Global Administrative Law: Implications for National Courts

*Professor Benedict Kingsbury**

I Introduction

How should a legal or governance institution appraise an administrative rule or decision concerning global regulatory governance made by an institution or agency that is not part of the same politico-legal system? In this essay I address one sub-set of these situations: the question of how a national court should appraise a governance decision or administrative rule adopted by an external institution even though that decision or rule may have no binding force in international law nor any formal status in the law of the forum. As with many topics in the emerging field of global administrative law, the issue is only just coming to be clearly delineated. As such, there is no standard line of analysis of the problem among national courts. However, the number of cases raising such questions can be expected to grow rapidly in parallel with the rapid proliferation of global governance norms. This essay therefore suggests the possibility of a standardised approach that can be informed by concepts and ideas from global administrative law.

In their 1997 decision rejecting a complaint by the Air Line Pilots' Association that certain disclosures from the cockpit voice recorders of a crashed aeroplane would be inconsistent with the Annex on Aircraft Accident and Incident Investigation to the Chicago Convention on International Civil Aviation of 1944,[1] Justice Kenneth Keith and his colleagues on the New Zealand Court of Appeal were, in effect, dealing with, and participating in, a form of global regulatory governance.[2] A state party can elect to depart from, or not to apply in domestic law, the Standards and Recommended Practices that appear in Annexes to the Chicago Convention and are revised regularly. However, the actual practical operation of the different Standards and Recommended Practices does not follow the uniform system that determines their formal legal status, but varies depending

* Murry and Ida Becker Professor of Law, New York University; Director, Institute for International Law and Justice. Many thanks to Claudia Geiringer, Dean Knight and the other organisers of the conference honouring Sir Kenneth Keith; to Ken, Jocelyn and their family for many years of convivial friendship and hospitality, and for their inspiration and nurturing of so many young New Zealand public lawyers; and to Laura Rees-Evans, BA (Oxon), LLM (NYU), for research help in finalising this text.

1 Convention on International Civil Aviation (7 December 1944) 15 UNTS 295.

2 *New Zealand Air Line Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA).

on the topic and phrasing of the particular Standard or Recommended Practice, and on market or bilateral pressures such as the threat of exclusion from United States airspace for non-compliance with some provisions.[3]

The approach taken by Ken Keith and his colleagues on the Court of Appeal has led *New Zealand Air Line Pilots' Association v Attorney-General* (*Air Line Pilots' Association*) typically to be classified as a decision on "international treaties in national law". To be sure, it is rightly regarded as a robust and sophisticated example in this category: the Court's careful handling of clause 5.12 of Annex 13 on cockpit voice recordings included fine-grained distinctions between this and other Standards and Recommended Practices, as well as close analysis of the relevant New Zealand legislation.

We can also see this case in a slightly different way, as one of many situations where a national court determines how it will appraise, and what weight to give to, a governance decision or administrative rule adopted by an external institution. It is of course important to consider the status in international law of the relevant rule or decision, and the effect given to this category of rule or decision in the national law of the forum. But inquiry may also be needed into other questions. What formal authority and status does the rule or decision have in the system within which it was made? How was it made (issues of process)? How does the governance regime actually work and how is it understood by its main participants or constituencies? How does this align with the public policy of the forum, and perhaps with broader public and governmental interests? What role could properly and usefully be played by the national court? The national court has responsibilities to its national public and to the State for its exercise of power; but the court may also have a functional if unarticulated role in the relevant global governance regime, and may even have responsibilities to others involved in that regime or affected by it who are not parties to the particular case. Operationalising this broader contextual view of the governance of the issue can be very difficult. How can the court be confident that it is well-informed on those broader issues? What are the sources of norms to be applied within such a governance system and, in any case, to what extent, if at all, should these governance considerations displace the outcome that would result from application of the formal law of the forum (including international law where the forum's law provides for that)?

It may be thought that the problems in operationalising this broader "governance" approach mean it should not be pursued. In my view, these problems must be faced no matter what framing is used. Thus, although it certainly does not use the language of governance, we can see the Court of Appeal in *Air Line Pilots' Association* grappling with some of these questions – trying to determine how the Chicago Convention system of global governance works, and what weight different elements of it should have for a New Zealand court if the formal status of these elements has not already been precisely worked

3 For example Standards and Recommended Practices relating to medical certification of aircrew, which New Zealand decided to depart from in a modest way in relation to certain older crew members until the United States Federal Aviation Administration indicated that New Zealand-registered aircraft risked being unable to operate in the United States. My thanks to Stephanie Winson-Rota of the Civil Aviation Authority of New Zealand for this example.

out in New Zealand law, as well as what the consequences might be if the New Zealand courts act in a particular way.

When a national judge is presented with a rule or decision from a different legal system (in particular, a legal system of a different order, such as an international law rule or a rule from a non-treaty global governance instrument), the national judge in practice often does not simply use a formal analysis based on the source of the international law rule (treaty or custom), nor does the judge have recourse to simple pragmatism which says that it is all a matter of policy choice in the circumstances of each case. Mattias Kumm argues that national judges do, and certainly should, begin by attaching presumptive but not dispositive weight to complying with international law to maintain the integrity of it as law, and then go on to analyse the specific external act and the possibilities for the court in terms of jurisdiction/competence, proportionality, protection of basic individual rights and a commitment to the principle of subsidiarity. This approach is not indeed limited to the usual question of how national courts should receive international law, but opens the possibility of a wider unified theory which also provides a basis for international judges to use in considering national law, and for different bodies in global governance to consider rules emitted by other such bodies.[4] Kumm points to insufficiencies both in the standard focus on nationally-framed conflicts-type rules for the reception or exclusion of international law, and in non-authority based dialogue-between-courts approaches. He argues instead for an approach which takes authority seriously but regards it as graduated, and which develops rules for engagement that provide a normative basis (not simply a sources basis) for dealing with different cases.

I am hesitant about the possibilities of such a confidently constitutionalist approach being viable in the often incoherent interactions and highly pluralistic values structure prevailing in much of global governance. I argue, more cautiously, that the emerging global administrative law provides some useful concepts and ideas for national courts in addressing such questions. In the next section, I introduce some basic concepts of global administrative law, with the aim of providing a lens through which to address the specific topic of this essay, namely how a national court should appraise a governance decision or administrative rule adopted by an external institution.[5] In the following section, I work through the possible applications in global governance of various approaches taken to this topic by national courts. In the final section, I introduce an argument of my own, that the weight given to a governance decision or administrative rule adopted by an external institution should depend, in part, on the degree to which that institution, in adopting that rule or decision, complied with criteria of "publicness".

4 Mattias Kumm "Democratic Constitutionalism Encounters International Law: Terms of Engagement" in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2006) 256.

5 I am not dealing in this essay with the core conflict of laws or choice of law questions about giving effect to the laws of a foreign state or the judgment of a foreign state's court.

II *Global Regulatory Governance as Administration (an Introduction to Global Administrative Law)*

The idea of a "global administrative space" marks a departure from orthodox understandings of international law, in which there is a strict separation of the domestic and the international. In the world of global governance, transnational networks of legal or other rule-generators and interpreters cause such strict barriers to break down. This new space is increasingly occupied by private regulators and hybrid bodies, in addition to the traditional international institutions and organisations, such as those of the United Nations. In many ways, global administrative law poses a threat to the classical model of consent-based international law,[6] but it is nonetheless equally, if not more, capable of producing governing and binding norms to which national courts are now forced to be alert. Traditional international law rules are incapable of guiding the decisions of national courts in this new and uncharted territory. As this essay will show, attempted characterisation of various global governance norms as jus cogens, customary international law, general international law or "general principles of law" has not fully resolved problems for courts in determining what the proper sources are of the rules to be applied, or indeed what the forum court's role is in a particular governance regime. A lot of the administration of global governance is highly decentralised and not very systematic. National courts can thus find themselves as actors in global regulatory governance, reviewing the acts of international, transnational and especially national bodies that are in, effect, administering global governance systems. In some cases the national courts themselves form part of the practical administration of a global governance regime. This truth is inescapable, even though it is not, of course, necessarily the way in which national judges wish to view themselves or their responsibilities. The emerging concept of global administrative law, which is animated in part by the idea that much of global governance can usefully be analysed as administration, may provide a way of framing this issue.

This administrative dimension of global governance, and the involvement of national courts in it, is evident in *Air Line Pilots' Association*, but it can also be readily seen in many other well known New Zealand cases. I will mention three further cases. Ken Keith was one of the New Zealand judges dealing with two of them, and a thoughtful commentator on the third.

The Court of Appeal's decision in *Sellers v Maritime Safety Inspector* can be read as upholding (or even as administering) a rather sparse global governance regime, that is, the regime of exclusive flag state jurisdiction on the high seas subject to defined exceptions, against efforts by the New Zealand Maritime Safety Authority to administer a different and essentially unilateral regime (embodied in legislation) of navigational prudence by non-New Zealand pleasure craft in areas of high seas where New Zealand has the responsibility for search and rescue operations.[7] Whether, as a governance matter, it was

6 See Nico Krisch and Benedict Kingsbury "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 EJIL 1, 10.

7 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA), referring to the New Zealand Maritime Transport Act 1994, s 21(1).

better for the Court to curb this unilateral action in favour of a slow-moving, negotiated international law system, or to allow the unilateral action as a form of innovation and decentralised variance that might have net beneficial effects, is an interesting question.

Similarly, when the Court of Appeal decided in *Wellington District Legal Services Committee v Tangiora* that the United Nations Human Rights Committee was not a "court" for the purposes of New Zealand's legal aid legislation, it was in effect participating in the administration of the highly decentralised funded-access regime to these United Nations human rights treaty bodies, and thus as part of the global governance system in which the Human Rights Committee operates, albeit a regime lacking any adequate centralised arrangement for financial assistance to applicants to the Committee.[8] It is thus not a complete appraisal of the case simply to align it with other judicial decisions on the weight to be given to "views" or interpretations expressed by United Nations human rights treaty bodies[9] or, indeed, with the governmental and public discussions of the weight to be given to Committee on the Elimination of Racial Discrimination's "early warning" decisions on Australia's Native Title Amendment Act 1998 (Cth) and New Zealand's Foreshore and Seabed Act 2004.[10]

In politely criticising the Privy Council's holding that people born in Western Samoa between 1928 and 1948 were born as British subjects who then became New Zealand citizens under the British Nationality and New Zealand Citizenship Act 1948, Ken Keith argued persuasively that the early resolutions of the Council of the League of Nations on citizenship in mandate territories were a much more important part of the background (against which to construe earlier Acts of 1923 and 1928)[11] than the Privy Council acknowledged.[12] These League of Nations resolutions, although generic rather than tied to the particular Western Samoa mandate, can be understood as an administrative form of global governance. Ken Keith's point, made also by the Court of Appeal in that case,[13] was that these resolutions were important even if they had no binding force in international law (although in some respects they may have), and even if they had no formal status in New Zealand law.

The spectrum of transnational/global governance regimes in respect of which a national court may have to determine the weight to give to assorted rules, decisions and policies of external bodies is very wide and highly variegated. The regimes may be differentiated according to the types of issues they deal with (security, global markets, moral and human rights issues, and so on) and according to the degree of coherence and agreement on the

8 *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA).

9 For example, the discussion of the weight to be given to statements of the Committee on the Elimination of Racial Discrimination in *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 225 (CA) Cooke J; 228 Richardson J; 233 Somers J.

10 Committee on the Elimination of Racial Discrimination Decision 1999/54 (18 March 1999) CERD/C/54/Misc40/Rev2 (on the Native Title Amendment Act 1998 (Cth)); Committee on the Elimination of Racial Discrimination Decision 2005/66 (11 March 2005) CERD/C/DEC/NZL/1 (on the Foreshore and Seabed Act 2004).

11 British Nationality and Status of Aliens (in New Zealand) Act 1923; British Nationality and Status of Aliens (in New Zealand) Act 1928.

12 Kenneth Keith "The Impact of International Law on New Zealand Law" (1998) 6 Waikato LR 1, discussing *Lesa v Attorney-General* [1983] 2 AC 20 (PC).

13 *Lesa v Attorney-General* [1982] 1 NZLR 165 (CA).

policies and standards within the particular regime. For a national court it will often be important to consider whether the forum state is a member of the organisation, whether the government or a leading national body is an active participant, what the attitude of the national legislature seems to have been to the organisation (for example, whether it has regularly utilised or endorsed the organisation's standards) and whether a particular role (broad or limited) for national courts in relation to this governance regime seems to be envisaged within the regime or in national legislation. Scholarship on global administrative law has differentiated global regulatory governance regimes according to the actors and organisational form involved, using a four-fold typology with regard to actors other than national governments and their agencies.

First are formal intergovernmental organisations such as the International Civil Aviation Organization. The International Civil Aviation Organization hosts the Chicago Convention regime for civil aviation, which is coherent and with relatively clear policies and standards, even if there is decentralised administration and scope for variation in approaches to particular subjects. The Chicago Convention regime is still primarily an intergovernmental regime operationalised through national government agencies, even while private entities such as the airline industry association (the International Air Transport Association) play a significant role, and it is predictable and sensible that national courts will play an administrative law role in relation to relevant actions of national agencies. New Zealand has long been a party to the relevant treaties and an active participant in the regime, much of which has been incorporated into national legislation. Thus the context for the involvement of New Zealand courts in *Air Line Pilots' Association* was reasonably straightforward. Other global governance regimes pose more challenging problems in these respects.

A second category of global administrative structures are intergovernmental networks of state officials, some of which work completely outside treaty structures, while others use network forms but also administer treaties. The many different kinds of networks of state officials (and sometimes of industry representatives or other private actors) in the Organisation for Economic Cooperation and Development (OECD) are illustrative. In 2008 the House of Lords, in determining the legality of the United Kingdom Serious Fraud Office's decision to halt the investigations into allegations of bribery by BAE Systems to procure military aircraft contracts with Saudi Arabia (the halt being due to political concerns concerning United Kingdom–Saudi relations), was asked to consider the meaning and implications of article 5 of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[14] an international treaty to which the United Kingdom is party and on which United Kingdom criminal legislation is partly based.[15] The treaty had not otherwise been given formal effect in United Kingdom

14 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997) 37 ILM 1, art 5: "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

15 *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 [*Corner House* (HL)], reversing *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin) [*Corner House* (EWHC)].

legislative instruments, but avoiding a violation of it had been one major consideration in the decisions taken by the Attorney-General and the Director of the Serious Fraud Office. They had decided that taking account of United Kingdom national security and Middle East foreign policy interests was proper under article 5 even though the impairments of these interests all resulted from the threat to United Kingdom–Saudi relations allegedly issued by Saudi representatives as a response to the bribery investigations. The House of Lords, finding that it could resolve the case on other grounds, decided not to make its own interpretation of article 5 on the basis that this internationally unresolved issue was better left to the OECD's Working Group on Bribery, which considers specific cases under the Convention including the allegations relating to these aircraft contracts. The House of Lords' reasons for leaving this to future deliberations of the Working Group on Bribery were not that the Working Group on Bribery has exclusive competence in Convention matters, or anything to do with lis pendens. Rather, the House of Lords reasoned that uniformity of interpretation of article 5 was highly desirable,[16] all the more so given the difficulty of some of the interpretive issues involved, and the concomitant hazards of unilateral interpretation by national courts.[17] It was preferable, the Law Lords suggested, to try to achieve agreement on this difficult issue through the Working Group on Bribery, which was the method stipulated in the Convention.[18]

Third are hybrid public-private governance or regulatory arrangements. These include mutual recognition arrangements where a private agency in one country tests products to certify compliance with governmental standards of another country, as well as more prominent organisational arrangements in which governments and private actors interact to promulgate and give effect to standards. A defendant to a negligence action might argue that a product complied with a standard of the International Standards Organization, a major norm-generating entity that is largely private.[19] Courts in the United States have frequently considered the relation between private standard-setting and national regulation of competition through antitrust laws, as for example in a telecommunications case where it is alleged that a company's patented technology was incorporated by the

16 *Corner House* (HL), above n 15, paras 44–46 Lord Bingham and paras 65–66 Lord Brown.

17 Ibid, paras 44–46 Lord Bingham; and paras 65–66 Lord Brown. The Divisional Court had made a further argument that uniformity is almost essential to the Convention succeeding as an anti-bribery instrument: "Self-interest is bound to have the tendency to defeat the eradication of international bribery. The Convention is deprived of effect unless competitors are prepared to adopt the same discipline. The state which condones bribery in its economic or diplomatic self-interest will merely step into the commercial shoes of the states which honour their commitment. Unless a uniform distinction is drawn between the potential effect upon relations with another state and national security, some signatories of the Convention will be able to escape its discipline by relying upon a broad definition of national security, thus depriving the prohibited consideration of the effect upon relations with another state of any force." See *Corner House* (EWHC), above n 15, para 142 Moses LJ for the Court.

18 *Corner House* (HL), above n 15, paras 45–46 Lord Bingham. The Divisional Court had also emphasised the absence of a definitive ruling from the Working Group on Bribery: "Faced with the WGB's apparent endorsement of the domestic rules and principles of prosecutions in the UK, Canada and Germany and absent any further ruling of the WGB, we express no concluded view as to whether it was open to the Director to take the view that his decision was in compliance with Article 5. See *Corner House* (EWHC), above n 15, para 157 Moses LJ for the Court.

19 For a helpful overview of United States judicial decisions on privately set standards see Harm Schepel "Constituting Private Governance Regimes: Standards Bodies in American Law" in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds) *Transnational Governance and Constitutionalism* (Hart Publishing, Oxford, 2004) 161.

European Telecommunications Standards Institute and other standard-setting bodies into the Universal Mobile Telecommunication System standard for cellphones, but that the company then failed to honour a commitment that the European Telecommunications Standards Institute had required of it to license this technology to others on fair, reasonable and non-discriminatory terms.[20] The International Standards Organization and its member organisations began to come in for potential judicial scrutiny in relation to the adoption, in March 2008, of a standard for Office Open XML, a Microsoft-inspired standard strongly opposed by some advocates of open source software.[21]

Fourth are structures of private global regulatory governance. Many areas of global governance are, in practice, dominated by non-state entities and interests (such as self-regulatory industry associations) and cooperative private–private regulatory arrangements (such as business–NGO partnerships for garment and shoe manufacture in the Fair Labor Association). National courts are increasingly called upon to weigh rules and decisions taken by such private bodies where there may have been no specific state or inter-state regulatory action at all. For example, the New Zealand Human Rights Review Tribunal in 2005 had to decide what weight to give to international airline industry standards in deciding whether an airline would commit unlawful discrimination by requiring a specified payment for advance provision of extra oxygen for customers who indicate they will require it on a flight.[22] It is easy to imagine contract disputes where a court would have to decide what weight to give to detailed sets of criteria for sustainable forest use developed by the Forest Stewardship Council, a transnational private body, or to a certificate of products under such criteria.[23]

In sum, instead of neatly separated levels of regulation, a congeries of different actors and different layers together form a variegated "global administrative space" that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects.[24]

This congeries of normative practices by diverse global governance actors is being brought together under the global administrative law label.[25] One approach understands global administrative law as the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability

20 One of several decisions in that case is *Broadcom v Qualcomm* (2007) 501 F 3d 297 (3d Cir).

21 In a press release, the United Kingdom Unix User Group stated that in June 2008, Lloyd Jones J had ruled against their application in the English High Court challenging the British Standards Institute's decision to vote in favour of this standard in the International Standards Organization, and indicated their intention to appeal: United Kingdom Unix User Group "UKUUG Appeals the Initial Court Decision on BSI's OOXML Action" (19 June 2008) Press Release www.uknug.org/ooxml (accessed 27 August 2008).

22 *Smith v Air New Zealand Ltd* (2005) 8 HRNZ 86.

23 See Errol Meidinger "The Administrative Law of Global Public-Private Regulation: The Case of Forestry" (2006) 17 EJIL 47.

24 Benedict Kingsbury and others "Foreword: Global Governance as Administration" (2005) 68 Law & Contemp Probs 1.

25 New York University Law School Institute for International Law and Justice's research project on Global Administrative Law has a website, including a series of working papers and extensive bibliographies, as well as links to papers from other scholars around the world: www.iilj.org (accessed 25 August 2008). Sets of papers from the first phase of this project appear in three journal symposia: (2005) 68 Law & Contemp Probs; (2006) 17 EJIL; and (2005) 37 NYU J Int'l L & Pol.

of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make.[26] This is described as "global" rather than "international" to avoid implying that this is all part of the lex lata, and instead to include informal institutional arrangements (many involving prominent roles for non-state actors) and other normative practices and sources that are not encompassed within standard conceptions of "international law". "Global functional systems", including the World Anti-Doping Agency, whose normative orders are not clearly characterised as "legal", are just one example of such informal institutional arrangements.[27] The World Anti-Doping Agency supervises the International Olympic Committee's drugs code in a complex relation with other international sports federations and their national affiliates. This anti-doping system includes procedural protections and a review structure to adjudicate complaints by athletes that they have been unfairly banned from competition, culminating in appeals to the International Court of Arbitration for Sport.[28] This is one of a growing number of sector-specific non-governmental (private) global governance regimes whose procedures, decisions, substantive standards and goals national courts may increasingly be called upon to address.

Global administrative law is emerging as the evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance. The sense that there is some unity of proper principles and practices across these issue areas is of growing importance to the strengthening, or eroding, of legitimacy and effectiveness in these different governance regimes.

Global administrative law is practiced at multiple sites, with some hierarchy of norms and authority, and some inter-site precedent and borrowing of principles, but with considerable contextual variation. It is influenced by treaties and fundamental customary international law rules, but it goes much beyond these sources and sometimes moves away from them. Its shared sets of norms and practices are in some cases regarded as obligatory. But they are also meshed with other sources of obligation applicable to that site – sources which may include the national law of the place, the constituent instrument and regulations of the norm-applying institution, contracts establishing private rights, or

26 Benedict Kingsbury, Nico Krisch and Richard B Stewart "The Emergence of Global Administrative Law" (2005) 68 Law & Contemp Probs 15.

27 Ralf Michaels and Nils Jansen "Private Law Beyond the State? Europeanization, Globalization, Privatization" (2006) 54 Am J Comp L 843.

28 Alec Van Vaerenbergh "Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime Arbitral" (International Law and Justice Working Paper IILJ 2005/11, Global Administrative Law Series, Institute for International Law and Justice, New York University School of Law, 2005) www.iilj.org (accessed 26 August 2008). Decisions of the International Court of Arbitration for Sport are generally enforceable in national law, in similar fashion to international commercial arbitration awards; and national courts tend to accord a lot of deference to these specialist arbitral bodies provided the procedures they apply are fair.

norms of general international law. It is in this challenging context that national courts are called upon to operate.

III Established Doctrines for Appraising External Rules and Decisions

What concepts and categories are available to a national court in appraising and determining what weight to give to a governance decision or administrative rule adopted by an external institution? Public international law purports to provide some trumping rules – a national court might decide, for example, to give no effect to an action of an external entity that violates jus cogens. The entity's action might also be evaluated by reference to the entity's own constitution or a controlling treaty, for example, to determine whether the body acted intra vires (or to determine who has the power to make such a determination). Customary international law, or general principles of international law, can also be used to provide norms for assessing the decision or rule of an external body. If the decision were that of a foreign state's court, the national court might treat this as a question of recognition and enforcement of foreign judgments, or res judicata, or perhaps comity. If what was involved was a foreign state's legal rule, the question would be one of applicable law and conflict of laws. I will give some examples of national courts taking such approaches. In some cases these approaches enable neat disposition of the issue. In others, however, the realities of contemporary global governance do not fit neatly into these traditional categories.

Reading these cases, many of which were decisions of first impression, it is clear that the judges struggled with challenging problems for which no comprehensive theoretical apparatus was available. What are the proper sources of rules to be applied? How should the relevant governance regime and the forum court's role within it be understood? Should, and if so by reference to what rules or criteria, the forum court review the procedural elements or indeed the substantive content of the external decision? These are the kinds of questions a global administrative law approach may help courts address.

A Jus Cogens

The possible role of jus cogens has been an issue in challenges by individuals arising from their designation as persons whose assets should be frozen under national (or European Community) measures implementing United Nations Security Council (UN Security Council) sanctions against specified persons suspected of financing terrorist activities.[29] The source of these cases was the increase in the UN Security Council's use of individual sanctions in the 1990s, which intensified from 2001. In most cases, neither the states implementing these UN Security Council measures (nor the European Community, where it implements them in European Community law) had provided hearings to listed persons or conducted inquiries into the merits of a listing. They simply followed and applied (as United Nations member states are required to do under the United Nations

29 See also David Feldman "The Role of Constitutional Principles in Protecting International Peace and Security Through International, Supranational and National Legal Institutions", above p 17.

Charter) the UN Security Council listings, for example under UN Security Council Resolution 1267.[30] Member states often have had no independent information in freezing a person's assets – they do so simply because the name appears on the UN Security Council list. The UN Security Council did not initially have anything remotely approaching an adequate procedure for listed persons to contest the listing and seek removal from the list, let alone an ex ante procedure providing an opportunity for those under consideration for listing to make representations. The state of the person's nationality or residence could request delisting, but initiating this process was discretionary, it then required bilateral negotiations with the listing state which might be protracted or fruitless, and it did not result in delisting unless and until the relevant UN Security Council sanctions committee so decided by consensus. This led to a great deal of dissatisfaction and frustration among government representatives of many states, including German, Indonesia, Sweden and others. The delisting procedures were reformed somewhat in 2006–2007, in UN Security Council Resolution 1730[31] and related amendments to the Sanctions Committee guidelines. Further reform in June 2008 sought to make the system more sustainable and defensible under rule of law principles, but perhaps came too late for the *Kadi* (ECJ) decision.

The leading judicial decision is that of the European Court of Justice (ECJ) in 2008, in the joined cases of *Kadi v Council of the European Union and Commission of the European Communities* and *Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (*Kadi* (ECJ)), setting aside decisions of the European Court of First Instance (Court of First Instance) in these two cases and, in effect, also rejecting parallel aspects of the Court of First Instance's decision in *Hassan v Council of the European Union and Commission of the European Communities* (*Hassan*).[32] In addressing the claims of the Al Barakaat International Foundation, Mr Kadi and Mr Hassan, the Court of First Instance had declared that the UN Security Council is constrained by the United Nations Charter and by norms of jus cogens. It asserted authority to determine whether the Sanctions Committee's listing and delisting procedure complied, in each case, with norms of jus cogens. This asserted authority was strongly contested in the ECJ proceedings by the United Kingdom, the Netherlands and France, and it was summarily

30 UNSC Resolution 1267 (15 October 1999) S/RES/1267/1999.

31 UNSC Resolution 1730 (19 December 2006) S/RES/1730/2006.

32 Joined Cases C-402/05 *Kadi v Council of the European Union and Commission of the European Communities*, 3 September 2008 and C-415/05 *Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 3 September 2008 (ECJ Grand Chamber) [*Kadi* (ECJ)]. These cases were on appeal from Case T-315/01 *Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 [*Kadi* (Court of First Instance)] and Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR II-3533 [*Yusuf*]. See also the Court of First Instance judgment in Case T-49/04 *Hassan v Council of the European Union and Commission of the European Communities* [2006] ECR II-52 [*Hassan*]. The institutional situation of the European Court of Justice, as also that of rlie European Court of First Instance, differs in important ways from that of a national court and colours the approach taken in these cases, but I refer to this jurisprudence because of its significance in global administrative law issues that national courts will face more and more. The Swiss Federal Courr in 2007, in a comparable case, took a somewhat similar approach to tlie Court of First Instance, accepting that review of the legality of UN Security Council resolutions by reference to a jus cogens standard might be proper, while holding that no violation of jus cogens had occurred: *Nada v Seco* (2007) 133 Entscheidungen des Schweizerichen Bundesgericht II 450 (Federal Court, Switz).

rejected by the ECJ, on the ground that the jurisdiction of the European Community courts is to review the European Community's implementing act but not to review the lawfulness of the Security Council resolution itself. This aligns with the ECJ's view of the European Community system as an autonomous legal system, but it is also consistent with the more basic point that the ECJ and the Court of First Instance are not United Nations institutions, were not set up by reference to the United Nations, and have received no express mandate to rule on the compliance of United Nations organs with the United Nations Charter or with general international law. The claim that it is proper for any court of law in any legal system to form its own assessment of the conformity of a United Nations decision with standards of jus cogens defined by the forum court, in proceedings in which the United Nations is not in any way represented, was impliedly made by the Court of First Instance but not with strong accompanying argumentation. A contrast may be noted with the strenuous efforts the European Commission makes to avoid member states seeking determinations of European Community law in non-European Union tribunals, as for example in its ECJ proceedings against Ireland for launching the MOX Plant arbitration in the International Tribunal for the Law of the Sea.[33]

Having decided to address the compatibility of the UN Security Council actions with jus cogens, the Court of First Instance got into difficulties in finding authoritative sources of normative material to articulate the precise content, and limits, of "jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible".[34] In *Kadi v Council of the European Union and Commission of the European Communities* the Court of First Instance concluded that, despite the lack of any effective judicial mechanism for review of the Sanctions Committee's actions, the Sanctions Committee's own procedures "constitute another reasonable method of affording adequate protection to the applicant's fundamental rights as recognized by jus cogens".[35] In *Hassan* the Court of First Instance held that the asset freeze "is not incompatible with the fundamental rights of the human person falling within the ambit of jus cogens, in light of the objective of fundamental interest for the international community" of combating terrorism.[36] This and other passages may be interpreted as introducing an attenuated proportionality test into the assessment of possible infringements of jus cogens: does the measure have a legitimate objective, how important is the objective, are the rights-infringing measures actually taken disproportionate to that objective? This is not untenable, but it pulls against the standard view, already accepted by the Court of First Instance, that no derogation is permitted from jus cogens norms. The ECJ in *Kadi* (ECJ) stepped neatly around these difficulties, holding that the European Union courts did not here have jurisdiction to review, even by reference to a jus cogens standard, the Security Council's resolutions (it

33 Case C-459/03 *Commission of the European Communities v Ireland*, 30 May 2006 (ECJ). In the Iron Rhine case, the Netherlands and Belgium were careful to consult the European Commission about the scope before moving forward with the arbitration: *Arbitration regarding the Iron Rhine Railway (Belgium v The Netherlands)* 24 May 2005 (Permanent Court of Arbitration) www.pca-cpa.org (accessed 27 August 2008).

34 *Kadi* (Court of First Instance), above n 32, para 226.

35 Ibid, 290.

36 *Hassan*, above n 32, para 101.

did not address the question whether designations of named persons might be acts of a different legal nature from the adoption of resolutions); and holding that the applicants were entitled to a full review of the European Community's own acts, not one limited to assessment of compatibility with jus cogens. Thus the ECJ was able to frame the specific norms at issue in these cases in terms of fundamental rights forming an integral part of the general principles of European Community law, rather than jus cogens: rights to be heard, to effective judicial review by a court, to property and to put a case concerning property restrictions to the competent authority. The ECJ confined itself to deciding whether the acts of European Union institutions and member states comported with European Union law (including human rights law, and the provisions of European Union law enabling and requiring that effect be given to United Nations Charter obligations); whether these subsume all the norms of jus cogens is an issue the ECJ did not address.[37] On this approach, the UN Security Council process could be, and was, assessed by the European courts, but simply to establish whether it in itself addressed the requirements and could thus be relied upon as a substitute for European Union or national review mechanisms. Insofar as the affected individuals had insufficient opportunity to trigger an adequate review process, it is conceivable that a remedy would be for the European Union itself (unlikely in practice, but perhaps indirectly through bringing together different national review tribunals) or for the member states directly involved in implementing the assets freeze to establish a review procedure, perhaps involving a specially appointed judge or tribunal with access to confidential information. Such a mechanism could operate in cases where a person alleges mistake of identity, or lack of evidence. It could also be used in periodic reviews, where a person or organisation claims either that new exculpatory evidence has been found, or that they have reformed. A finding by a review tribunal that a person should not have been, or should not now be, listed would be made public. It would not in itself compel the state or the European Union to terminate the listing, but would raise pressure on the UN Security Council to act, and could trigger an obligation of compensation to be held in an escrow account. Such a review mechanism could address state actions dealing with matters such as household expenses exceptions to freezes, family assets and succession to assets on the death of the listed person.

In summary, a finding that a rule or decision of an external governance institution is contrary to jus cogens undoubtedly provides a compelling reason for not giving weight to it, but institutional issues counsel national (and supranational) courts to be cautious before setting themselves up as judges of compatibility with jus cogens in any but extreme cases. The legal consequences of a finding of a violation of jus cogens are also likely to require more intricate legal analysis than the simple propositions in the Vienna Convention on the Law of Treaties that a treaty is void if incompatible with a norm of jus cogens existing at the time the treaty was made, or becomes void and terminates if the norm of jus cogens emerges later.[38] In global administrative governance, the problems of the meaning and consequences of invalidity, and of incompatibility, involve more complex problems even

37 *Kadi* (ECJ), above n 32, paras 331–376.

38 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 arts 53 and 64.

than those that have perplexed many systems of national administrative law,[39] and have not yet been studied nearly enough.

B Customary International Law

"Customary international law" is often used as the basis for claims about the quotidian aspects of global administrative law (conduct of administrative processes which, while important, do not involve great questions of war and peace, crimes against humanity and the like). To give one of numerous examples, a North Atlantic Free Trade Agreement (NAFTA) Arbitral Tribunal used customary international law in *Pope & Talbott Inc v Canada* (*Pope*) in considering whether the Canadian government's administrative dealings with this softwood lumber producer met the international minimum standard.[40] However, even with regard to the international minimum standard a state must observe in its dealings with aliens in relation to their property, an area on which there are numerous legal decisions and bodies of state practice over many decades, debates are rife as to how the law now applies to various kinds of administrative actions, as indicated by the tensions between the *Pope* Tribunal and the three NAFTA state parties who together issued a note of interpretation, in effect, challenging the Tribunal's approach.[41] Such uncertainty is rife with regard to detailed standards for the evaluation of actions of global governance actors not involving the well-established law on state treatment of aliens. The Benthamite line about the unsustainability of real custom under modern conditions carries some weight. Customary law may not be adequate for the regulatory needs of advanced global capitalism: it is not sufficiently precise, it changes too slowly, it gives too much weight to status quo interests and too much negotiating power to hold-outs. More than that, the social conditions for customary international law, involving repeat interactions between foreign ministries, have been displaced by the innumerable nodes of interaction in contemporary global governance. New customs will not always emerge with enough stability of obligation in the casual interactions fostered by monetised global markets. Thus, while relatively abstract principles of rule-making and decision-making (such as due process and non-corruption) may be customary international law in the traditional sense, it seems unlikely that customary international law (in the mode of widespread state practice accompanied by opinion juris) provides a sufficient or satisfactory basis for articulating much of the detailed body of global administrative law which national courts might use to appraise acts of external governance actors. Custom provides the authoritative basis for one important form of positive international law. But its role in providing a basis for fast-changing norms among many kinds of actors must be a truncated one.

39 See for example Christopher Forsyth "The Theory of the Second Actor Revisited" [2006] Acta Juridica 209.

40 *Pope & Talbott Inc v Canada* (Award on the Merits of Phase 2) 10 April 2001 (NAFTA Arbitral Tribunal) www.naftaclaims.com/disputes_canada_pope.htm (accessed 26 August 2008).

41 NAFTA Free Trade Commission "Notes of Interpretation of Certain Chapter 11 Provisions" (31 July 2001) www.sice.oas.org/TPD/NAFTA/commission/CH11understanding_e.asp (accessed 15 September 2008); *Pope & Talbott v Canada* (Award in Respect of Damages) 31 May 2002 (NAFTA Arbitral Tribunal) www.naftaclaims.com/disputes_canada_pope.htm (accessed 27 August 2008).

C *General International Law*

The use of general international law as a resource for inter-regime accommodation in international legal practice is long established. Some of the reasons for its use are illustrated by the decision of the England and Wales Court of Appeal in *Occidental v Ecuador*, a case in which Ecuador sought to challenge an adverse arbitral award issued against the state by an arbitral tribunal established under the Ecuador-United States bilateral investment treaty (BIT).[42] Ecuador's challenge came before the English courts because, although the case had no other relation to the United Kingdom, the seat of the arbitration was England. Occidental argued that the Court should find Ecuador's challenge non-justiciable on the ground that it involved interpreting an inter-state treaty (the BIT) not incorporated into United Kingdom law, and thus trenched on the relations of foreign sovereigns inter se (that is, relations between the United States and Ecuador). The Court rejected Occidental's argument. While the BIT was indeed a treaty between foreign sovereigns, the agreement to arbitrate was between Ecuador (whose consent to arbitrate was given by the BIT) and Occidental (whose consent was given by it in the request for arbitration). This agreement was, in the Court's view, governed by international law, even though Occidental is not a governmental entity. Thus the norms the Court should apply to it were to be found in international law, not in Ecuadorian or other national law.

Occidental v Ecuador uses general international law as a legitimate (because overarching) means to address inter-institutional review on issues concerning global commerce and investment, and related questions of property and social policy.

A different use of general international law is in the "elementary considerations of humanity" that the International Court of Justice relied upon in *The Corfu Channel Case* (in which Albania had failed to warn the British navy of mines posing an imminent danger to life),[43] or that Judge Simma discusses in addressing physical assaults by the Democratic Republic of the Congo personnel on people waiting at Kinshasa airport in the *Case Concerning Armed Activities on the Territory of the Congo*,[44] or that judges of the International Tribunal for the Law of the Sea have applied in condemning unnecessary violence against seafarers when a coastal state is arresting a vessel. In such cases, the tribunals reached beyond applicable treaties and relied upon such a notion to establish a rule against the offending conduct, without seeking to show that the rule derived from widely followed practice accompanied by opinion juris as standard accounts of customary international law require.

This kind of approach seems consonant with the late 18th and early 19th century understanding of the law of nations on great moral questions, slavery above all. As Joseph

42 *Occidental v Ecuador* [2005] EWCA Civ 1116. The substantive case concerned Ecuador's denial of a value added tax exemption for oil exported by Occidental.

43 *The Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4.

44 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 116, separate opinion of Judge Simma, paras 16–41.

Story framed his view in *United States v La Jeune Eugenie*:[45]

> [N]o [customary] practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admit the injustice or cruelty of it.

Custom can be part of the overlay of positive law that displaces the application of reason-based natural law and morality, but custom is not itself natural law or morality.

General international law might be a way of framing an accurate account of global administrative law. Some analogy may be drawn from common law – judges have been able over time to construct systems of administrative law (admittedly, somewhat different systems in different common law countries) without comprehensive specification in statutory or constitutional text. It is now possible plausibly to assert that some of the core principles are so deeply part of the common law that they will often be applied by judges in hard cases, even in the face of apparently inconsistent statutes or constitutional provisions. But the method of the common law, in a more or less unified judicial system, for the most part built on a unified professional formation of judges and lawyers educated for that system, is more precise than that of general international law.[46] While "general international law" is an acceptable category in that many participants in international legal processes would not reject it, it is not methodologically precise. At this level of generality, the content of its norms, and their authority in relation to competing norms, are difficult to specify and evaluate.

D "General Principles of Law" as International Law

One possible approach to a global administrative law problem is to try to utilise (and enlarge) the rubric of "general principles of law" as a source of international law (it is listed as such a source in the Statute of the International Court of Justice, although the fit with jus inter gentes has troubled many). Such a project to accommodate the principles of global administrative law faces two practical obstacles that, while not insuperable, will not easily be overcome. First, the sources of global administrative law are more diverse, its content much fuller and its scope more comprehensive than the propositions the International Court of Justice has hitherto endorsed in its very limited jurisprudence of "general principles of law". Secondly, the status of "general principles" would imply that the principles of global administrative law all enjoy the hierarchical status of international law vis-à-vis other normative systems, such as national law. Practice is a long way from this at present. Principles are applied, but often without a strong sense of hierarchical obligation or even of formal sources.

A different and more specific jurisprudence of "general principles" has developed within the European Union. Its application in global governance is illustrated in *Kadi* (ECJ),

45 *United States v La Jeune Eugenie* (1822) 26 F Cas 832, 846 (CCD Mass) Story J.

46 In addition, the elusive concept of custom remains much more central in international law than in the common law.

where the ECJ grounded its assertion that respect for human rights, or for fundamental rights, is a condition for the lawfulness of European Community acts, in the holding that fundamental rights are general principles of law. General principles of law are to be drawn by the Court from the constitutional traditions common to member states, and from the international instruments for the protection of human rights on which they have collaborated, special significance attaching in this regard to the European Convention on Human Rights and Fundamental Freedoms. Some of the problems in extending this already established analysis to harder cases were manifested in *Hassan*, where the Court of First Instance sought to enhance the possibility that an individual listed under a UN Security Council sanctions resolution might be able to obtain reconsideration of that listing by determining that European Community law obliged member states to exercise diplomatic protection where a national or resident sought delisting. Since no such obligation is formulated in the relevant European Community regulation, the legal foundations for this determination were said to be either the rights traditions of the European Union member states, or the fundamental rights respected by the European Union and set forth particularly in the European Convention on Human Rights and Fundamental Freedoms. The stretch involved is apparent: neither source is compelling in establishing an obligation of diplomatic protection.[47]

E Conflict of Laws

Conflict of laws approaches offer a potentially attractive pluralism and neatness of application in situations where one legal regime or tribunal recognises that the law of another legal regime governs the substance of the issue. These approaches encompass methodologies for deciding which body of law should be applied (choice of law) and for making exceptions on grounds such as the public policy of the forum. Disagreement over the criteria for deciding which law governs, and what its content is, or over exceptions such as those grounded in the public policy of the forum, or over jurisdiction and institutional issues, can make these solutions much less clear cut.

Thus far conflict of laws approaches have not been applied very systematically to administrative laws and decisions taken outside the forum. One obstacle has been reluctance to apply most foreign public law (the revenue rule), although this is becoming more attenuated, as exemplified by the willingness of the New Zealand courts to prohibit publication in New Zealand of the Spycatcher book in order to give effect to United Kingdom public law.[48] The allocation of supervisory powers and decisional authority among administrative authorities of different states (and in some cases to inter-state

47 *Kadi* (ECJ), above n 32, paras 283–284 and 303–304; *Hassan*, above n 32, paras 110–122. The ECJ in *Kadi* did not address the diplomatic protection obligation formulated in *Hassan*. In practice, the effectiveness of diplomatic protection is variable. A state raising a delisting claim half-heartedly will have little effect, and even states such as Switzerland, Sweden, and Germany, when energetically seeking a delisting in the years immediately leading up to *Hassan*, had great difficulties in getting the UN Security Council's delisting procedure actually to reach this result.

48 *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA). The Australian courts refused to take similar measures: *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 78 ALR 449 (HCA).

institutions too) has become a staple of transnational regulatory governance. Thus the widely subscribed Hague Convention on inter-country adoption[49] allocates to the agencies of the child's country of origin the determination that the child is adoptable and that parental consent has been obtained where required, and allocates to the administrative authorities of the country of the adopting family the responsibility to assess their suitability and to supervise post-adoption activities. In situations where such a coordinating scheme (with duties of cooperation and so on) has not been established, national courts seised of litigation may find themselves having to help formulate principles of such a scheme. Their own experience in the allocation of judicial jurisdiction and competence among the courts of different countries will be of only limited analogical relevance, because the ways in which governance powers operate in layers, with functional overlaps and structures of cooperation, do not mirror the more territorial, exclusive and horizontal view taken in allocations among different countries' courts. Conflict of laws approaches to choice of law have focused more on formal national laws and institutions than on the diverse array of networks, and hybrid and private orderings that comprise contemporary global administration. In sum, the effort to apply conflict of laws approaches to global regulatory governance problems is only just beginning in the academic literature,[50] but this will become an increasingly important source of ideas for national courts.

F Comity

Comity, connoting a respectful engagement with or deference to a decision issued on the same specific subject matter by a different body, has become a notable feature of contemporary United States Supreme Court jurisprudence on global governance issues, notably in opinions of Breyer J.[51] It has been argued that the Supreme Court's 2004 opinion in *Rasul v Bush*, which accorded some procedural rights to Guantanamo detainees but did not refer to international law in doing so, can be read as an implicit request to other juridical actors outside the United States to accord comity to this United States approach.[52] In purporting to base comity on a discretionary choice rather than on

49 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (29 May 1993) 1870 UNTS 167.

50 I draw in this section on unpublished work by Horatia Muir Watt. See also Hannah Buxbaum "Transnational Regulatory Litigation" (2006) 46 Va J Int'l L 251; Paul Schiff Berman "The Globalization of Jurisdiction" (2002) 151 U Pa L Rev 311; Robert Wai "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization" (2002) 40 Colum J Transnat'l L 209; Christian Joerges "Conflict of laws as Constitutional Form: Reflections on the International Trade Law and the *Biotech* Panel Report" (RECON Online Working Paper 2007/03, May 2007) www.reconproject.eu/projectweb/portalproject/RECON Working Papers.html (accessed 26 August 2008).

51 See for example *Hoffman-LaRoche v Empagran* (2004) 542 US 155 Breyer J for the Court; and *Sosa v Alvarez-Machain* (2004) 542 US 692 Breyer J concurring.

52 Harlan Grant Cohen "Supremacy and Diplomacy: The International Law of the US Supreme Court" (2006) 24 Berkeley J Int'l L 273, 324, discussing *Rasul v Bush* (2004) 542 US 466. The Supreme Court's decision in *Hamdan v Rumsfeld* (2006) 548 US 557 places international law, specifically Common Article 3 of the 1949 Geneva Conventions, much more at the centre of its holding on the illegality of the Military Commissions as then proposed, although this holding was reached on the basis that the authorising statute on which the administration relied itself referred to the "laws of war".

international obligation, and in proceeding without an account of the role of international law in the regulation of comity decisions, the United States courts have drawn criticism. *Republic of Austria v Altmann*, while open to the same criticism for treating the immunity of foreign sovereigns in United States courts as a matter of comity rather than international legal obligation, has potential jurisgenerative implications for that reason.[53] In particular, claimants in national courts whose suits against foreign sovereigns for human rights abuses have been defeated by immunity claims have in the past been unable to convince the European Court of Human Rights that upholding the defendant's immunity breaches their rights. The reason has been that international law requires foreign sovereign immunity in such circumstances. But the *Altmann* analysis, if widely accepted, would defeat that argument and potentially give greater scope to national court adjudication of foreign sovereign activities in exceptional cases. Thus the comity approach, while lacking a sophisticated theory of legal obligation and authority, has significant policy attractions for those who envisage a growing role of national courts in supervision of external entities as part of the juridical structure of global governance.

G *The "Forum Law/Forum Institution's Action" Basis of Review*

The conclusion that, absent clear statutory or higher authority, a court cannot review the action of an institution not part of the legal system of the forum court has a long pedigree. In *Hirota v MacArthur*, for example, the majority of the United States Supreme Court ruled that it had no jurisdiction to consider a habeas corpus petition by persons who had been convicted by the International Military Tribunal in Tokyo.[54] The grounds were that this tribunal had "been set up by General MacArthur as the agent of the Allied Powers", so this "was not a tribunal of the United States." This case dramatises the obvious problems of such a self-denying approach, that in the present situation of global governance there might then be no suitable review tribunal at all, and that a strong incentive is created for a state wishing to escape national rule of law controls to instead arrange for measures to be taken by an international institution that it helps establish, or indeed by another state or private entity.

The dynamics of such a distinction can be discerned in the first few Court of First Instance cases on anti-terrorism sanctions against individuals and organisations. Whereas in *Kadi v Council of the European Union and Commission of the European Communities* and similar cases, the Court of First Instance did not (unlike the ECJ when the appeals reached it) invalidate the European Community's implementation of sanctions against persons listed by the UN Security Council, its approach was bolder when applying the direct "law of the forum" to the listing of certain organisations under the European Community's own procedure for anti-terrorism listing of additional persons, entities and groups not

53 *Republic of Austria v Altmann* (2004) 541 US 677.
54 *Hirota v MacArthur* (1948) 338 US 197.

listed by the UN Security Council. In December 2006 the Court of First Instance annulled such a listing, finding that: [55]

> [T]he contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant's right to a fair hearing was not observed. Furthermore, the Court is not, even at this stage of the procedure, in a position to review the lawfulness of that decision.

The United States District of Columbia Circuit Court of Appeals in some respects faced no such problem in its important decision in August 2006 in a case brought by the Natural Resources Defense Council challenging a rule adopted by the United States Environmental Protection Agency.[56] The Natural Resources Defense Council challenged the Environmental Protection Agency's rule on critical use exemptions from the restrictions on methyl bromide, on the ground that it did not comply with an administrative decision of the Meeting of the Parties to the Montreal Protocol concerning methyl bromide. Thus the Court was able to review the Environmental Protection Agency's implementing (or non-implementing) action. The United States Clean Air Act stated that the Environmental Protection Agency may exempt critical uses "[t]o the extent consistent with the Montreal Protocol".[57] The Montreal Protocol prohibits the production or consumption of methyl bromide except "to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses." The Court's holding could be read as a narrow one – that this Meeting of the Parties decision was not "the Montreal Protocol" for the purposes of the controlling United States statute, and hence provides no basis for a challenge in a United States court to the Environmental Protection Agency's rule. Formally, the Court might be thought to confine its review to the actions of a United States agency, judged simply against standards defined in a United States statute. However, some of the Court's remarks are broader. The Court asserts that the "Parties' post-ratification actions suggest their common understanding that the decisions are international political commitments ... to be enforceable as a political matter at the negotiation table." It is undoubtedly true that these are political commitments, but the Court does not address (it does not even mention) the question whether they are also international legal commitments. Instead, it asserts that the parties did not intend these decisions to be judicially enforceable domestic law. No direct evidence for this view of the parties' intentions is offered. The Court switches to an assertion about United States legal process: "Without congressional action, however, side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts, but through international negotiations."[58] This may be simply a statement that where a treaty is self-executing and is given effect in United States courts under the supremacy clause, a decision taken within that treaty's subsequent process is not self-executing (at least where the treaty depended on approval by the Senate or by the House

55 Case T-228/02 *Organisation des Modjahedines du People d'Iran v Council of the European Union* [2007] 1 CMLR 34.

56 *Natural Resources Defense Council v Environmental Protection Agency* (2006) 464 F 3d 1 (DC Cir).

57 Clean Air Act 42 USC § 7401, §7671.

58 *Natural Resources Defense Council v Environmental Protection Agency*, above n 56, 10 Randolph J.

and Senate). More likely, however, it reflects an anxiety about ex ante delegation of law-making power to an international body. This anxiety would apply not simply to Meeting of the Parties decisions, as to which it was not clear what the intention of Congress might have been, but to all changes in the treaty rules unless and until incorporated by Congress ex post into legislation. Thus the Court's concern would apply to "adjustments" to the Protocol, which Congress purported to approve as the legal standard in advance (in the Clean Air Act). On this reading, the Court is concerned with how United States law is made, and thus against what rules a United States agency may be reviewed by a United States court. It does not purport to review the acts of the Meeting of the Parties, nor to decide on the status under international law of their actions (although this reading would admittedly be more compelling had the Court noted, as it perhaps should have done, that its remarks about the Meeting of the Parties decision being only a political commitment did not imply a view of the international legal status of those decisions).

The review by the British Columbia Supreme Court of the arbitral award in *The United Mexican States v Metalclad Corporation*, initiated by Mexico because British Columbia was the place of arbitration, also focuses initially on the application of the relevant national law, in this case the relevant British Columbian statute, the International Commercial Arbitration Act 1996.[59] The Court treated this statute as establishing not only the Court's powers and responsibilities, but also the scope and standard of review. It refrained from utilising an emerging jurisprudence of the Supreme Court of Canada in what might be called the common law of administrative review, which applies a "pragmatic and functional" approach.[60] The British Columbian Court then engaged directly in the interpretation of NAFTA, holding that the arbitral tribunal's interpretation of "international law" in NAFTA article 1105 went beyond the established meaning of "international law" without an adequate basis to do so, and wrongly imported into NAFTA chapter 11 an obligation of transparency, thus exceeding the scope of the submission to arbitration. In crossing into international law, the British Columbian Court did not shift explicitly into a different interpretive mode – in this respect, its approach is more comparable to that of the Court of First Instance in *Kadi v Council of the European Union and Commission of the European Communities*, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* and *Hassan*, and stands in contrast to, for example, that of the House of Lords in *Corner House*.[61]

IV A New Approach?: "Publicness" Criteria in Appraising External Rules and Decisions

"Publicness" is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality,

59 *The United Mexican States v Metalclad Corporation* (2001) BCSC 664.

60 See Dean R. Knight "A Murky Methodology: Standards of Review in Administrative Law", below pp 205–206.

61 *Kadi* (Court of First Instance), above n 32; *Yusuf*, above n 32; *Hassan*, above n 32; *Corner House* (HL), above n 15.

are necessary to the concept of law in an era of democratic jurisprudence.[62] By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.

Publicness thus exists as a desideratum wherever there is democratic law. The components of publicness need not necessarily be expressed in legal terms – they are also parts of the process of democratic political organisation, and of social expectations for publicly-oriented institutions. Insofar as they are applied by courts, however, they are typically expressed in legal terms. In my view, it is possible to identify several general principles of public law, and some more detailed rules or precepts flowing from them, which are accepted in many democratic legal systems and give content to the requirement or aspiration of publicness in law. I am going to argue that application of these principles helps produce an assessment of the degree of publicness followed by an external entity in producing a rule or decision which a national court must appraise. Before doing that, I will try to sketch some of the general principles of public law that provide content to the requirement or aspiration of publicness.

A Components of Publicness: General Principles of Public Law

General principles of public law combine formal qualities with normative commitments in the enterprise of channeling, managing, shaping and constraining political power. These principles provide some content and specificity to abstract requirements of publicness in law. Principles potentially applicable within any system of public law, and in relations between different systems of public law, may include to different degrees some of the following. This is merely an indicative list, without any comparative or doctrinal analysis, but it is sufficient to suggest that the principles embodied in such a conception of public law are significant.[63] These are normative principles that do real work, yet they are not principles of substantive justice in the Dworkinian sense. In accepting the idea of the rule of law, of the unity of basic normative principles rather than the rule of arbitrary power or the rule of the philosopher, this is the kind of list one gets.

1 The Principle of Legality

One major function of public law is the channelling and organising of power. This is accomplished in part through a principle of legality – actors within the power system are constrained to act in accordance with the rules of the system. This principle of legality enables rule-makers to control rule-administrators. The agent is constrained to adhere to the terms of the delegation made by the principal. In a complex system of delegation, it is often preferable to empower third parties to control the agent in accordance with criteria set by the principal, creating the basis for a third-party rights dynamic even in this principal-agent model. In the case of inter-state institutions, the states establishing

62 Jeremy Waldron "Can There Be a Democratic Jurisprudence?" (Analytic Legal Philosophy Conference, New York, 16–17 April 2004). Waldron is Professor at New York University School of Law. His ideas about publicness in national democratic legal systems inspired this part of my project about global governance, and I am deeply indebted to him.

63 See generally David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2003); see especially Michael Taggart "The Tub of Public Law" in ibid, 455.

the institution often style themselves as principals (severally or collectively) with the institution as agent, but their direct control of the agent may be attenuated, a problem they typically mitigate both by legal controls and by limiting the operational capacity of the agent. Thus international institutions usually depend on individual states to act as agents in operational implementation.

2 The Principle of Rationality

The culture of justification has been accompanied by pressure on decision-makers (and in some countries, on rule-makers) to give reasons for their decisions, and to produce a factual record supporting the decision where necessary. This is part of both political and legal culture. In both contexts it leads those institutions with review power into continuous debates about whether and on what standard to review the substantive rationality of the decision: manifestly unreasonable, incorrect, and so on.

3 The Principle of Proportionality

The requirement of a relationship of proportionality between means and ends has become a powerful procedural tool in European public law, and increasingly in international public law, although some national courts (for example, in the United Kingdom) have balked at unfamiliar arguments based on it.

4 Rule of Law

The demand for rule of law can mean many things. The dominant approach is proceduralist,[64] meaning a general acceptance among officials (and in the society) of particular deliberative and decisional procedures. This is prima facie in tension with a conception of the rule of law as simply a structure of clear rules, reliably and fairly enforced, without regard to their substantive content (the "rule book" conception); and with "the ideal of rule by an accurate public conception of individual rights" (the "rights conception").[65] Proceduralists argue for adhering to procedures even at the price of unsatisfactory outcomes – but face problems in explaining why any decision taken in accordance with prescribed procedures should not then be part of the law which adherents of the rule of law must uphold.[66] David Dyzenhaus has argued for an approach which shifts the focus of rule of law from law (and rules) to the element of ruling – so a breach of procedural requirements is not unthinkable, but involves a compromise of legality that must be carefully weighed.[67]

5 Human Rights

I mean here the basic rights the protection of which by the legal system is almost intrinsic (or natural) to a modern public legal system. This category overlaps a lot with the previous

64 An illustration is Richard Fallon "The Rule of Law as a Concept in Constitutional Discourse" (1997) 97 Colum L Rev 1.

65 Ronald Dworkin *A Matter of Principle* (Harvard University Press, Cambridge (Mass), 1985) 12.

66 Jeremy Waldron "The Rule of Law as a Theater of Debate" in Justine Burley (ed) *Dworkin and His Critics: with Replies by Dworkin* (Blackwell, Malden (Mass), 2004) 319, 323.

67 See David Dyzenhaus "Aspiring to the Rule of Law" in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds) *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, New York, 2003).

four categories, but I list it separately to leave scope for arguments that some human rights (perhaps of bodily integrity, privacy, personality) are likely to be protected by public law as an intrinsic matter (without textual authority), yet without being subsumed into "rule of law".

B Applying Publicness Criteria to Entities Producing Rules or Decisions in Global Governance

My argument is that, subject to other constraints and considerations, national courts will and should give more weight to rules or decisions produced by external entities where these more comprehensively meet requirements of publicness. This overlaps with, but differs from, the idea that national courts recognise a de facto delegation of power to an external entity, or that national courts defer to an external entity. So national courts might accept that the states members of the United Nations have delegated certain powers to the UN Security Council and decide to attach decisive weight to a UN Security Council action without further inquiry. But where this is a retail rather than wholesale act, affecting named individuals in a disproportionate and arbitrary way and without reasons being given or recourse being available, a national court might make its own inquiry into the degree to which requirements of publicness have been met. Similarly, national courts might defer to a global industry association standard because of its expertise, but if the particular standard affects third parties and they were not consulted or permitted to participate, the courts might apply criteria of publicness in determining what weight to give to it.

Adam Smith recognised a form of political development in which the chiefs are in office before there is a constitution or substantive law. Similarly, judges may be appointed judges before there are any substantive rules for them to apply – the international law idea of adjudication ex aequo et bono is an illustration.

The justification for a democratic polity acquiescing in the work of, or appointing, an external rule-maker or decision-maker within a structure of global governance is greater if that entity meets requirements of publicness. In addition to their normative attractions, these requirements may be instrumentally useful, helping ensure a substantively better rule or decision, and they may help increase buy-in to it.

The reason-giving requirement is illustrative of this mix of normative and functional attributes. Governance mechanisms can be arrayed along a spectrum between essentially political and essentially legal modes of operation, based upon the degree of commitment to deliberation and reason-giving in their decision-making. A purely political mechanism, such as the casting of votes in a secret ballot, involves no obligation to give any reasons or to seek to persuade anyone else. Conversely, a judicial mechanism usually involves an obligation to state reasons and a considerable effort to make these reasons convincing to the parties and to the relevant audience. In between are modalities that are more political but have a deliberative rather than arbitrary decisionist mode of operation. In developing such an analysis, John Ferejohn has hypothesised that purely political mechanisms (such as electoral choices) that play a vital part in national democracies can seldom be routinised in global administration, where democratic legitimation of political decision-making is not

achievable. As a substitute, actors with the power (individually or in coalition) routinely to impose political decisions must usually give reasons to overcome the legitimacy deficit that otherwise would generate contestation or non-cooperation from necessary parties.[68]

This "publicness" analysis could be applied to the Chicago Convention system and the work of the International Civil Aviation Organization, in the kind of situation exemplified by the *Air Line Pilots' Association* case. A national court faced with uncertainty as to whether the controlling law of the forum makes a Standard or Recommended Practice obligatory or not might consider the degree to which the International Civil Aviation Organization and its participants acted in accordance with the relevant rules and the acceptability of these rules, the degree to which membership of the Organization includes or gives real consideration to all of the relevant interests, the relationship of proportionality between the legitimate end and the means employed, Lon Fuller-type criteria of publication, even-handed application and the like, and the effect of the Standard or Recommended Practice on basic human rights. Insofar as a balance had been struck between maximising navigation safety and fair treatment of pilots in the use of cockpit voice recordings, on the one hand, and fairness to crash victims and their families on the other, the degree to which these interests had been fully represented and fairly weighed in the International Civil Aviation Organization process would be one relevant factor for a national court. Beyond "publicness" considerations, the national court might also take account of the possible effects of its decision in relation to the whole global governance regime, giving different weight to such questions depending on the whole context.

I have argued that global governance is generating categories of legal problems which raise unfamiliar challenges for national courts, and I have tried to point to some of the conceptual resources that might be available in dealing with these problems as more and more of them arise. Sir Kenneth Keith's remarkable range, from administrative law to public international law and from economic governance to conflict of laws, his ability to see patterns and connections among categories ordinarily kept separate, and his imaginative but robust methods for bringing all of these together in dealing with concrete legal problems, exemplify what will be needed to guide the development of jurisprudence in this area.

68 John Ferejohn "Accountability in a Global Context" (International Law and Justice Working Paper IILJ 2007/5, Global Administrative Law Series, Institute for International Law and Justice, New York University School of Law, 2007) www.iilj.org (accessed 26 August 2008).

Seeing the World Whole

Essays in Honour of Sir Kenneth Keith

Edited by
Claudia Geiringer and Dean R Knight

Victoria University Press

in association with

NEW ZEALAND CENTRE FOR
PUBLIC LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

VICTORIA UNIVERSITY PRESS
Victoria University of Wellington
PO Box 600 Wellington
victoria.ac.nz/vup

New Zealand Centre for Public Law
Victoria University of Wellington
PO Box 600 Wellington

First published 2008

National Library of New Zealand Cataloguing-in-Publication Data

Seeing the world whole : essays in honour of Sir Kenneth Keith /
edited by Claudia Geiringer and Dean R. Knight.
Includes bibliographical references and index.
ISBN 978-0-86473-589-8
1. Constitutional law. 2. International law.
3. Law—Study and teaching. 4. Procedure (Law)
I. Keith, Kenneth James. II. Geiringer, Claudia, 1968-
III. Knight, Dean. R.
340—dc 22

. This book was produced with the assistance of

The Law Foundation NEW ZEALAND

Typesetting by Ahi Text Solutions, Wellington
Printed by Astra Print, Wellington