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Top Heavy: Beyond the Global North & the Justification for Global Administrative Law

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Abstract:
Global administrative law scholars have argued that global administrative law's principles and normativity can bring about legitimacy to global governance institutions, and subsequently benefit the people of the Global South. I challenge these recent arguments that suggest global administrative law has managed to incorporate the concerns of the Third World. I caution international lawyers' attempt to theorize global governance as administration to fill the democracy gap within the global space. My arguments are premised on the history of domestic administrative law and its uses to facilitate the settler colonial project in places like North America. I first examine the two animating claims within global administrative law and then focus, based on taxonomies available within the current literature, on procedural administrative law. The procedural argument has been developed by American legal scholars that want to deploy their common law based notions of administrative law within the global space. Based on this analysis, I develop and deploy a case study from the International Criminal Tribunal for Rwanda as illustration of judicial review within an international criminal institution set up by the UN Security Council. In the final section, I challenge global administrative lawyers' arguments that global administrative law can be tool of emancipation for the people of the Global South based on the ICTR case study.

Keywords: Global Administrative Law; Procedural Global Administrative Law; Third World Approaches to International Law; Third World Approach to Procedural Global Administrative Law.

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1 Introduction: Global Administrative Law as a Field of Study

The administrative state through administrative agencies deliver essential goods and services for their respective populations.[1] Administrative law, by empowering and regulating these administrative agencies, has become an essential part of our everyday lives. For example, the administrative state supplies the news, regulates farming and agriculture, delivers healthcare, administers schools and prisons, and regulates borders.[2] Administrative agencies and administrative law, in various 'post' colonies have regulated the lives of their respective local inhabitants.[3]

Within the North American context, administrative law has played a significant role in providing public programs. These programs are part of a set of twin rationalities that formed the backdrop to the process of settling on Indigenous lands.[4] The Truth and Reconciliation Commission of Canada, a public body set up to examine the effects of residential schools on Indigenous children and their respective communities noted the following: god had given the European settlers the right to colonize the lands and convert the Indigenous population. These European settlers also brought with them the gift of progress based on European rationalities.[5]

In our respective domestic experiences then, the development of administrative law is closely tied to the delegation of the state's power to administrative bodies as part of the creation of the welfare state.[6] Administrative law now regulates the conduct of administrative agencies and public bodies with delegated executive authority as they administer special programs and services. Our courts act as umpires between the state and its citizen when conflicts arise. More importantly, our courts use various doctrines to ensure fairness and legality of the decisions as they mediate and police the relationship between the state and its citizen. The experience within national jurisdictions have precipitated the migration of the idea of administration to the global context. This paper is concerned with this movement of domestic notions of administration to the global space.

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[1] Sabino Cassese with Elisa D'Alterio, Introduction: the development of Global Administrative Law, in Sabino Cassese (ed) *Research Handbook on Global Administrative Law* (Edward Elgar, Cheltenham UK, 2016) 1.

[2] Colleen Flood & Jennifer Dolling, An Introduction to Administrative Law: Some History and Few Signposts for a Twisted Path, in Colleen Flood & Lorne Sossin (eds) *Administrative Law in Context,* 2nd ed (Toronto, Emond Montgomery Publications, 2013) 2-3.

[3] Sujith Xavier, False Western Universalism in Canadian Constitutionalism and Global Constitutionalism: The 1867 Canadian Constitution and the Legacies of the Residential Schools in Richard Albert et al. (eds), *The New Frontiers Constitutions* (Toronto, University of Toronto Press, 2018) [forthcoming].

[4] Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal, McGill-Queen's University Press, 2015) 46; Sujith Xavier, Theorising Global Governance From Below? Learning from the Global South through Ethnographies and Critical Reflections, 32 *Windsor Yearbook of Access to Justice* (2016) 229.

[5] Truth and Reconciliation Commission, *supra* note 4, at 46.

[6] Gus Van Harten et al., *Administrative Law: Cases, Texts, and Materials*, 6th edn (Emond Montgomery Publications, Toronto, 2010) 3.

In what follows, I challenge recent arguments that global administrative law has, indeed, managed to incorporate the concerns of the Third World.[7] Scholars have argued that global administrative law's principles and normativity can bring about legitimacy to global governance institutions which then benefits the lives of the people of the Global South. I caution international lawyers' attempt to theorize global governance as administration to fill in the democracy gap within the global space. My arguments are buttressed by the history of domestic administrative law and its uses to facilitate the settler colonial project in places like North America. In Canada for example, the administrative agency responsible for Indigenous peoples across the vast territories was instrumental in the creation of the Residential Schools systems that sought to remove "the Indian from the child".[8] Shifting to the United States and focusing on one of the effects of colonization and trade in human beings and their subsequent enslavement, the Freedmen's Bureau was set up to provide essential services for former enslaved people in the aftermath of the Civil War in 1865.[9]

Context and history must play a role within the spaces in which global administrative law is identified and or found by global administrative lawyers. In this analysis, I focus on the American or procedural global administrative law.[10] I first set out the two animating claims within global administrative law and then focus, based on taxonomies available within the current literature, on procedural administrative law. The procedural argument has been developed by American legal scholars that want to deploy their common law based notions of administrative law within the global space.[11] Based on this analysis, I will develop and deploy a case study from the International Criminal Tribunal for Rwanda (ICTR) as illustration of judicial review within an international criminal institution set up by the UN Security Council.

In the final section, I will challenge global administrative lawyers' arguments that global administrative law can be tool of emancipation for the people of the Global South based on the ICTR case study. My analysis is analogous to the critics of global administrative law. For example, Carol Harlow has pointedly noted that it is extremely difficult to identify a universal set of administrative law principles. For Harlow, administrative law is "largely a western construct, taking its shape during the late 19th century as an instrument for the

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[7] Lorenzo Casini, Global Administrative Law Scholarship, in Sabino Cassese (ed) *Research Handbook on Global Administrative Law* (Edward Elgar, Cheltenham UK, 2016) 554; Rene Fernando Urena Hernandez, Global Administrative Law and the Global South, in Sabino Cassese (ed) *Research Handbook on Global Administrative Law* (Edward Elgar, Cheltenham UK, 2016) 392.

[8] Chief Dan Miskokomon, Opening Welcome delivered at "Our Histories, Our Stories: Moving towards Reconciliation" organized by University of Windsor Faculty of Law, Wapole Island First Nation, 17 March 2016, [unpublished].

[9] W.E.B. Du Bois, *The Souls of Black Folk* (New York, Oxford University Press, 2007) 16-32.

[10] Casini, *supra* note 7, at 554.

[11] Richard B Stewart, US Administrative Law: A Model for Global Administrative Law?, 68 *L & Contemp Probs* (2005) 63; Richard B Stewart, The Normative Dimensions and Performance of Global Administrative law, 13 *Intl J Constitutional L* (2015) 499; Benedict Kingsbury, Nico Krisch & Richard B Stewart, "The Emergence of Global Administrative Law" 68 *Law & Contemp Probs* (2005) 15.

control of public power".[12] Dominated by a philosophy of control, "administrative law has played an important part in the struggle for limited government, its core value being conformity to the rule of law".[13] Susan Marks also suggests that global administrative law "seems to bring an object into being, with a solidity and even a monumentality, that risks putting in the shade disputes over process, agency, and orientation".[14]

In this vein, and focusing on the theoretical arguments of Third World Approaches to International Law (TWAIL) scholars, I argue that the American/procedural global administrative law ignores the context in which international institutions are operating. Focusing on this context enables us to turn to thinking about the very nature of international law. International law, generally, has facilitated the drive to universalize Western notions of law and justice to the global space.

2 Global Administrative Law

Global administrative law scholars have advocated for the use of administrative law for two specific reasons. First, they argue that global administrative law can help map the existing global governance infrastructure (beyond domestic and international conceptualizations). Second, they suggest that global administrative law can fill in the democracy deficit within global governance institutions.[15] Some suggest that there are normative and procedural principles within international and transnational law and their respective institutions which can help overcome the democracy deficit within international institutions. These principles include "transparency in rule-making, due process […] in decisions that directly affect private parties; review mechanisms to correct errors and ensure rationality and legality […]" and other mechanisms to promote accountability.[16] Moving beyond the mapping exercise, some global administrative law scholars have characterized global governance as administration.[17]

Global administrative law scholarship has expanded since 2005. This growth can be tracked on two axes. These two axes correlate to the two central aims of global administrative law: The first axis identifies the emerging principles of global administrative law within the international and transnational regulatory regimes.[18] Global administrative law scholars moreover argue that these principles generate, or more importantly, can

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[12] Carol Harlow, Global Administrative Law: The Quest for Principles and Values, 17 *Eur J Intl L* (2006), 187, 190.
[13] Ibid.
[14] Susan Marks, Naming Global Administrative Law, 37 *NYUJ Intl L & Pol* (2005) 995, 995.
[15] Urena Hernandez, *supra* note 7, 392.
[16] Lorenzo Casini, States and Global Administrations in Context, in Sabino Cassese et al. (eds) *Global Administrative Law: The Casebook* (New York, Institute for International Law and Justice, 2013) 25.
[17] For example, Kingsbury, Krisch & Stewart suggest the following: "[…] we are also proposing that much of global governance can be understood and analyzed as administrative action […]"; Kingsbury et al., , *supra* note 11, at 17. Kingsbury and Donaldson have suggested the following in 2011: "The interactions and relationships among different administrative actors and their activities in global governance also increasingly attract demands for application of global administrative law standards"; Benedict Kingsbury & Megan Donaldson, Global Administrative Law, in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law*, 12th edn (Oxford, Oxford University Press, 2011).
[18] Cassese with D'Alterio, *supra* note 1, 3.

generate accountability through for example doctrines of judicial review, transparency and participation.[19]

There are many ways to create a taxonomy of the growing literature on global administrative law. One recent taxonomy has described the field as having three approaches rooted in the experiences of American, European & worldwide perspectives.[20] Lorenzo Casini suggests that these three perspectives have been largely successful in deploying global administrative law's central concerns identified earlier.[21] The American perspective is largely based on the writings of scholars like Benedict Kingsbury and Richard Stewart. Their approach is centred on a sectoral case study method using various interdisciplinary perspectives.[22] The European (largely Italian) approach moves away from procedure to take on a broader perspective rooted in history and multidisciplinarity.[23] This perspective is tied to the various national experiences with the European Union.

In characterizing the worldwide perspective, Casini relies on Bhupinder Chimni's 2005 reflections on global administrative law.[24] He uses Chimni's tepid ten year old endorsement of global administrative law's potential to act as a tool of resistance to measure the success of this field.[25] Yet this characterization of Chimni's 2005 scholarship misses crucial nuances of the arguments that Chimni has put forward throughout his lifetime of research through the Third World Approaches to International Law.[26] This characterization is on par with a fleeting reference by Sabino Cassese in the introduction to the same research handbook in describing the development of global administrative law: "[…] global rules, institutions and procedures have developed under the strong influence of American examples- not as part of a process of 'colonization', but mainly as a process of contamination and intellectual influence".[27]

These assertions however mischaracterize the compatibility of global administrative law to democratise the global governance space, especially as it relates to the Global South. I will examine a specific strand of global administrative law: Procedural administrative law

[19] Ibid, 8-9.
[20] Casini, *surpa* note 16, 560.
[21] See generally Cassese, *supra* note 1.
[22] Stewart, *supra* note 11; Stewart, *supra* note 22.
[23] Casini, *supra* note 20, 557.
[24] The characterization of the world-wide perspective is plainly orientalist; see for example the reference to Global Administrative Law's Arabian nights; Casini, Ibid, 560; For more details on Orientalism, see Edward S Said, *Orientalism* (New York, Random House, 1979); BS Chimni, Co-option and Resistance: Two Faces of Global Administrative Law 37 NYU Journal of International Law and Politics (2005) 799-827.
[25] Casini states: "After 10 years, it must be recognized that many of the conditions listed by Chimni have actually been met, as demonstrated in this handbook"; Casini, Ibid, 561.
[26] BS Chimni, *International Law and World Order* (Cambridge, Cambridge University Press, 2017); BS Chimni, The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi's Hind Swaraj or Indian Home Rule, 23 *Eur J Intl L* (2012) 1159; BS Chimni, The World of TWAIL: Introduction To the Special Issue, 3 *Trade, L & Development* 14 (2011); BS Chimni, Third World Approaches to International Law: A Manifesto, 8 *Intl Community L Rev* (2006) 3.
[27] Cassese with D'Alterio, *supra* note 1, 10.

or American administrative law. I focus on two central figures within this type of scholarship (Benedict Kingsbury and Richard Stewart) and then I construct an example of what procedural administrative law would look like based on a decision from the ICTR.

2.1 Focus on Procedure in Global Administrative Law

In the global legal order, and unlike its domestic counterpart, there is no potential for direct democratic participation by the various constituents. The structure of the global order, based on notions of Westphalian sovereignty, does not allow for such participation. Much more importantly, there is no Leviathan like sovereign at the global level and the respective branches of government are hard to discern.[28] Subsequently, a central goal of the procedural, or American global administrative law, is to redeploy global governance as administration.[29] Proponents suggest that this framing allows the recasting of "many standard concerns about the legitimacy of international institutions in a more specific and focused way".[30] The concern centres on "how can these global regulatory regimes be made accountable to the actors or publics whose interests they are supposed to serve"?[31]

In this section of the chapter, I focus on Benedict Kingsbury and Richard Stewart and their understanding of global administrative law. Noted as the "founding fathers" of global administrative law[32], these scholars have argued that global administrative law contains the mechanisms, principles, practices, and supporting social understanding that affect accountability of international regulatory agencies. They suggest that international agencies have developed standards such as transparency, participation, reasoned decision-making, legality and effective review of the decisions.[33]

In 2015, Richard Stewart put forward the following understanding of global administrative law: "GAL's central insights are that much global regulatory governance is administrative in character and that it accordingly invites application of administrative law mechanisms, including transparency, participation, reason giving, and review".[34] Policy makers more importantly should turn to the fundamental principles of administrative law. By turning to these principles, they can overcome the democracy deficit and problems of legitimacy within the global spaces.[35] The central goal then is to position administration as global governance. This positioning enables "recast[ing] many standard concerns about the legitimacy of international institutions in a more specific and focused way".[36]

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[28] Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil* (Oxford University Press, Oxford, 1996).
[29] Kingsbury et al., *supra* note 11.
[30] Ibid, 27.
[31] Stewart, *supra* note 11, 64.
[32] Casini, *supra* note 20, 555.
[33] Kingsbury et al., *supra* note 11.
[34] Stewart, *supra* note 22, 499.
[35] Daniel Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 *Yale LJ* (2006) 1490.
[36] Benedict Kingsbury, The Concept of "Law" in Global Administrative Law, 20 *Eur J Intl L* (2009) 23, 27.

In the global regulatory space, Stewart suggests that there are three types of international regulatory regimes: Treaty-based international regulatory regimes; Transnational regulatory networks; mutual recognition agreements and cooperative regulatory equivalence determinations.[37] Focusing on the first type of regime identified by Stewart, we know that international institutions are often created by diverse actors and these institutions are not accountable to a constituent population. Democratic participation, analogous to that found in the national jurisdictions is not available within international institutions, especially Treaty-based international regulatory regimes

The International Criminal Tribunal for former Yugoslavia and ICTR are good examples where the local populations are unable to participate except as witness to criminal proceedings. The United Nations Security Council created these two international criminal institutions through its Chapter VII Charter powers. The UN Security Council granted these two institutions specific powers to set up the internal infrastructure of the tribunals through the respective statutes. The respective statutes of both criminal institutions invite the judges to draft, repeal and amend the rules of evidence and procedure.[38] This rule-making power has effectively given the judges the power to legislate.[39] More importantly, the tribunal judges are solely accountable to the UN Security Council. The Security Council was very keen to deliver justice cheaply and quickly. As a result, the UN Security Council instituted the completion strategy, a vision to complete the prosecution of international war criminals.[40] The judges have used their power over their respective rules of evidence and procedure to amend the rules to expedite the decision-making process.[41]

From a democratic legitimacy perspective, these types of international adjudicatory agencies with these powers generate decisions that affect portions of the population in Rwanda or in the former Yugoslavia. The constituents of these places have no way of participating in the processes set up by the United Nations Security Council. This facet of global governance therefore engenders a democracy deficit.

Kingsbury and Stewart argue that the results of such a democracy deficit have produced two possible responses: extension of domestic administrative law to intergovernmental regulatory decisions or the development of administrative law type mechanisms at the global level to address decisions and rules made within the global regimes. Kingsbury and Stewart suggest that the proliferation of international, transnational regulation and administration designed to address the "globalized interdependence in such fields as security […]" underlines the emergence of global administrative law.[42] They note that

[37] Stewart, *supra* note 11, 65.
[38] Megan Fairlie, Rulemaking from the Bench: A Place for Minimalism at the ICTY, 39 Texas Intl LJ (2003) 257.
[39] Ibid.
[40] United Nations, *United Nations Peacekeeping Operations Principles and Guidelines* (United Nations Secretariat, New York ,2008) <http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf>.
[41] Maximo Langer & Joseph W Doherty, Managerial Judging Goes International but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms, 36 *Yale J Intl L* (2011) 241.
[42] Kingsbury et al., *supra* note 11, 17.

"[I]ncreasingly, these consequences cannot be addressed effectively by isolated national regulatory and administrative measures".[43]

Stewart moreover has argued for an American model of administrative law. He suggests that this model might be useful in creating accountability within the global governance infrastructure through either a bottom up approach or top down approach.[44] Focusing on the top down approach in deploying administrative law within treaty based international regulatory regimes, he identified several international treaty-based regimes that directly regulate member states, non-state actors and other complex regimes. In detailing the latter, he suggested that "such regimes are most likely to exhibit the characteristics of delegation and norm specificity and authority that are [favourable] to the development of U.S.-style administrative law at the regime level".[45] Within these complex regimes, what procedural global administrative lawyers are looking for is any form of mechanism that generates accountability, transparency, participation.[46] They have identified numerous examples and these include the World Trade Organization, Food and Agricultural Organization, and other international institutions.

In this type of analysis, the regimes picked up as illustrative usually focus on the delivery of public programs at the global level. Very little attention has been paid to the various international criminal institutions set up in the wake of the Cold War. These criminal institutions were created as means to deliver justice to the countless number of victims of war crimes, genocide and crimes against humanity. In this contribution, I focus on an international criminal law institution that wound up its activities in 2012. The following example from the ICTR demonstrates how scholars writing in this genre of global administrative law arrive at their respective conclusions based on their procedural approach to usher in accountability.

The UN Security Council, through *Resolution 955,* established the ad hoc International Criminal Tribunal for Rwanda (ICTR) along with its empowering statute.[47] The UN Security Council initially established the Commission of Experts to investigate the atrocities committed during the Rwandan genocide from January 1994 to December 1994.[48] The Secretary General of the UN appointed three experts from the region to the Commission of Inquiry, and a final report was submitted to the UN Security Council in October 1994. According to the Commission of Experts, "since 6 April 1994, an estimated

[43] Ibid.
[44] Stewart, *supra* note 11, 71-73.
[45] Ibid, 98.
[46] Ibid, 100.
[47] Statute of the International Criminal Tribunal for Rwanda*,* Adopted by United Nations Security Council on July 1 1994 at its 3400th meeting (49th Sess), UNSC Res 935, UN Doc S/RES/935 (1994).
[48] Virginia Morris & Michael P Scharf, *International Criminal Tribunal for Rwanda Volume 1* (New York, Transnational Publishers, 1998), 63-64; Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge UK, 2010), 139; Payam Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment. 90 *Am J Intl L* (1996) 501, 504.

500,000 unarmed civilians have been murdered in Rwanda".[49] Using its Chapter VII powers, UN Security Council established the ad hoc International Criminal Tribunal for Rwanda along with its empowering Statute through *Resolution 955*.[50] ICTR Statute has 32 provisions that identify the international crimes, the organisational structure and the composition of the tribunal.[51] The Statute set out four punishable crimes (genocide, grave breaches of the 1949 Geneva Convention, war crimes, and crimes against humanity[52]). The ICTR delivered its final trial decision in 2012.[53]

The negotiations within the United Nations Security Council were spearheaded by the United States and New Zealand, including the drafting of the statute. Rwanda voted against the resolution at the end. It did however promise to co-operate with ICTR, while China abstained.[54] The various aspects of the statute therefore have strong common law elements predicated on the strong American influence. As the ICTR and its sibling tribunal, the International Criminal Tribunal for former Yugoslavia progressed with their mandate, a strong sense of American type managerialism also took hold.[55]

I present this example as an illustration of global governance as administration at work within global institutions. In what follows, I describe a unique instance in where the judges of the International Criminal Tribunal for Rwanda invoked Anglo-Saxon principles of judicial review.

2.2 Judicial Review before the International Criminal Tribunal for Rwanda:

In July 2001, the International Criminal Tribunal for Rwanda's Registrar suspended the employment contract of Thadée Kwitonda, a defence investigator. Kwitonda was employed as part of Arsène Shalom Ntahobali's defence team.[56] ICTR's Office of the

[49] Letter from the UN Secretary-General Addressed to the President of the United Nations Security Council (Report of the UN Secretary-General), October 4, 1994, UN Doc S/1994/1125 (1994) [43].
[50] Statute*, supra* note 47.
[51] Statute of the International Criminal Tribunal for the Former Yugoslavia*,* Adopted by the United Nations Security Council at its 3217th meeting (48th Sess), UNSC Res 827, UN Doc S/25704 (1993).
[52] Ibid, arts 2-4.
[53] The Mechanism for International Criminal Tribunals assumed responsibilities for the ICTR's residual functions, including rendering one of the final appeal decisions. United Nations Mechanism for International Criminal Tribunals, *The ICTR in Brief*, <http://unictr.unmict.org/en/tribunal>.
[54] Roy Lee, The Rwanda Tribunal, 9 *Leiden J Intl L* (1996) 37, 43.
[55] Daryl A Mundis, New Mechanisms/or the Enforcement of International Humanitarian Law, 95 AJIL (2001) 934; Langer & Doherty, *supra* note 41.
[56] Arsène Shalom Ntahobali was born in 1970 in Tel Aviv, Israel and is a Rwandan national. He is the son of two incumbent Rwandan government ministers during the genocide (Pauline Nyiramasuhuko, Minister for the Family and Women's Affairs and Maurice Ntahobali, former President of the Rwandan National Assembly, Minister for Higher Education and Rector of the National University of Butare). The Trial Chamber convicted Ntahobal of committing, ordering, and aiding and abetting genocide, extermination and persecution as crimes against humanity, and violence to life, health and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; *Prosecutor v Arsène Shalom Ntahobali,* ICTR-97-21-T, The President's Decision on the

Prosecutor investigated Kwitonda as a potential perpetrator of genocide. The prosecutor's finding led to Kwitonda's suspension from his role as a defence investigator.

In challenging the suspension, Ntahobali argued that his investigator, Kwitonda, was the only person with knowledge and confidence of the potential witnesses. Kwitonda was an essential member of the defence team and he was instrumental in aiding the newly appointed Defence Counsel.[57] The Prosecutor argued that the Registrar's decision was not subject to judicial oversight through review, available through legal provisions within the enabling statute, secondary legislation such as the rules of evidence and procedure or Tribunal policy.

The Tribunal's Trial Chamber agreed with the ICTR Prosecutor. The Trial Chamber relied on the delegated administrative powers and responsibilities of the registrar in organising and appointing defence investigators as set out in the statute. The Chamber found that "the issue of re-instatement of a suspended [i]nvestigator is an administrative matter resting with the Registry".[58] The Trial Chamber, using the language of administrative law and judicial review, showed deference to the policy decision of the registrar. Those working in procedural global administrative law can use this decision as evidence to support their arguments that the ICTR is deploying administrative law.

In response to the decision and relying on Tribunal policy directives[59], Ntahobali requested that the International Criminal Tribunal for Rwanda's President Justice Navi Pillay to judicially review the decision of the registrar and the Trial Chamber. Justice Pillay dismissed Ntahobali's motion. She deferred to the administrative decision of the registrar. In her decision, she stated:

> […] In all systems of administrative law, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. There are various formulations of this threshold condition in national jurisdictions, but a common theme is that the decision sought to be challenged, must involve a substantive right that should be protected as a matter of ***human rights jurisprudence*** or public policy.
>
> […] Bearing in mind also, the limited scope of my ***judicial review jurisdiction*** as opposed to an appeal on merits, I do not find the exercise of discretion by the Registrar in the present case to be unreasonable or *malafide* or based on irrelevant or extraneous factors. [***emphasis added***][60]

Application by Arsène Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator (13 November 2002) (International Criminal Tribunal for Rwanda).

[57] Ibid.

[58] Ibid.

[59] *Prosecutor v Arsène Shalom Ntahobali,* ICTR-97-21-T, Directive on Assignment of Defence Counsel and the Rules of Procedure and Evidence (13 November 2002) (International Criminal Tribunal for Rwanda).

[60] Ibid.

Justice Pillay's judicial review of the Registrar allows global administrative law scholars to suggest that international institutions have developed administrative law standards. Pillay's decision can be viewed as an example from the international criminal institutions to illustrate the way principles of judicial review are being deployed in this context. Much more importantly, the language of deference deployed by the Trial Chamber and then Justice Pillay is an important feature of administrative law within commonwealth jurisdictions.[61] Deference is one of the central features of domestic administrative law. The principle of deference allows the supervising courts to show respect to the administrative decision makers, given the expertise of the agency.

With the above listed example, we can see the that the delegated authority granted to the Registrar's office is supervised by the ICTR's judiciary and the President of the Tribunal. In this instance, global administrative lawyers can argue that there is the development of a process of effective review of the administrative decisions that these international criminal tribunals make.[62] For procedural global administrative law scholars like Kingsbury and Stewart, this is an illustration of global governance as administration.[63] But the important question for administrative lawyers is whether such processes actually generate accountability.

These interventions in applying the standard practice adopted by the proponents of global administrative law seem somewhat misplaced. For example, focus on how international institutions function, especially through the ability to judicially review an administrative decision does not generate actual accountability or legitimacy. Claims made by global administrative lawyers is susceptible to challenge because their vision of global governance ignores the true markings of the international regulatory regimes.

Moreover, claims to legitimacy, accountability, and other similar goals obscure the realities of international institutions, while simultaneously propagating an outlook premised on Western accounts of domestic conceptions of law, regulation and governance. In the next section, I develop this argument further by turning to another theoretical field: Third World Approaches to International Law. This field has been sustained by the writings of scholars like Bhupinder Chimni.

3 Moving Beyond Simple Analogies: Third World Approach to Global Administrative Law?

Within commonwealth conceptions of administrative law, animating questions concern the role of government and judges in the process of delivering public programs. In Canada for example, the evolution of the administrative state is tied to the process of settling on

[61] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; David Dyzenhaus, The Politics of Deference: Judicial Review and Democracy, in Michael Taggart (ed) *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) 279.
[62] Kingsbury et al., *supra* note 11, 17.
[63] Ibid; Benedict Kingsbury, The Administrative Law Frontier in Global Governance, 99 *Am Soc Intl L Proceedings* (2005) 143; Kingsbury, *supra* note 36, 27.

Indigenous territories.[64] As the administrative state sought to unite Canada during its early history, administrative agencies such as the Canadian Board of Railway Commission[65] were created to forge a greater connection between the various trading posts across the vast territory. What is missing from these narratives is the way these agencies helped foster colonization of Indigenous territories.

It has been argued that a form of Western universalism is imbedded within the constitutional structure of Canada.[66] This Western universalism in fact works to dispossess Indigenous Peoples of their lands and continue the project of settlement and erasure of Indigenous Peoples. Canadian administrative law and its agencies are the tools by which Canada dispossessed Indigenous peoples. Canadian administrative agencies have fostered the ongoing colonization of settled territories through their state building practices. Administrative agencies in Canada have continued this tradition of dispossession and settlement while simultaneously opening Canada's borders to migrants and refugees. For example, the Canadian Border Services Agencies and the Immigration and Refugee Board controls various populations as they seek to enter Canada as migrants and refugees.[67] Some claimants are deemed worthy to enter Canada while others are denied the benevolence of the settler state.

Building from this domestic experience and circling back to procedural global administrative law, there is a danger in suggesting that the application of administrative law principles within global governance institutions will usher in legitimacy.[68] As noted above, domestic administrative law played a significant part in building the settler state infrastructure, including demarcating the role of judges in policing the boundaries of the administrative state. Administrative law (and its institutions) were created and then used to disenfranchise certain populations. Administrative law then is not neutral in how it was forged or applied.
In taking these principles to the global space ignores the role of administrative law in the settler colonial project. More importantly, there is a historical amnesia about the political role of administrative law in facilitating the erasure and marginalization of the Indigenous

[64] Sujith Xavier & Shanthi Senthe, Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada, 31 *Windsor YB Access Justice* (2014) 1.
[65] Jamie Benidickson, The Canadian Board of Railway Commissioners: Regulation, Policy and Legal Process at the Turn-of-the-Century, 36 *McGill LJ* (1991) 1223.
[66] Xavier, *supra* note 3.
[67] Sherene Razack, When Space Becomes Race, in Sherene Razack (ed) *Race, Space and the Law* (Toronto, Between the Lines, 2002) 1; Bonita Lawrence, Rewriting Histories of the Law: Colonization and Indigenous Resistance in Eastern Canada, in Sherene Razack (ed) *Race, Space and the Law* (Toronto, Between the Lines, 2002) 21.
[68] Karl-Heinz Ladeur has argued that domestic administrative law (and respective institutions) do not generate legitimacy; Karl-Heinz Ladeur, The Emergence of Global Administrative Law and Transnational Regulation, 3 *Transnational Leg Theory* (2013) 243; Sujith Xavier, Theorising Global Governance Inside Out: A Response to Professor Ladeur 3 *Transnational Leg Theory* (2013) 268.

people and people of colour.[69] Focusing on the potential of administrative law to usher in democracy ignores the context in which it was forged. It ignores the way these laws and institutions have been used to marginalize certain Indigenous people and communities of colour. For example, Indian agents (public servants) in Canada were used to kidnap children to populate the Residential schools as far back as 1867.[70]

Within the context of global governance and international law, Third World Approaches to International Law scholars have devoted close to 20 years since their initial conference in 1997 to challenge Western centric international law and institutions.[71] The methodological inclinations advocated by TWAIL can be traced back to the early writings of Third World jurists like Georges Abi-Saab, Mohammed Bedjaoui and R.P Anand.[72] Some have even retraced the evolution of Third World Approaches to International Law back to the dissenting opinion of Justice Pal before the International Military Tribunal for the East.[73]

In their respective interventions, TWAIL scholars have struggled with international law and its potential for emancipation of the people of the Global South.[74] Fundamentally, TWAIL scholars have characterised their movement as encompassing both a theory and method[75] that seeks to: deconstruct the racial hierarchies embedded within international law and to rebuild the edifices of international law as to benefit the lives of the people of the Global South.[76] One of the central features used by TWAIL scholars to deconstruct the embedded racial hierarchies is the dynamic of difference.[77]

Antony Anghie characterised the dynamic of difference as a process that creates a gap between two cultures.[78] One culture is marked as superior while the other is deemed inferior. Techniques are developed to bridge the gap between both cultures.[79] TWAIL

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[69] Constance Backhouse, What is Access to Justice?, in Julia Bass, WA Bogart & Frederick H Zemans (eds) *Access to Justice for a New Century: The Way Forward* (Toronto, Law Society of Upper Canada, 2005) 119.
[70] Truth and Reconciliation Commission, *supra* note 4, 37.
[71] Usha Natarajan et al., Introduction: TWAIL - On Praxis and the Intellectual, 37 *Third World Q* **(**2016) 1946; James Gathii, TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography, 3 *Trade, L & Development* (2011) 26.
[72] Antony Anghie & BS Chimni, Third World Approaches to International and Individuals Responsibility in Internal Conflicts, 2 *Chinese J Intl L* (2003) 71; George Galindo, Splitting TWAIL, 33 *Windsor YB Access Justice* (2016) 37.
[73] Asad Kiyani, John Reynolds & Sujith Xavier, Third World Approaches to International Criminal Law, 14 J Intl Criminal Justice (2016) 915; John Reynolds & Sujith Xavier, The Dark Corners of the World: International Criminal Justice and the Global South 14 *J Intl Crim Justice* (2016) 959.
[74] Xavier, *supra* note 4, 244.
[75] Obiora C Okafor, Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" 10 *Intl Community L Rev* (2010) 37.
[76] Makau Mutua, What is TWAIL?, 94 *American Society Intl L Proceedings* (2000) 31; Gathii, *supra* note 71; Anghie & Chimni, *supra* note 72; Xavier, *supra* note 4.
[77] Antony Anghie*, Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2004) 4.
[78] Ibid.
[79] Ibid.

scholars deploy this argument as means to challenge the universality of international law.[80] In essence, TWAIL scholars, including B.S. Chimni argue that international law is the bridge between the civilized and the savage and it is used as a means to transcend the gap.[81] Similar to the arguments I alluded to earlier within the domestic space, international law is the means by which Western universalism is transferred (and at times imposed upon) those participating within the global structure.[82]

The central tents of TWAIL's arguments focus on the history of international law. This history demonstrates that there are disparities between established, and supposedly neutral, legal concepts and their contemporary application. For example, early European attempts to curtail the raw power of the sovereign resulted in the creation of new rules in the form of international law.[83] These rules, based on European conception of sovereignty and Western notions of law were then applied to communities with different legal traditions in the 'newly' discovered territories.[84]

Scholars like Anghie have demonstrated that international law, and the sovereignty doctrine in particular, was used largely to regulate encounters between local inhabitants of the newly rediscovered world and the European colonisers.[85] This development of international law in the 17th and 18th centuries is predicated on the continuation of colonialism and imperialism.[86] By the late 19th and 20th centuries, the accelerated drive of international law had resulted in an abundance of international institutions that were created to deal with the global issues. This proliferation of international institutions by the late 20th century signalled a new international space that needed to be described and theorised, given the push of globalisation and the changing nature of the nation state.

3.1 Third World Approaches to Procedural Global Administrative Law

It is necessary to apply TWAIL insights to American/procedural global administrative law. Identifying common law type administrative law principles in international law and its institutions to solve the accountability problems does not resolve the existing inequities built into our global governance infrastructure. This practice that global administrative lawyers propose does not take into account the manner in which these tribunals (and international institutions) are created, the rationale and the politics involved in their creation and how they function. Rather, deploying such arguments obscures and reifies the malignant effects of international law and its institutions on various parties that are implicated in the respective decisions. Ultimately, the presence of procedural administrative law does not usher in greater legitimacy to the various international institutions. Rather, this argument camouflages the Western universalism imbedded within the global infrastructure and creates sense of false hope for the people of the Global South.

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[80] Natarajan, *supra* note 71.
[81] Chimni, *supra* note 26.
[82] Stephanie Black, *Life and Debt*, <http://www.lifeanddebt.org/>.
[83] Anghie, *supra* note 77, 17.
[84] Gathii, *supra* note 71.
[85] Anghie, *supra* note 77.
[86] Gathii, *supra* note 71.

The aforementioned Kwitonda decision could be used as a potential reference of judicial review by procedural global administrative lawyers. Their reasoning would be based on how the judges deploy respective rules of evidence and procedure as means to judicially review the Registrar's Office. But doing so ignores the dynamics of the ICTR. The problem with the ICTR started with how it was created.

The UN Security Council created the ICTR to bridge the gap between two cultures, one Western and the other, barbaric. The Tribunal was set up to prosecute the perpetrators of heinous atrocities committed during the Rwandan genocide. These crimes were committed largely by the Hutu majority against the Tutsi minority in Rwanda. The Tribunal was tasked with determining the greatest responsibility for the commission of international crimes. In doing so, the UN Security Council granted the judges the power to create and amend the rules.

The rules were then amended on average 2.6 times per year to comply with the completion strategy and deliver justice cheaply and quickly at the expense of the fair trial guarantee afforded to the accused.[87] Constant changes to the rules have led to problematic witness testimony, trial delay and a myriad of other related problems, all of which highlight the fact that the rights of the accused were not seriously applied.[88]

Justice Pillay dismissed the accused's motion using the vernacular of administrative law. This however does not mean that we can co-opt this example from this specific international criminal institution as demonstrating the vernacular of administrative law. We must first look at the context in which these institutions operate as well as how they function.

The context of Rwanda is such that almost all the citizens were affected by the conflict and the ensuing genocide. Historian Mahmood Mamdani has illustrated the difficulty in ascribing individual criminal responsibility, either by commission or omission, because nearly all Hutus in Rwanda were implicated in the genocide.[89] Much more importantly, to use the ICTR and its jurisprudence as an illustration of administrative law principles in global governance simply ignores the larger systemic problems endemic in international law and international institutions.[90]
In a similar vein, all other international institutions have analogous contextual problems. These issues are deeply connected to how international institutions were forged and how they continue to operate. Historian Mark Mazower has suggested that international institutions like the United Nation's predecessor, League of Nations, have the propensity

[87] Christoph Safferling, *International Criminal Procedure* (Oxford, Oxford University Press, 2012) 25.
[88] Nancy A Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge, Cambridge University Press, 2010); Xavier, *supra* note 68.
[89] Mahmood Mamdani, *When Victims Become Killer* (Princeton, Princeton University Press, 2002) 3-18, 41-102, 185- 233.
[90] BS Chimni, International Institutions Today: An Imperial Global State in the Making, 15 Eur J Intl L (2004) 1.

to be “based on the notional superiority of the great powers, an instrument for a global civilising mission through the use of international law”.[91]

The presence of these administrative law principles then, as illustrated by Justice Pillay’s limited scope of judicial review jurisdiction, says nothing about broader accountability or legitimacy of these types of institutions.[92] Simply pointing to the use of administrative law does not render international institutions more or less legitimate. Rather, it seeks to mask a larger universalist project embedded in politics and interests fuelled by Western notions of law and justice.

The above analysis leads to a question about the true nature of global administrative law proposed by the scholars examined in the previous section. What is demonstrable is that these scholars are relying on their domestic experience with the Western notions of administrative law. They are trying to discover these principles in the global space. There is no regard to the context or the history from which these international institutions emerge. By not engaging in this manner, global administrative law claims described earlier succumb to a peripheral reading of international institutions and the way they function. These characterisations inadequately reflect the inherent realities of these international institutions.

4 Conclusion

Depicting a very singular narrative that focuses on the law on the books, as witnessed by scholars based in Berlin, Hamburg, London, New York, and Toronto is not useful. Generating top heavy theory from the Global North may not help us understand the different political compromises involved in how international law and its institutions are created and how they operate. These types of global governance characterisations described above about international institutions and the various international regulatory bodies are missing the mark by focusing solely on the general legal frameworks, rather than embracing the internal dynamics emblematic within these institutions.

I engaged scholars writing about global governance through the lens of global administrative law with a focus on those advocating for a procedural perspective. I reviewed distinct attempts to understand administration as global governance. This was a purely descriptive account of international institutions and their use of administrative law principles. These scholars have argued that the deployment of administrative principles in international institutions can fill the democracy deficit and usher in notions of accountability.[93] As illustrated within this analysis, these claims are not possible. The evidence from the ICTR highlights that it is possible to describe the Tribunal’s operation in terms of administrative law principles, but this does not mean that the use of these principles will bring about more or less legitimacy or accountability. In fact, arguing for the existence of such principles obscures international law’s deeply unbalanced history of

[91] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United States* (Princeton, Princeton University Press, 2009) 21.
[92] Xavier, *supra* note 68.
[93] Stewart, *supra* note 22, 500.

universalising a specific set of Western norms and how international institutions, including the ICTR, are imbricated in this history.

This type of Global North heavy projects will not bring about the desired legitimacy or accountability within the global governance institutions. There is a need to move beyond this type of a single, universalising, linear, and decontextualized narrative. In this vein, there are proposals to theorise global governance from the bottom-up, beginning with the Global South.[94]

[94] Xavier, *supra* note 4.