⁹.

But critics rightly complain that ‘to date, UNHCR has not made public any of these documents referred to in these official statements about reform, although NGOs have called on UNHCR to initiate public consultations’⁸⁰. It shows that GAL cannot act as a tool of change unless a more open institutional culture is established. I have elsewhere argued, relying on the work of Jurgen Habermas, that the international refugee regime can only be reformed through a dialogic process⁸¹. The dialogue has to take place not only between UNHCR and NGOs and UNHCR and the refugee community but also within UNHCR. The states have inevitably to be involved for the solution to many a problem -such as setting up of an appropriate appeal structure- lies in more resources. In short, a dialogic process must replace a defensive institutional culture that is unwilling to respond to legitimate criticisms. If the UNHCR does not enter the dialogic process voluntarily it must be compelled to do so through the collective action of the NGO community in alliance with progressive academics.

In sum, GAL holds promise when it comes to the RSD activities of UNHCR. It could help save the life and liberty of hundreds of asylum seekers. Of course, the principles of transparency and accountability also need to be built into UNHCR’s humanitarian assistance activities. What is required in these regards is an open institutional culture. For this to happen concerned NGOs need to play, as RSDwatch for example is doing, an important role in drawing

‘The varied operational environments in which UNHCR undertakes RSD make the “*RSD Procedural Standards*”, issued in December 2003, a challenge to implement. Support and implementation missions in 2004 assisted in evaluating the impact and level of implementation of the standards. This process will expand to include NGOs and governments in 2005 with a view to the promulgation of standards externally while simultaneously ensuring that they are effectively implemented internally within UNHCR’⁷⁸. UNHCR Global Report 2004, p.89, <http://www.unhcr.ch/cgi-bin/texis/vtx/template?page=publ&src=static/gr2004/gr2004toc.htm>

⁷⁹ <http://www.unhcr.ch/cgi-bin/texis/vtx/protect?id=3d3d26004>

⁸⁰ Ibid.

⁸¹ B.S.Chimni, The Reform of the International Refugee Regime: A Dialogic Approach, 14 Journal of Refugee Studies (2001) 151.

the attention of the international community to the current state of affairs. The results are already beginning to show⁸².

VI

Conclusions

The emergence and development of GAL is to be welcomed. It *inter alia* draws attention to a range of rules adopted, and decisions taken, by international bodies and non-state organizations that affect the rights of private actors, often without adhering to the basic principles and procedures of administrative law. However, from a third world perspective GAL has a limited role in injecting the elements of democracy, equity and justice in international law and international institutions. Indeed, GAL can be co-opted by powerful states to their advantage. While this is no reason for neglecting the development of GAL, it is important to understand its limits. GAL can, in other words, only act as *a very limited tool of resistance and change*. Even for this to happen certain conditions must be present.

Some of the conditions that will facilitate GAL to act as an instrument of resistance and change are:

- The administrative bodies in issue are an integral part of a progressive substantive international law regime;
- The substantive international law regime in issue has a strong human rights dimension;
- Sufficient resources and technical assistance are made available to developing states and concerned NGOs to effectively participate in administrative rule and decision-making;
- A global right to information convention is adopted allowing ordinary citizens and NGOs access to information about the working of international administrative bodies;
- Global teams of experts, eminent individuals and NGOs are formed to monitor administrative decision-making in particular areas;
- An open institutional culture prevails within concerned international agencies so that dialogue between stakeholders is institutionalized;
- GSMs and/or NGOs are active in taking up the cause of those affected by administrative rules and decision-making.

⁸² RSDwatch.org reports that ‘the UN refugee agency will publish long-awaited new refugee status determination procedural standards on 1 September 2005’. http://www.rsdwatch.org/index_files/Page333.htm