

## CO-OPTION AND RESISTANCE: TWO FACES OF GLOBAL ADMINISTRATIVE LAW

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### I. INTRODUCTION

This Article addresses some issues relating to the emergence of global administrative law from a third world perspective.<sup>1</sup> The essential idea is to determine the nature, character, and limits of an evolving global administrative law (GAL).<sup>2</sup> In order to do so, this Article departs from a formalistic and narrow definition of global administrative law that excludes the content of substantive rules from its ambit entirely, 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.”<sup>3</sup> This Article instead seeks to assign GAL a more expansive meaning in the context of the changes that are transforming the nature and character of international law and institutions in the era of globalization. A strict separation of the content of substantive rules and GAL, which is largely procedure, is not tenable as states slowly evolve into administrative agencies of international institutions (as, for example, in the case of World Trade Organization (WTO)), and because the operation of GAL can impact the content of substantive rules or be co-opted and subverted by them. The principal aim of this Article, however, is to explore the conditions in

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1. In this paper, the terms “third world countries” and “developing countries” are used interchangeably. For a third world perspective on international law, see generally B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 47-73 (Anthony Anghie et al. eds., 2003); B.S. Chimni, *Towards a Radical Third World Approach to Contemporary International Law*, *INT’L CENTER FOR COMP. L. & POL. REV.*, Oct. 2002, at 14.

2. On global administrative law, see the seminal article of Benedict Kingsbury, Nico Krisch & Richard B Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (Summer/Autumn 2005).

3. *Id.* at 29.

which GAL can act—in however limited a way—as a tool of resistance and change in the international system.

Part II of this Article argues that an evolving GAL is an inextricable part of contemporary international law and of institutions that have an imperial character. Therefore, in the absence of criticism and reform of those substantive laws and institutions, GAL has only a limited potential to further the cause of democracy and justice. Indeed, without a concurrent concern with substantive law, GAL may only legitimize unjust laws and institutions. By focusing exclusively on GAL, a false impression may arise that existing international institutions are becoming more participatory and responsive to the concerns of developing countries and their peoples. Therefore, GAL needs to be re-conceptualized in a manner that does not dictate the complete separation between substantive and procedural administrative rules.

Part III explores the conditions in which GAL can advance the global democratization and justice agenda by looking at the national experience of a developing country—India—in the context of 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 populations, the use of administrative law is often a mere theoretical possibility. However, the experience also suggests that there are conditions in which administrative law principles can serve as instruments of change. These conditions include the design of appropriate participatory structures of administrative bodies, the presence of social movements and non-governmental organizations (NGOs) that support the causes of ordinary citizens, and the existence of a right to information-access laws that can be used to compel the transparency and accountability of administrative bodies.

What is true of the disadvantaged and marginal populations in India is true of many other developing countries in their relations with global administrative bodies. Part IV illustrates the need for appropriate participatory structures with reference to the Codex Alimentarius Commission that sets international food standards with implications for the trade of third world countries. The case study reveals, among other things, that at the international level a participatory structure has meaning only if third world states and relevant NGOs are

provided with the financial and technical assistance necessary to effectively participate in the work of an international body.

Part V of this Article examines the case of refugee status determinations conducted by the Office of the United Nations High Commissioner for Refugees (UNHCR) and suggests 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 decisionmaking by an international body. GAL can be effectively implemented in such contexts only if a watchdog role is played by Global Social Movements (GSMs) or concerned NGOs. Thus, the lesson learned 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 in the international context, where judicial intervention is not normally available.

Part VI concludes with 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

### A. *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 advantage.<sup>4</sup> This characterization rests on, among other things, 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. Taken together, these developments have laid the foundation of a world order in which the North-South divide continues to grow while the powerful states are less constrained in the use of force against third world states and have

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4. B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, *ECON. & POL. WKLY.*, Feb. 6, 1999, at 337; B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 *EUR. J. INT'L L.* 1 (2004).

constructed fortresses in Europe and America, keeping out both economic migrants and asylum seekers.

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

### B. *The Emerging Global State*

At the national level, the nature and content of the rule of law, and thereby administrative law, is shaped by the nature and character of the state, among other things. For instance, administrative law has a different content in liberal democratic states than in states that are not democracies; in the latter, administrative law is somewhat underdeveloped.<sup>5</sup> Non-democracies usually do not take seriously the administrative law principles of transparency, accountability, and responsiveness.<sup>6</sup> In short, an understanding of the working of administrative law anticipates a particular theory of the state and law.

This is equally true at the global level. GAL can assume different shapes depending on the nature and character of international law and institutions. Today, in the era of globalization, international law and institutions are playing an increasingly significant and intrusive role, especially in relation to developing countries. These countries are compelled to cede economic, social, and political sovereignty to international in-

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5. As P.P. 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* 3 (5th ed. 2003).

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 EUR. FOREIGN AFF. REV. 563, 572 (1998); B.S. Chimni, *WTO and Environment: The Shrimp-Turtle and EC-Hormone Cases*, *ECON. & POL. WKLY.*, May 13, 2000, at 1752.

stitutions.<sup>7</sup> Arguably, a “global state” is emerging, constituted by a range of international institutions that regulate the social, economic, and political life of states.<sup>8</sup> In fact, the emergence of GAL can be seen as evidence of the evolution of a nascent global state.

What then must be developed is a theory of the character of the emerging global state and its law. If the emerging global state and law have an imperial character, as suggested above, this fact will unavoidably shape and color GAL. To state the matter differently, an imperial global state cannot easily coexist with the principles of GAL. Characterizing the global state and identifying the actors who 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, and 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, the transnational corporation—a key agent of the TCC—is better situated to use GAL to its advantage because of its huge resources.

C. *Conceptualizing GAL: Narrow v. Broad Definitions*

Most significantly, the character of the emerging global state is important from the standpoint of conceptualizing GAL itself. GAL can be defined either in a narrow or in a broad manner depending on the political theory used to interpret developments in the area of international law and institutions in the era of globalization.<sup>9</sup> Benedict Kingsbury, Nico Krisch, and Richard Stewart offer a narrow definition of GAL on the basis of a dualistic understanding of international law, namely that international law does not directly address private entities and individuals. According to these scholars, “we may identify

7. Chimni, *supra* note 4, at 1-39; Kingsbury, Krisch & Stewart, *supra* note 2, at 16.

8. Chimni, *supra* note 4.

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, at 3.

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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.”<sup>10</sup>

The narrow definition of GAL thus incorporates the understanding that GAL is merely an early departure from the continuing dualistic understanding of international law. It searches for examples of such departures to see whether certain principles and best practices of administrative law can be brought to bear on them. Thus, for example, we can look to the work of the Codex Alimentarius Commission, or that of the Basel Committee, or the World Bank’s Inspection Panel, and determine how such work should be carried out. The idea is to identify all those agencies and mechanisms that should be subject to principles and good practices that 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 underlying nature of international law and institutions. Recent developments have, among other things, turned nation-states into administrative agencies (as in the case of the WTO),<sup>11</sup> leading to questions about considerations of global democracy and global citizenship. This calls for 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. A broader definition of GAL does not, in the face of the democracy deficit that characterizes international institutions and bodies, accept the strict separation between substantive law and administrative law.

There is no unique way of classifying developments as representing GAL. Thus, the *Shrimp Turtle I (United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia)* report of the WTO Appellate Body (AB) may either be seen as an important positive administrative law development, as it is seen by Kingsbury, Krisch, and Stewart, or as an interpretation which transforms substan-

10. Kingsbury, Krisch & Stewart, *supra* note 2, at 17.

11. Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 695 (2005).

tive rules to the disadvantage of the third world countries in the name of ensuring transparency, accountability, and deliberative democracy.<sup>12</sup> I have argued elsewhere that the WTO AB Report in the *Shrimp Turtle I* case legitimizes using unilateral trade measures to realize domestic environmental goals by linking it to a consultative process, all the while ignoring the fact that this process is subject to power dynamics.<sup>13</sup> More significantly, on my reading of *Shrimp Turtle I*, the affected state cannot, in the final analysis, prevent a state from taking a unilateral trade measure, as the obligation on the state taking the measure is only to negotiate—not to arrive at a mutually acceptable agreement.<sup>14</sup> The idea of a prior consultative process should also consider the fact that the *Shrimp Turtle I* case represents a radical departure from the *Tuna Dolphin* cases in ac-

12. Kingsbury, Krisch & Stewart 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 U.S. administrative authorities.

Kingsbury, Krisch & Stewart, *supra* note 2, at 21.

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13. B.S. Chimni, *WTO and Environment: The Legitimation of Unilateral Trade Sanctions*, *ECON. & POL. WKLY.*, Jan. 12, 2002, at 133. As Shaffer has noted:

[P]rocess-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 *POWER AND GLOBAL GOVERNANCE* 130-61 (Michael Barnett & Raymond Duvall eds., 2004).

14. See Chimni, *supra* note 13, at 133.

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cepting the validity of unilateral trade measures for environmental protection.<sup>15</sup>

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—that is, the imperial nascent global state—cannot tolerate a robust application of principles of administrative law. GAL is today being shaped by a transnational capitalist class that seeks to legitimize unequal laws and institutions and deploy it to its advantage. But even if we were to reject this understanding, there would remain questions as to whether GAL can serve as a tool of resistance and change. It is useful in this regard to look at the specific national experience of a developing country 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 relevant because access to judicial review of administrative decisions, more or less ruled out in the international sphere, is not practicable for a vast majority of Indians. It is at best a mere 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 beyond the scope of democratic governance. Baxi has 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.’”<sup>16</sup>

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

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15. *See id.*

16. Upendra Baxi, *Introduction* to I.P. MASSEY, *ADMINISTRATIVE LAW*, at xiii (5th ed. 2001).



many other allied groups of underprivileged and deprived.<sup>17</sup>

Baxi discusses the “boundless manipulability” of administrative law by the “middle classes” to stop it from realizing its “benign potential.”<sup>18</sup> Therefore, the central question in his view is how we may “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.”<sup>19</sup>

Baxi suggests that “we ought to bear in mind that courts are not the only agencies for combating and controlling excesses of public power.”<sup>20</sup> Indeed, according to him, “it is doubtful that courts have been the decisive instrumentalities of generating an ethic of power anywhere in the world.”<sup>21</sup> 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 administrative law jurisprudence towards the growth of an ethic of public power.”<sup>22</sup> He suggests exploring feasible alternative options for the development and implementation of administrative law.<sup>23</sup> This suggestion has even greater salience in the global realm, where judicial intervention is unavailable.

The alternatives to judicial intervention for the development and enforcement of administrative law are 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 the course of its work. A possible example of this is the Delhi “Bhagidari” Scheme that won the UN Public Service Award in 2005 for improving transparency, ac-

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17. *Id.* at xxiv; *see also* BIMAL JALAN, *THE FUTURE OF INDIA: POLITICS, ECONOMICS AND GOVERNANCE* 108 (2005) (“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.”).

18. Baxi, *supra* note 16, at xiv-xv.

19. *Id.* at xxvii.

20. *Id.* at xxxiv.

21. *Id.* at xxxv.

22. *Id.* at xxxvii-xxxviii.

23. *Id.* at xxxviii.

countability, and responsiveness in public service.<sup>24</sup> The “Bhagidari” scheme has been implemented in the National Capital Territory of Delhi with its own legislative assembly and chief minister.<sup>25</sup> 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 populations.<sup>26</sup>

Moreover, the scheme promoted transparency and accountability, professionalism, and represented a “radical departure in design” from prior models.<sup>27</sup>

The official website of the Delhi Government describes the “Bhagidari” scheme as “a citizen’s partnership in governance” to bring about changes in the city of Delhi. These changes are to be achieved through the collaboration of stakeholders and by holding large group interactive events.<sup>28</sup> The Delhi government claims that such collaboration and interactive events have already been implemented in relation to different public services and activities, resulting in the award for public service by the UN.<sup>29</sup>

A second option for the non-judicial development and implementation of administrative law principles is for social movements (or concerned NGOs) to play a watchdog role. It is most often social movements or 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 already formally required to abide by core administrative law principles of participation,

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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/unpan021332.pdf>.

27. *Id.*

28. Gov’t of National Territory of Delhi, Bhagidari, <http://delhigovt.nic.in/bhagi.asp#1> (last visited Mar. 2, 2006).

29. *See generally id.*

transparency, and accountability. To take a recent example, in August 2005, Resident Welfare Associations (RWAs), NGOs, and citizen forums in Delhi agitated to get the Delhi government to withdraw a ten percent increase in the power tariff in urban areas. These organizations complained of the absence of transparency and participation in decisionmaking by the Delhi government. In the absence of sufficient justification, the Chief Minister of Delhi was compelled to withdraw the increase in the power tariff.<sup>30</sup> The power agitation demonstrates the critical role of social movements even where an appropriate administrative structure such as the “Bhagidari” scheme has been put in place.<sup>31</sup>

A third non-judicial option that can facilitate the implementation of administrative law principles is a robust right-to-information law. It is an excellent tool to improve the functioning of administrative bodies by making their actions transparent and accountable. The passage of the 2005 Right to Information Act in India is a step in this direction. As its preamble notes, the act seeks “to promote transparency and accountability in the working of every public authority.” It was

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30. One media report sums up the grievances of ordinary citizens:

A major issue highlighted in the protests over the tariff hike was that while tariffs had risen significantly, the power situation in the capital was yet to improve. Another important issue was ‘meter terrorism.’ Over the past three years, the Tata-owned NDPL and the Reliance Group-owned BSES companies had changed electricity meters across the city. While the DISCOMs [privately owned distribution companies] claimed that the new meters reduced power leakage and loss, residents alleged that the meters were faulty and the electricity bills shot up after they were installed. The prospect of being forced to pay an additional 10 per cent galvanized the middle class into action.

Aman Sethi, *Frontline: The Price of Reforms* (PBS television broadcast, Sept. 10, 2005), available at <http://www.flonnet.com/fl2219/stories/20050923002703700.htm>. The agitation by RWAs, NGOs, and citizen forums eventually received support from elected members of the ruling Congress. Tribune India, *Delhi Cabinet Approves Rollback of Tariff Hike*, Aug. 31, 2005, <http://www.tribuneindia.com/2005/20050901/delhi.htm#1>.

31. See generally Lokraj Sangathan Online, *Delhi Resident Welfare Association Joint Front Launches Protest Action Against Power and Water Charges*, <http://www.geocities.com/lokrajsangathan/pages2/rRWA5806.htm> (last visited Mar. 10, 2006); Confederation of Indian Industry, *Delhi Power Hike to Be Rolled Back in Its Entirety*, [http://www.ciionline.org/news/newsMain.asp?news\\_id=8312005103655AM](http://www.ciionline.org/news/newsMain.asp?news_id=8312005103655AM) (last visited Mar. 10, 2006); Sethi, *supra* note 30.

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 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 the Indian state of Rajasthan in 2000.<sup>32</sup> The Rajasthan Right to Information Act 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 (Raj samand 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 curtailed.<sup>33</sup>

The Indian experience shows that the role of social movements may 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

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32. The text of the act is available at <http://www.rajasthan.gov.in/ACTS%20AND%20RULES.SHTM> (last visited Mar. 10, 2006).

33. Aruna Roy & Nikhil Dey, *Guaranteeing Action for Employment*, THE HINDU, Aug. 15, 2005; see also Aruna Roy & Nikhil Dey, *The Right to Information: Facilitating People’s Participation and State Accountability*, <http://www.10iacc.org/download/workshops/cs54b.pdf> (last visited Mar. 14, 2006); Neelabh Mishra, *People’s Right to Information Movement: Lessons from Rajasthan Discussion Paper Series* (2003) (on file with author).

justice and insist on transparency, accountability, and responsiveness in international institutions that suffer from a serious democracy deficit. GSMs, moreover, are already influential. For example, they were instrumental in the 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).<sup>34</sup> In order to be effective, GSMs need a global right-to-information convention like those at the domestic level, so as to allow NGOs and ordinary citizens access to information about the working of international administrative bodies. In playing their watchdog role, GSMs can consider forming global teams of eminent individuals and concerned NGOs to monitor administrative decisionmaking in specific institutions. Such a scheme would allow a sustained monitoring of appropriate bodies on a worldwide scale.

#### IV. IMPLEMENTING GAL I: THE CASE OF THE CODEX ALIMENTARIUS COMMISSION

International bodies, like their domestic counterparts, need to adopt measures to strengthen their participatory structure, ensure transparent functioning, and enforce accountability. The need for a more participatory structure may be illustrated with reference to the workings of the Codex Alimentarius Commission (Codex).

Established in 1963 by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), Codex is the foremost international body involved in setting food safety and quality standards.<sup>35</sup> It acquired an added de-

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34. 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." ROBERT O'BRIEN ET AL., *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* 218 (2000).

35. Its functions are stated in Article 1 of Statutes of the Codex Alimentarius Commission, available at <http://www.fao.org/docrep/W5975E/w5975e02.htm>:

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 Pro-

gree of authority and salience after being referred to in the WTO Agreement on Sanitary and Phyto-Sanitary Measures (SPS).<sup>36</sup> 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.”<sup>37</sup> Arriving at appropriate standards is also significant from the point of view of consumer interests and for environmental protection in both the first and third worlds.

The objectives of Codex have not been realized for a variety of reasons. First, while industry in the developed world actively participates in formulating Codex standards, “consumers, public health advocates, and environmental organizations

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gramme, the purpose of which is: (a) protecting the health of the 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 (c) 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.

36. See Agreement on the Application of Sanitary and Phytosanitary Measures, LEGAL TEXTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS art. 3, para. 4 (1994), available at [http://www.wto.org/English/tratop\\_e/sps\\_e/sps\\_e.htm](http://www.wto.org/English/tratop_e/sps_e/sps_e.htm); Frode Veggeland and Svein Ole Borgen, *Changing the Codex: The Role of International Institutions* 15, 26 (NILF Norwegian Agricultural Economics Research Institute Working Paper No. 2002–16), available at [http://www.ecolomics-international.org/caa\\_veggenland\\_borgen\\_changing\\_codex\\_nilf\\_oslo\\_02.pdf](http://www.ecolomics-international.org/caa_veggenland_borgen_changing_codex_nilf_oslo_02.pdf). The reason is that while Codex standards “do not have the force of international law . . . 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.” *Id.* at 15.

37. James Steinberg & Michael Mazarr, *Developing Country Participation in Transnational Decision-making: Lessons for IT Governance* (2003), [http://www.markle.org/downloadable\\_assets/lessons\\_it\\_governance.pdf](http://www.markle.org/downloadable_assets/lessons_it_governance.pdf). 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.” MINISTRY OF HEALTH & WELFARE, CODEX INDIA, ABOUT CODEX, <http://codexindia.nic.in/upecs.htm> (last visited Mar. 14, 2006).

have been relative latecomers, and still comprise a very minor voice.”<sup>38</sup> 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.”<sup>39</sup> This is especially true for consumer and environmental groups in developing countries, since 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) are taking steps to consult consumer organizations at the national level, the precise extent of this consultation and participation is not known.<sup>40</sup> This situation is to be contrasted with the fact that transnational corporations play an extensive and important role in framing standards. The strong role of such corporations 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 [they] might unduly influence the Codex process.”<sup>41</sup>

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 participants;<sup>42</sup> (2) members from developing countries have received

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38. Comments of Public Citizen, Inc. Regarding FDA’s Consideration of Codex Alimentarius Standards, Docket No. 97N-0218 (1997), *available at* [http://www.citizen.org/litigation/briefs/HealthSafety/\\_harmonize\\_/articles.cfm?ID=5212](http://www.citizen.org/litigation/briefs/HealthSafety/_harmonize_/articles.cfm?ID=5212).

39. Codex Alimentarius Commission, ALINORM 03/25/5, Report of the Twenty-Fifth (Extraordinary) Session para. 44 (Feb. 13-15 2003) [hereinafter ALINORM 03/25/5], *available at* [http://www.codexalimentarius.net/download/report/607/alx3\\_05e.pdf](http://www.codexalimentarius.net/download/report/607/alx3_05e.pdf).

40. Codex Alimentarius Commission, ALINORM 05/28/15, Report of Fourteenth Session of the FAO/WHO Coordinating Committee for Asia paras. 95-101 (July 4-9, 2005) [hereinafter ALINORM 05/28/15], *available at* [http://www.codexalimentarius.net/download/report/622/al28\\_15e.pdf](http://www.codexalimentarius.net/download/report/622/al28_15e.pdf).

41. ALINORM 03/25/5, *supra* note 39, para. 44.

42. Steinberg and Mazarr, *supra* note 37, at 6.

little support from their governments;<sup>43</sup> (3) developing countries have held few leadership positions in the primary committees;<sup>44</sup> and (4) the complexities involved in “tracking implementation requirements.”<sup>45</sup>

A Codex Trust Fund to finance the greater participation of developing countries was launched and became operational on March 1, 2004.<sup>46</sup> 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 Fund.<sup>47</sup>

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43. “[D]eveloping 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.” *Id.* (emphasis in original).

44. “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.” *Id.* (emphasis in original).

45. “*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.” *Id.* (emphasis in original).

46. For the detailed objectives of the Fund, see Codex Trust Fund, <http://www.who.int/foodsafety/codex/trustfund/en/index1.html> (last visited Mar. 13, 2006). For a detailed statement, see FAO/WHO Cooperative Programme Multi-Donor Project, Project Document, FAO/WHO Project and Fund for Enhanced Participation in Codex (June 17, 2003), <http://www.who.int/foodsafety/codex/trustfund/en/index2.html>.

47. Codex Alimentarius Commission 46 CAC/27 INF.9, Report of the Administrator: FAO/WHO Project and Fund for Enhanced Participation in Codex, Agenda Item 15. paras. 4-5 (June 28-July 3, 2003), *available at* <http://www.who.int/foodsafety/codex/trustfund/en/>.



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 example, has expressed concern that the broad goals of the Trust Fund, which include the transformation of domestic practices rather than simply promoting greater participation of developing countries, may, given the Fund's meager resources, mean that the objective of promoting greater participation may suffer.<sup>48</sup> Furthermore, the strong presence of private industry, the absence of serious expertise among developing countries and their consumer and environmental organizations, and the lack of development of national Codex committees pose a major hurdle to the effective participation of developing countries in Codex's 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 Commission's decisionmaking process. 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 mem-

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48. India has strongly objected to the enlargement of the "original objectives" for setting up the trust fund. It has gone on record as stating:

The main objective for which the developing countries have been requesting for [sic] 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.

Codex Alimentarius Commission 4 CX/MPH 03/4, India's Comments: Trust Fund for Participation of Developing Countries and Countries in Transition in the Work of the Codex Alimentarius Commission, Agenda Item 4 (Feb. 13-15, 2003), *available at* <http://codexindia.nic.in/ipcac.htm#>. On the terms of reference of the National Codex Committee, see CodexIndia, National Codex Committee, <http://codexindia.nic.in/comm.htm> (last visited Mar. 10, 2006).

ber countries as well as the public in the commitment of Codex to protecting health.<sup>49</sup>

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 . . . ."<sup>50</sup>

Therefore, the participation of developing countries in future work may not bring the results they desire, such as renegotiating standards unfavorable to the interests of the developed countries and transnational corporations.

Third, developing countries will incur substantial costs to implement the WTO Agreement on SPS measures.<sup>51</sup> 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 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.<sup>52</sup>

49. *Id.*

50. Vegeeland and Ole Borgen, *supra* note 36, at 16.

51. STEVE SUPPAN & ROD LEONARD, COMMENTS SUBMITTED TO THE INDEPENDENT EVALUATION OF THE CODEX ALIMENTARIUS AND OTHER FAO-WHO WORK ON FOOD STANDARDS (2003), <http://www.agobservatory.org/library.cfm?refID=30278>.

52. *Id.* Suppan and Leonard further note:

[T]he 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

Members have also drawn attention to problems relating to the ability of developing countries to meet traceability requirements given the costs of such requirements, which could potentially negatively impact trade.<sup>53</sup> In short, the relationship of costs and benefits in relation to Codex standards still must be worked out.<sup>54</sup>

Finally, the WTO AB has held that “higher than international” standards (i.e., Codex standards) can be used by states as long as they meet the preconditions in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The use of a higher standard is not to be viewed as an exception to the use of international standards, but rather as a right of member states; the right requires that states provide a scientific justification and commit to undertaking appropriate risk

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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.

*Id.*

53. CodexIndia, Key Issues—Traceability, <http://codexindia.nic.in/keytrace.htm> (last visited Mar. 10, 2006). “Traceability” may be defined as the “the ability to follow the movement of a food through specified stage(s) of production and processing and distribution.” Int’l Ctr. for Trade & Dev., *Codex Agrees on Traceability, Stalled on Biotech Labeling* (May 10, 2004), <http://www.ictsd.org/biores/04-05-28/story2.htm>. See generally *AgroTraceability, Affordable Traceability for the Farm Sector* (Feb. 2, 2005), [http://64.233.179.104/search?q=cache:7CjcEx8mRkKJ:www.seel-tesis.com/sumtrace.pdf+Cost+of+Traceability+or+Developing+Countries&hl=en&gl=in&ct=clnk&cd=9;Jean-Christophe+Bureau,+Sébastien+Jean+&Alan+Matthews,+The+Consequences+of+Agricultural+Trade+Liberalization+for+Developing+Countries:+Distinguishing+Between+Genuine+Benefits+and+False+Hopes+\(Aug.+13,+2005\),+http://+64.233.179.104/search?q=Cache:YqZ2Sw8nagYJ:www.cepii.fr/anglaisgraph/workpap/pdf/2005/wp05-13.pdf+Cost+of+Traceability+or+Developing+Countries&hl=en&gl=in&ct=clnk&cd=6](http://64.233.179.104/search?q=cache:7CjcEx8mRkKJ:www.seel-tesis.com/sumtrace.pdf+Cost+of+Traceability+or+Developing+Countries&hl=en&gl=in&ct=clnk&cd=9;Jean-Christophe+Bureau,+Sébastien+Jean+&Alan+Matthews,+The+Consequences+of+Agricultural+Trade+Liberalization+for+Developing+Countries:+Distinguishing+Between+Genuine+Benefits+and+False+Hopes+(Aug.+13,+2005),+http://+64.233.179.104/search?q=Cache:YqZ2Sw8nagYJ:www.cepii.fr/anglaisgraph/workpap/pdf/2005/wp05-13.pdf+Cost+of+Traceability+or+Developing+Countries&hl=en&gl=in&ct=clnk&cd=6).

54. See SUPPAN & LEONARD, *supra* note 51.

assessment.<sup>55</sup> In these circumstances, the participation of developing countries in the work of the Codex is not as significant as it is often made out to be. GAL is especially limited when 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 consultants.<sup>56</sup> Some changes have been recommended with a view towards improving its work and ensuring greater participation of developing countries in the mission of Codex. However, what is necessary in light of the above analysis is a more extensive review of how developing countries, their consumer and environmental organizations, and ordinary citizens 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 the formulation of Codex standards includes the concerns of developing countries, their consumer and environmental organizations, and ordinary citizens. At the same time, however, this improvement is unlikely under current circumstances, given the broad goals of the Codex Trust Fund, the inadequate expertise of the consumer and environmental organizations in the developing world, the mechanics of the working procedures, and the “irreversible” nature of the standards. More significantly, the ambiguities in the SPS text mean that the potential gains to developing countries from implementing first principles of administrative law to Codex may be negated through interpretations of the substantive law. The lessons drawn from this case study emphasize once again the limitations of a narrow and formalistic definition of GAL.

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55. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products* ¶ 104, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13 1998).

56. For a brief statement on the evaluation of Codex by FAO and WHO, see *Codexalimentarius.net*, *Evaluation of Codex*, [http://www.codexalimentarius.net/web/evaluation\\_en.jsp](http://www.codexalimentarius.net/web/evaluation_en.jsp) (last visited Mar. 11, 2006). For the report of the independent committee, see *Joint FAO/WHO Food Standards Programme, Report of the Executive Committee of the Codex Alimentarius Commission: Review of Codex Committee Structure and Mandates of Codex Committees and Task Forces*, CX/EXEC 05/55/2 Part III (Feb. 9-11, 2005).

## V. IMPLEMENTING GAL II: UNHCR AND REFUGEE STATUS DETERMINATION

I turn now to an area of international agency administrative decisionmaking that has received relatively little attention.<sup>57</sup> The UNHCR carries out refugee status determinations (RSD) with grave implications for the life and liberty of individuals.<sup>58</sup> The numbers of refugees affected by RSD procedures has grown steadily in recent years:

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 predominantly affects urban refugee populations, and is particularly common in the Middle East.<sup>59</sup>

Today, the UNHCR is undertaking RSD under its mandate in some 80 countries (two-thirds of which are State Parties to the 1951 Refugee Convention); therefore, there is good ground to believe the numbers of RSD applications received are even larger than the above quote suggests.<sup>60</sup>

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57. Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT'L J. REFUGEE L. 1 (2006). I am indebted to Kagan for both ideas and for guidance with regard to literature in the field.

58. "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*, 17 GEO. IMMIGR. L. J. 367, 377 (2003); see also Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms* 5 (unpublished manuscript, on file with the author).

59. 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. See Kagan, *supra* note 57, at 1. Pallis, *supra* note 58, at 5.

60. United Nations High Commissioner on Refugees, UNHCR Global Report 2004 89, available at <http://www.unhcr.org/cgi-bin/texis/vtx/template?page=publ&src=static/gr2004/gr2004toc.htm> (last visited Apr. 10, 2004).

Most of the RSD of the UNHCR, as has been noted, is done in third world states.<sup>61</sup> The UNHCR steps in only when a government is “unwilling or unable to do so.”<sup>62</sup> The UNHCR may be either solely responsible for RSD, or a government may be the one making decisions, but governments often rely on UNHCR assessments of cases.<sup>63</sup> UNHCR RSD facilitates protection for refugees in three principal ways: by promoting respect for the principle of *non-refoulement*, by helping in the promotion of durable solutions, and by identifying refugees in need of social and economic assistance.<sup>64</sup>

In the last decade, studies have pointed to lapses in the conduct of RSD by UNHCR. In a pioneering article, Michael 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.”<sup>65</sup> These included the need to publish and make available clear guidelines for UNHCR staff working in RSD; to provide asylum seekers clear written information in their own languages on RSD criteria used; to provide free access to independent legal advice and representation; to allow and facilitate the presence of legal representatives at all interviews and appeal hearings; to permit asylum seekers to have access to all materials or information on which

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61. Kagan notes, for example, that

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 57, at 3.

62. *Id.*

63. *Id.*

64. *Id.* 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.” *Id.*

65. Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 INT’L J. REFUGEE L. 251, 286-87 (1999). On the possible need to meet the obligations under international human rights law, see also Pallis, *supra* note 58, at 6.

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decisions are based; to provide for full written decisions including reasons for any decisions, particularly where claims are rejected; and to establish an independent and impartial body to decide appeals outside the branch office structure.<sup>66</sup>

Michael Kagan has likewise suggested that “clear standards of transparency” should be established in the work of the refugee agency.<sup>67</sup> 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.”<sup>68</sup>

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

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66. *Id.* On the possible need to meet the obligations under international human rights law, see also Pallis, *supra* note 60, at 6.

67. 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 57, at 24-27. R

68. Kagan goes on to note that:

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 57, at 26-27. R

an act or omission of the UNHCR.”<sup>69</sup> But UNHCR officers tend to respond like government officers and may argue that “introduction of modern administrative law principles will increase workloads, leading to increased staff requirements, and more expense.”<sup>70</sup> Another obstacle is the defensive nature of institutional culture: “the UNHCR sometimes acts as if it’s above criticism and normal measures of accountability.”<sup>71</sup> On the other hand, the refugee constituency “lacks not only the leverage and the expertise but also the means and the resources.”<sup>72</sup> According to Hoi Trinh, “advocacy and media pressure” are perhaps “the only effective course of action avail-

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

[T]he 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 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.

*Id.* at 52-53. For a detailed analysis of the internal accountability mechanisms, see Pallis, *supra* note 58.

70. Alexander, *supra* note 65, at 286.

71. 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* 358 (2001).

72. Trinh, *supra* note 69, at 47-48.

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able to those whose lives may be short-changed by the UNHCR.”<sup>73</sup>

In this context, then, 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 concern with the fairness of RSD practices of the UNHCR in Africa, the 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.”<sup>74</sup> The NGOs also called on the UNHCR to initiate public consultations on the new draft refugee status determination procedures.<sup>75</sup> 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 in-

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73. *Id.* at 45.

74. NGO Submission, International Protection, Agenda Item 6 (i), 55th Sess. of the UNHCR, Executive Committee of the High Comm’rs Programme 2 (Oct. 4-8 2004) [hereinafter NGO Submission, International Protection], *available at* [http://www.reahamba.nl/documents/FINAL\\_NGO\\_statement\\_EXCOM\\_protection.pdf](http://www.reahamba.nl/documents/FINAL_NGO_statement_EXCOM_protection.pdf). A study done by Human Rights Watch that, among other things, looked at UNHCR RSD in Nairobi 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 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 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 11-12 (2002).

75. *Id.*

ternational human rights lawyers, international and national NGOs working on refugee issues, academics, and legal aid practitioners.”<sup>76</sup> The evaluation would “recommend rights-based RSD procedures to be followed consistently by all field protection officers with a mechanism to ensure their implementation.”<sup>77</sup>

Faced with academic and NGO criticism, the UNHCR announced a commitment to improve its RSD activities.<sup>78</sup> In 2003-2004 it indicated that it was drafting a new handbook governing its RSD work.<sup>79</sup> Furthermore, the UNHCR’s Department of International Protection (DIP) worked to make RSD procedures more effective.<sup>80</sup>

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76. NGO Submission, International Protection, *supra* note 74, at 2.

77. *Id.*

78. RSDwatch.org, UNHCR-RSD Reform, [http://www.rsdwatch.org/index\\_files/Page441.htm](http://www.rsdwatch.org/index_files/Page441.htm) (last visited Mar. 5, 2006).

79. 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.

*Id.*

80. 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. *Id.* The project also assists in designing and delivering RSD training to UNHCR staff. Seventeen international consultants and twelve United Nations Volunteers (UNVs) were deployed through this project to assist UNHCR field offices and governments in nineteen countries to undertake RSD. *Id.* The employees assisted in reducing backlogs of asylum applications. Some 6,000 cases were processed, comprising over 14,000 applicants. *Id.* They helped to develop and implement RSD procedures and in training UNHCR and NGO staff. *Id.* The varied

A RSD Unit was also 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 operations.<sup>81</sup>

In September 2005, the UNHCR finally published the Procedural Standards for Refugee Status Determination Under UNHCR's Mandate.<sup>82</sup> The NGO community called the document "an important step forward" since it had "for the first time published comprehensive guidelines" and recognized "the importance of legal aid, greater transparency and the need to provide reasons for rejections."<sup>83</sup> NGOs were, however, dismayed by the lack of adequate progress on two key issues: the use of secret evidence and the creation of an independent appeals system.<sup>84</sup> The argument that the UNHCR does not have sufficient resources to set up an independent appeals system has been met with criticism. It has been pointed out that "there is no provision in human rights law to compromise on due process just because a government lacks

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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. UNHCR Global Report 2004, *supra* note 60, at 89.

81. UNHCR, Protecting Refugees, <http://www.unhcr.org/cgi-bin/texis/vtx/protect?id=3d3d26004> (last visited Apr. 24, 2006).

82. UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=4317223c9> (last visited Apr. 24, 2006).

83. See Int'l Council of Voluntary Agencies, NGO Statement on International Protection, <http://www.icva.ch/cgi-bin/browse.pl?doc=doc00001470> (last visited Mar. 14, 2006); see also RSDwatch.org, *NGOs React to New UNHCR Procedural Standards*, [http://www.rsdwatch.org/index\\_files/Page3962.htm](http://www.rsdwatch.org/index_files/Page3962.htm) (last visited Mar. 14, 2006).

84. *Id.*

resources.”<sup>85</sup> Therefore, if the UNHCR accepts this justification, it could set a “dangerous precedent” for governments in Africa, Asia, the Middle East, and Latin America.<sup>86</sup>

In sum, GAL holds promise when it comes to the RSD activities of the 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. I have argued elsewhere, relying on the work of Jurgen Habermas, that the international refugee regime can only be reformed through a process of dialogue.<sup>87</sup> The dialogue has to take place not only between the UNHCR and NGOs, or between UNHCR and the refugee community, but also *within* the UNHCR. In short, such a process must replace a defensive institutional culture that is unable to respond to legitimate criticisms. If the UNHCR does not enter the dialogue process voluntarily, it must be compelled to do so through the collective action of the NGO community in alliance with progressive academics.

## VI. CONCLUSION

The emergence and development of GAL should be welcomed by practitioners and academics alike. It draws attention to a range of rules adopted and decisions made, 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 into 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 the limits of this expanding phenomenon. 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.

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85. RSDwatch.org, *On the Tough Issues, UNHCR Pleads Incapacity*, [http://www.rsdwatch.org/index\\_files/Page3752.htm](http://www.rsdwatch.org/index_files/Page3752.htm) (last visited Mar. 14, 2006).

86. *Id.*

87. B.S. Chimni, *The Reform of the International Refugee Regime: A Dialogic Approach*, 14 J. REFUGEE STUDIES 151 (2001).

Some of the conditions that will facilitate GAL to act as an instrument of resistance and change are: (1) the administrative bodies that make up the GAL phenomenon must adopt a progressive substantive international law regime; (2) the relevant substantive international law regime must have a strong human rights dimension; (3) sufficient resources and technical assistance must be made available to developing states and concerned NGOs if they are to effectively participate in administrative rule and decisionmaking; (4) a global right-to-information convention should be adopted, allowing ordinary citizens and NGOs access to information about the workings of international administrative bodies; (5) if possible, global teams of experts, eminent individuals, and NGOs should be formed to monitor administrative decisionmaking in particular areas; (6) an open institutional culture must prevail within concerned international agencies so that dialogue between stakeholders is institutionalized; and, finally, (7) GSMs and/or NGOs should be active in taking up the cause of those affected by administrative rules and decisionmaking.

