Legitimacy Principles in Global Administrative Law

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I. Framing a Global Legal Space

Let us begin the present considerations with a terminological differentiation, which admittedly also has conceptual consequences. Global Administrative Law (in capitals),[1] originating from a multinational research project based at New York University, conceives global administrative law (in small letters) as an answer to the question about the legitimacy of global governance; the latter thus refers to the rules and principles that the former "identifies as normatively governing global administration".[2] Global

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1 B Kingsbury 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

2 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328 (328, 329); B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 1: "Global administrative law can be understood as comprising the legal rules, principles, and institutional norms applicable to processes of `administration´ undertaken in ways that implicate more than purely intra-State structures of legal and political authority."

constitutionalism[3] – an admittedly "contested and fuzzy" concept[4] – and the small-letter variant "global administrative law",[5] defined as "the body of law or law-like principles and mechanisms governing the procedural dimensions of an increasingly important global, or at least transnational, 'administration'",[6] are, as different as they might be conceptually,[7] still built on common ground and share common preconditions. Both face a global legal space in which state and non-state actors alike exercise formerly state-bound (and in fact *exclusively* state-bound) power and which has been brought about by globalization[8] – an even more fuzzy and emphatically contested concept than constitutionalism. Notwithstanding all its ambiguities and shades of grey, globalization would be utterly misconceived if, in its essence, seen as a political ideology, a normative construct or a regulatory revolution purposefully disempowering the traditional nation-state in favour of transnational global elites. Globalization describes, first and foremost, a complexity of real-world phenomena caused by dramatic and

3 A Atilgan, *Global Constitutionalism. A Socio-Legal Perspective* (Springer, 2018); A. Tschentscher/H Krieger, 'Verfassung im Völkerrecht' (2016) 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 407 and 439 (each providing extensive further reference); K Möller, *Formwandel der Verfassung. Die Postdemokratische Verfasstheit des Transnationalen* (transcript, 2015); T Kleinlein, *Konstitutionalisierung im Völkerrecht* (Springer, 2012).

4 C Möllers, 'Constitutional Foundations of Global Administrative Law' in Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107.

5 B Kingsbury et al., 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; CD Classen/G Biaggini, 'Die Entwicklung des Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft' (2008) 67 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 365 and 413; N Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner/M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), 245; M Savino, 'What if Global Administrative Law is a Normative Project?' (2015) 13 *International Journal of Constitutional Law* 492.

6 B Kingsbury, 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 527.

7 *Ibid*, 527: "Unlike other accounts, particularly those tracing a `constitutionalization´ of the world, GAL does not seek to make sense of the entire complex of legal orders and their relation to one another. Rather, it is oriented towards the frayed edges of various orders, the cornucopia of new institutional forms that are springing up and not easily classified within existing categories (…)."

8 The literature is abundant; here are just two samples with a democracy-related ambition: D Rodrik, *Das Globalisierungs-Paradox. Die Demokratie und die Zukunft der Weltwirtschaft* (C.H. Beck, 2011) 416; A v. Bogdandy, 'Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme' (2003) 63 *ZaöRV* 853.

dramatically ongoing technological progress – the World Wide Web and the growing importance of Artificial Intelligence (AI) being perhaps the most striking examples – and by a dramatic increase of non-geographically limited risks, climate change and, again, AI being the potentially most striking threats.[9] These phenomena, in themselves intertwined, have blurred the boundaries between legal regimes and require – as did all fundamental changes throughout human history – legal responses to guarantee effective governance in and for this more or less "brave new world".[10]

Since all exercise of power – which comes along with any form of governance – needs to be legitimized, organized, limited and controlled,[11] advocates of global constitutionalism try to translate these classical constitutional functions into a transnational narrative and to develop a transnational legal architecture of some constitutional quality, knowing that a global constitution "stricto sensu" would be utterly unrealistic.[12] They address, with a constitutional mindset, the very foundations of the international order. Protagonists of global administrative law are, a bit less foundational in their ambit, "animated (…) by the view that much of global governance (particularly global regulatory governance) can usually be analyzed as administration."[13] Both the global constitutional and the global administrative law concept have to deal with the fact that the powers they aim to constitutionalize (or at least to tame) and the processes they seek to regulate are no longer neatly separated into public, private, local, regional, national or transnational spheres, but are intertwined in manifold ways. The

9 See also R Howse, 'The globalization debate – A mid-decade Perspective' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 515, contrasting globalization with the origins of the anti-globalisation debate.

10 Hoping that Aldous Huxley´s 1932 "Brave new World" dystopia will not become its decisive feature.

11 All forms of uncontrolled discretions, as benevolent the actors at the beginning may be, necessarily amount to administrative tyranny at the end of the day; see MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019), 328 (329).

12 B Kingsbury et al., 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

13 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 24, 25; even more outspoken are B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 526, 528: "GAL is distinct in its renunciation of any comprehensive vision of order, and any *a priori* normative foundation."

global legal space, whether conceived as constitutional or administrative space, is composed by a multiplicity of different actors (sometimes themselves hybrid) and different regulatory layers including states, international organisations, transnational networks, domestic as well as international administrations, NGOs, transnational enterprises, informal institutional arrangements, inter-institutional relations, hard law, soft law, gentlemen´s agreements, best practices, self-commitments and others.[14]

This structural heterogeneity is crucial in the search of "administrative sovereignty"[15] and all the more decisive for answering the legitimacy question in a multipolar setting, causing an ongoing diversification of rule-making subjects/rule-enforcing actors.[16] It would be an obvious shortcoming to address only the legitimacy of what each single subject/actor does in its own right, in its own capacity, and corresponding to its own constituency. What needs to be legitimized is their hybrid interplay[17] and interaction causing transboundary legal effects and having repercussions on domestic legal/administrative orders. Thus, a simple transposition of legitimacy modes from the national to the global legal space would be doomed to under-complex failure. Limited and careful analogies, however, might very

14 Different types of global regulatory regimes are identified by S Battini, 'The proliferation of global regulatory regimes' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 45, 53; moreover K Jayasuriya, 'Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance` (1999) 6 *Indian Journal of Global Legal Studies* 425. With particular reference to inter-institutional relations, see B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 54.

15 K Muth, 'The Potential and Limits of Administrative Sovereignty' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 59, 60: administrative authority being "an assertation of control over recognizable administrative mechanisms of government separate from the comprehensive operation of a nation."

16 G Skogstad, 'Global Public Policy and the Constitution of Political Authority' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 23: "The first proposition is that transnational political actors require a legitimate basis for their exercise of political, including regulatory, authority". Furthermore S Cassese et al., 'Towards Multipolar Administrative Law: A Theoretical Perspective' (2014) 12 *International Journal of Constitutional Law* 354.

17 L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 25, 31, holding that "norms produced within global regulatory regimes tend to appear extremely *hybridized*" (italicization in the original).

well be helpful, since global governance itself is in many regards a form of regulatory administration shaped by administrative law instruments stemming from national legal orders (such as the law of participation, the law of transparency, principles of proportionality and accountability, judicial control of administrative functions etc.).[18] Global administrative and domestic law share another baseline principle: the overall accountability and responsibility of regulatory bodies.[19] Consequently, global administrative law also focuses on the protection of human rights and the promotion of democratic ideals.[20] In turn, it formulates global standards that have to be implemented and enforced by national administrations.[21] Global norms thus "reshape the administrative state",[22] whereas "ideas from domestic administrative law can help us to solve accountability problems in global governance."[23]

II. Identifying Legitimacy Principles Relevant for the Global Legal Space – Three Preliminary Questions

Keeping these unquestionable interdependencies and potential analogies in mind, legitimacy principles in global administrative law might be related to the classic distinction between input and output legitimacy; to procedural and substantive legitimacy; to the constitutional triad of human rights, democracy and the rule of law; and last, but not least, to the identification of public goods on the global scale.[24] Obviously, the democratic

18 M Kotzur, 'Art.: World Law' in H Anheier/M Juergensmeyer (eds), *Encyclopedia of Global Studies* (Sage Publications, 2012).

19 See R Keohane, 'Global Governance and Democratic Accountability' in D Held/M Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Blackwell Publishers, 2003); the accountability mechanisms themselves might be competing, see N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 262.

20 M Kotzur, 'Art.: World Law' in H Anheier/M Juergensmeyer (eds), *Encyclopedia of Global Studies* (Sage Publications, 2012).

21 M Kotzur, 'Art.: World Law' in H Anheier/M Juergensmeyer (eds), *Encyclopedia of Global Studies* (2012). Furthermore, L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016), 25, 27 on the effects of globalization.

22 D Barak-Erez and O Perez, 'Whose Administrative Law is it Anyway?` (2013) 46 *Cornell International Law Journal* 456.

23 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 248.

24 L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016), 25, 29.

feature is the least likely one to find (close) resemblance on the global plane. International human rights and an international rule of law can be seen as more appropriate, nevertheless contested, candidates.[25] Spelled out more specifically, (sub-)categories such as transparency, (procedural) participation, mechanisms for consultation and effective review, reasoned decision-making processes, accountability, responsiveness, rationality, legality and quite a few more principles have the potential to become founding principles for global administrative regulation[26] or, in a more encompassing sense, a global polity.[27] There is no shortage of theoretical approaches on constituting transnational political authority, in particular participatory models (the right to exercise voice for all actors affected by the decisions) and delegated-authority models (accountability to those who delegated the authority).[28]

1. However, before delving deeper into the issue of building transnational public authority on legitimate grounds, we need to clarify the question of who both the subjects and objects (targets, addressees) of this authority (and thus also of global administrative law) are. It goes without saying that global administrative law first studies and then attempts to theoretically frame very distinct processes of administration within the realm of global governance. The institutional settings that are scrutinized range from formal (bilateral and often multilateral) treaty-based ones through

25 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107 f., distinguishes a rights-based legalistic approach (107), an alternative approach referring to "technocratic criteria to substitute or at least complement constitutional norms for the rise of the global executive" and global administrative law concerned with the "internationalization and globalization of administrative law". Furthermore, see B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 32.

26 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 25; as far as global regulatory regimes and their proliferation are concerned, see S Battini, 'The proliferation of global regulatory regimes' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016), 45. Furthermore, S Krasner, *International Regimes* (Cornell University Press, 1983).

27 S Cassese, *The Global Polity* (Global Law Press, 2012); I Volkmer, 'The Transnationalization of Public Spheres and Global Policy' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 240 ff.

28 G Skogstad, 'Global Public Policy and the Constitution of Political Authority' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 23, 26 f.

less formal regulatory networks, to hybrid and finally wholly private transnational actors, often even established under national private law.[29] The proliferation of global regimes targets states (i.e., sovereignty concerns) and individuals (i.e., human-rights concerns) as well. States and individuals, therefore, are the subjects and the objects of the same legal system. Or, expressed more pointedly: "Global regimes have assumed the power to impose legal rules upon individuals and national administrations as their members, without requiring prior state authorization."[30] The legitimacy question arises in both dimensions submitting states, on the one hand, and individuals, on the other, to transnational (public) authority.

2. The second preliminary question is that of publicness within the global public space.[31] Without being able to do this in detail here, publicness (or publicity) has to be contextualized with the classic notion of "res publica", meaning public affairs and the good governance thereof by the relevant public.[32] Within the nation-state, the relevant public can be more easily identified as a well-ordered and free political community under a "good constitution", which is characterized by the long-established attributes liberal, democratic, responsible and responsive. The "public" dimension of a "good" constitution depends to a very important extent on a connection of responsiveness and accountability between those who govern and those who are governed. Without minimizing the relevance of input legitimacy, the rule-makers and norm-enforcers should be aware of and *respond to* the ideas, needs, concerns, anxieties, hopes and fears of every actor subjected to their power.[33] Responsiveness and responsibility

29 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 529.

30 M Macchia, 'The Rule of Law and Transparency in the Global Space' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 261.

31 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23 (31) names the following general principles of public law as constitutive for publicness: the principle of legality, the principle of rationality, the principle of proportionality, the rule of law, and human rights.

32 K Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (C.H. Beck, 1999) para. 120K; Nowrot, Das Republikprinzip in der Rechtsordnungsgemeinschaft (Mohr-Siebeck, 2014) 292.

33 The reference to Abraham Lincoln´s famous "Gettysburg Address" A Lincoln/D Fehrenbacher Speeches and Writings 1859-1865: Speeches, Letters, and Miscellaneous Writings, Presidential Messages and Proclamations, (Liberty of America, 1989) 536 is

are not only semantic twins; they represent the two sides of one and the same medal in the tradition of "res publica", "salus publica" and "public freedom".[34] Regarding global administrative law and the global space within which it is built, *B. Kingsbury* has translated these complexities into the following formula: "By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the whole society as such."[35] It consequently is necessary "to connect the law-making process with a political procedure. Needed are therefore enforceable rules for this political process to maintain its legitimacy by legalizing the political system".[36]

3. The quest for global administrative law´s publicness can either be conceived as a "top-down" or a "bottom-up" process. In the prior variant, global administrative law might be related to a cosmopolitan constituency; in the latter variant, it could be construed as the interplay of diverse state or non-state actors involved in its creation. Let us briefly look at the cosmopolitan "top-down" approach. Whereas constitutional theory uses the "common good" as a regulative idea to build a political community on the common interests of the people, various public international law theories try to conceptualize the global legal order as transcending the particular interests of sovereign states and serving the common interests of humankind as such. Humanity is their public; humanity´s publicness lies at the very heart of building global legal regimes. Scholars such as *P. C. Jessup*, *C. W. Jenks* and *W. G. Friedmann* idealistically relied on humankind orientation when describing the transformation of public international law from a system merely organizing the

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not completely unintentional: "government of the people, by the people, and for the people".

34 In that sense, the interpretation of a "republic" by P Häberle, *Verfassungslehre als Kulturwissenschaft* (Duncker & Humblot, 2nd edn, 1998) 1000; furthermore, P Häberle/M Kotzur, *Europäische Verfassungslehre* (Nomos, 8th edn, 2016) para. 324. A classic is, of course, J Bodin, *Six Livres de la République* (Du Puys, 1577).

35 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 31; I Volkmer, 'The Transnationalization of Public Spheres and Global Policy' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University press, 2019) 240 (241); J Habermas, *Strukturwandel der Öffentlichkeit* (Suhrkamp, 1962); J Habermas, *Die postnationale Konstellation* (Suhrkamp, 2001).

36 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 110.

coexistence of sovereign states to a system facilitating the cooperation of States and also non-State actors.[37] The "bonum commune humanitatis" (*F. Suárez*)[38] was also an underlying idea(l) when the "common heritage of mankind" had been developed. Recently, the "bonum commune", the "common heritage of mankind" and the "global commons" have been, amongst others, used as means to observe and as argumentative tools to conceptualize a no longer exclusively state-bound international legal order.[39] Global administrative law, however, mistrusts all attempts to base global administration on substantive grounds. Its approach can rather be characterized as bottom-up, assuming a "massive volume, polycentricity, and obscurity of the interactions", which constitute a global administration and involve a "blurring of national and international, and public and private, dimensions."[40]

37 W Jenks, *The Common Law of Mankind* (Stevens and Sons Limited, 1958) 19 et passim; P Häberle, 'Nationales Verfassungsrecht, Regionale "Staatenverbünde" und das Völkerrecht als Universales Menschheitsrecht: Konvergenzen und Divergenzen' in Gaitanides (ed), *Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (Nomos, 2005) 80.

38 As early as the 18th century, E. de Vattel had framed his "humankind-focused" concept of a "société des nations". Even before that, F. Suárez (1548-1617), a famous representative of the Spanish School, had placed an emphasis on the "bonum commune humanitatis". Humanity itself or, expressed in classical Latin terms, the "societas humana" was one cornerstone of rationalistic natural justice – later on, and with a less Eurocentric starting point, this translated into texts of national constitutions as well as international treaties. The same is true for the Ciceronian notions of "res publica" and "salus publica". Along with these developments came the – in a broader sense – republican premise that justice requires all laws to serve the common good, which is to say the common good not only of national or regional political communities, but of all mankind.

39 S Paquerot, Le Statut des Ressources Vitales en Droit International – Essai sur le Concept de Patrimoine Commun de l'humanité (Bruylant, 2002); K Baslar, The Concept of the Common Heritage of Mankind in International Law (Brill, 1998); W Stocker, Das Prinzip des Common Heritage of Mankind als Ausdruck des Staatengemeinschaftsinteresses im Völkerrecht (Schulthess Juristische Medien, 1992); B Blanc, El Patrimonio Común de la Humanidad – Hacia un Régimen Jurídico Internacional para Su Gestión (Bosch, 1992).

40 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011), para. 1 and 2.

III. Legitimacy Principles Identified

An early framing of global administrative law had, as *B. Kingsbury*, *M. Donaldson* and *R. Vallejo* put it, "provisionally `bracket(ed) the question of democracy´ as too ambitious an ideal for global administration".[41] The approach´s founding fathers, among them B. Kingsbury, even emphasize that global administrative law was neither pursuing any "comprehensive vison of order" nor endorsing "any a priori normative foundation", but being driven by another normative concern, namely, bridging "description and prescription".[42] It intends to reframe "the narratives of justification" – i.e., legitimization – "attributed to global decision-making".[43] This reframing is anything but trivial. Given an obvious lack of shared values and common standards, the framework to be developed cannot simply rely on democratic input legitimacy and can hardly claim a direct output legitimacy by strengthening an international rule of law[44] or advancing human rights.[45] Where the substance of norms remains contested,[46] a "fundamental and durable contestation over the right constituency of global governance" pre-

41 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526.

42 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 528.

43 Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 526 (528); furthermore, see S Ranganathan, 'The Value of Narratives: The India USA Nuclear Deal in Terms of Fragmentation, Pluralism, Constitutionalization, and Global Administrative Law' (2013) 6 *Erasmus Law Review* 16.

44 A Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15; D Thürer, 'Internationales "Rule of Law" – Innerstaatliche Demokratie' (1995) 5 *Swiss Review of International and European Law* 455; I Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations* (1998); Chesterman, 'Rule of Law' in *Max Planck Encyclopedia of International Law* (Springer Netherlands, 2007); M Wittiger, 'Das Rechtsstaatsprinzip – vom Nationalen Verfassungsprinzip zum Rechtsprinzip der Europäischen und der Internationalen Gemeinschaft?' (2009) 57 *Jahrbuch des öffentlichen Rechts der Gegenwart* 427.

45 For further reference, see KH Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation' (2012) 3 *Transnational Legal Theory* 243.

46 See A Wiener, *A Theory of Contestation* (Springer, 2014).

vails;[47] processes and procedural structures, as well as less demanding, but effect-oriented, input and output mechanisms, might open an alternative avenue.[48] Moreover, the shortcomings of real-world governance should not make regulative ideals obsolete. On the contrary, global administrative law can become a dispatcher of both these ideals and of infrastructural incentives for the exercise of power via administrations on the national as well as on the international plane.[49]

1. According to what has just been said, a *Kantian* "humankind orientation", even though it lies in the aforementioned tradition of international-law thinking,[50] might not be the obvious candidate to start reflections on what kind of legitimizing principles global administrative law can rely on. It may nevertheless not be forgotten that the human being – though not necessarily, at least not exclusively, conceived of as an individual holder of rights following Western legal thought[51] – is the *ultimate aim* of *all law* and of *any legal order*. This holds true for global administrative law, too: The human person has to be seen as its very center.[52] Where a "single overarching authority", let alone a democratic grounding in the classical sense, is missing and normative rules do not emanate from a single sovereign,[53] the indispensable "power of legitimacy"[54] might stem from a focus on the needs and threats of

47 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 248.

48 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011), para. 3: "(…), global administrative law principles and mechanisms primarily address process values rather than substantial values (…), which are extremely difficult to ground as generally-accepted bases for most global administrative structures".

49 C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *EJIL* 187.

50 W Jenks, *The Common Law of Mankind* (Stevens and Sons Limited, 1958) 19 et passim; P Häberle, 'Nationales Verfassungsrecht, Regionale "Staatenverbünde" und das Völkerrecht als Universales Menschheitsrecht: Konvergenzen und Divergenzen' in Gaitanides (ed), *Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (Nomos, 2005) 80.

51 In this context, some even fear a human-rights expansionalism; see U Baxi, 'Too Many, or Too Few, Human Rights?' (2001) 1 *Human Rights Law Review* 1.

52 In that sense, see P Allott, 'Reconstituting Humanity – New International Law' (1992) 3 *EJIL* 219; P Allott, *Eunomia – New Order for a New World* (Oxford University Press, 1990).

53 J Klabbers, *International Law* (Cambridge University Press, 2013) 9.

54 T Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).

the human being and humanity[55] as such (as, e.g., expressed by *F. D. Roosevelt's* famous "Four Freedoms Speech" of 7 January 1941).[56] Since the *unbound* "global village" or "contemporary global condominium"[57] – describing manifold worldwide interdependencies in fields such as Artificial Intelligence, technology in general, economy, ecology, security, climate protection, trade policies (WTO), banking supervision, fighting corruption, fighting terrorism, migration policies, competition policies, food-safety standards etc. – forces us to challenge categories of traditional *state-bound* legal thinking, we are in urgent need of (unorthodox) conceptual alternatives. Even though global administrative law, in the absence of universal agreement on moral values, seeks to avoid any content-based conception of law, it must not lose sight of its ultimate addressees. It consequently needs some kind of sensitivity to humankind in its attempt to reconceptualize governance, instead of government-related legal thinking. The legitimacy of global administrative law as an emerging form of transnational law, albeit "implemented and developed by sub- and non-state administrative institutions, often with little or no involvement of political branches of governments",[58] must be measured against its human rights-adequacy.

2. It has already been mentioned several times that global administrative law cannot be democratically grounded in the way democratic input

55 E Benvenisti, 'Sovereigns as Trustees of Humanity' (2012) 107 *AJIL*, 295; A Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *EJIL* 513, 535.

56 "In the future world, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world. The third is freedom from want – which, translated into world terms, means economic understandings, which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world. The fourth is freedom from fear, which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – everywhere in the world." For the citation see L Kühnhardt, *Die Universalität der Menschenrechte* (Bundeszentrale für Politische Bildung, 1987) 112; furthermore H Lauterpacht, *An International Bill of the Rights of Man* (Oxford University Press, 1945) 6, 84.

57 E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2012) 107 *AJIL* 295 (298).

58 A Golia, 'Judicial Review, Foreign Relations and Global Administrative Law. The Administrative Function of Courts in Foreign Relations' (2020) no. 2020-20 *MPIL Research Paper Series* 7.

legitimacy is traditionally conceived.[59] Global governance regimes, no matter how institutionally consolidated they may be, hardly provide sufficient opportunities for individuals to participate directly or indirectly in political decision-making or law-making processes through their elected representatives;[60] at best, NGOs or comparable actors could be seen as somehow representing a global civil society.[61] Output-oriented legitimacy is a different story. It highlights the substantive quality of decisions to "effectively promote the common welfare of the constituency in question".[62] Just one example: International control of environmental issues might be preferred to the national alternative because it is more likely to limit "negative externalities".[63] However, this promotion of common welfare or the common good ("bonum commune") not only has to do with the aims it pursues (freedom, security, peace, political stability, a functioning economy, an intact environment, social subsistence, welfare, fair distribution of life chances on a global scale[64] etc.). It also has to do with the openness and intelligibility concerning the modes of promotion – i.e., transparency (requiring that all decisions of administrative bodies be made publicly accessible within due time) and reason-giving (the ways and reasons why and how a certain decision has been reached needs to be explained), both of which are key features of "democratic" governance.[65] The addressee of a decision needs to understand the rationale behind the (often) discretionary line of argumentation and should fur-

59 J Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, 551: "The ways and means of international norm setting and law making, the modes in which international law "commands", are so varied, sometimes even radically so, that any attempt to bring them into the laboratory of democracy as if belonging to a monolithic species called "international law" will result in a reductionist and impoverished understanding of international law, of democracy and of the actual and potential relationship between the two."

60 M Strebel et al., 'The Importance of Input and Output Legitimacy in Democratic Governance' (2019) 58 *European Journal of Political Research* 488, 489.

61 For further reference regarding a "cosmopolitan constituency", see N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 255.

62 F Scharpf, *Governing in Europe: Effective and democratic?* (Oxford University Press, 1999) 6.

63 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 255.

64 A Denhard, *Dimensionen Staatlichen Handelns* (Mohr-Siebeck, 1996) 119.

65 I Opdebeek/S de Somer, 'Duty to Give Reasons in the European Legal Area. A Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law' (2016) *RAP* 97.

thermore be informed about the processes in the course of which the decision has been reached. It has long become a commonplace: The more complex the multi-level form of (global) governance is, the more complex the infrastructure of sufficient accountability, controllability, and comprehensibility becomes. Moments of input and output legitimacy must be combined; direct and indirect forms of participation and control are intertwined. Transparency[66] and control, as well as procedural justice and fair processes of low-threshold participation, constitute a legitimacy amalgam.[67] Above all, decisions must be justified in a transparent and comprehensible manner.[68]

3. Another democracy-related element that global administrative law can rely on is cooperation and dialogue in the sense of "bottom-up" deliberative democracy.[69] Some restrictions and adjustments obviously have to be made. Not "We, the people" are involved in discourse, at least not primarily, but the different decision-making and governing actors who have already been described above. Their deliberations, exchange of views, openness for mutual learning from best practices, readiness for comparative interaction etc. will nevertheless improve the quality of the outcome. An all-too-idealistic view of open and all-inclusive deliberation would, however, be misleading. The preconditions of such an ideal deliberative forum could, facing global inequality, hindrances

66 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 28.

67 M Nettesheim, 'Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie – Wechselwirkungen bei der Herausbildung eines europäischen Demokratieprinzips' in H Bauer et al. (eds), *Demokratie in Europa* (Mohr-Siebeck, 2005) 143, 144, 176; B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984).

68 See also the second paragraph of Article 296 of the TFEU, stating that "legal acts shall state the reasons on which they were based and shall refer to any proposals, initiatives, recommendations, requests or opinion required by the Treaties".

69 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in A Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 535. As to the notion of deliberative democracy as such, see J Cohen, 'Deliberative Democracy and Democratic Legitimacy' in A Hamlin/P Pettit (eds), *The Good Polity* (Wiley-Blackwell, 1989), 17; M Warren, 'Deliberative Democracy' in A Carter/G Stokes (eds), *Democratic Theory Today. Challenges for the 21st Century (*Polity, 2002), 173; J Fishkin, *Democracy and Deliberation* (Yale University Press, 1991); C Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993).

to participation,[70] power gaps etc., never be met. Viewed through a more realistic and practice-oriented (and thus, to some extent, also broader) lens, however, global administrative law can foster in global administration "an interlinked web of deliberative arenas",[71] being concerned with discussing standards. These standards, again, are related to "transparency, participation, reason-giving, review and reconsideration" and, in particular, "accountability of decision-makers".[72] To make that argument very clear: Legitimacy can, to some extent at least, also be reached by debating legitimacy standards. Mutual consultations not only help administrative actors to better manage conflicting interests and to coordinate overlapping interests more prudently, but also to give voice to the stakeholders concerned. Using, among others, the Aarhus Convention as an illustrative example, E. Benvenisti explains that domestic democratic processes also need to be enhanced for this purpose: "in the case of the Aarhus Convention on access to domestic environmental decision-making and to give voice to stakeholders that are sometimes ignored by state organs at the domestic level (e.g. the tribunals instituted in the areas of human rights, trade, and investment, or the World Bank Inspection Panel)".[73]

4. Unlike the principle of democracy, the nomocratic principle is not bound to supposedly ontological quantities such as "the people" or "the state", but is linked solely to the existence of institutionalized power[74] and thus faces fewer obstacles in its application to state-unbound exercise of power. Even though the *rule of law* implies a rules-based form of governance, it must not be mistaken for a rule by law.[75] Simply setting legal standards and ensuring their execution through a bureaucracy does

70 See B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 28.

71 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 536.

72 *Ibid*, 536.

73 E Benvenisti, 'The Future of Sovereignty: The Nation State in the Global Space' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 483, 489.

74 A v. Arnauld, 'Rechtsstaat' in O Depenheuer/C Grabenwarter (eds), *Verfassungstheorie* (Mohr-Siebeck, 2010) § 21, para. 13, para. 58 ff.

75 See T Ginsburg/T Moustafa, *Rule by Law. The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

not live up to the much higher expectations of a true rule of law regime.[76] It is the effective control of administrative agencies and of the discretionary power they exercise, which lies at the very "heart of the rule of law".[77] The "law" in the rule of law not only serves as an *instrument of rule*, but forms, more importantly, the standard of *legitimation for rule*. The institutional threshold for such a rule-of-law model is – besides self-control mechanisms embedded in administrative procedures – the independent judicial review of the legality of administrative action guaranteeing the peaceful and law-based/rule-based settlement of disputes caused by administrative measures.[78] Only those actors who can be sure of the enforceability of their rights, and who can therefore trust law-making as well as law-executing and law-enforcing authorities, will be willing to submit themselves to "sovereign" power – be it exercised in the traditional state-bound way or detached from the state in various forms of global governance. Legal remedies and dispute-settlement mechanisms are, in other words, the decisive prerequisites for legitimizing government as well as governance. That notion brings us back to the procedural dimension of global administrative law's legitimacy. Global regulatory regimes, global institutions and international organization have been increasingly concerned with developing procedures most of which are "similar to models adopted at the domestic level"[79] – from access to documents to "audiatur et altera pars", and from mechanisms of administrative self-control to due process-bound review bodies.

76 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 113.

77 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328, 329.

78 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328, 329, with further reference to A Harel, *Why Law Matters* (Oxford University Press, 2014). *Möllers*, however, calls for a realistic perspective: "The idea that any action performed by international administrative units can be reviewed independently appears to be dramatic and unrealistic, but it is clear that such a guarantee would contribute not only to the internal legitimacy of an organization that can plausibly claim to adhere to its own rules, but also to its external legitimacy, in that it would be open to impartial control."

79 L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 25, 38; N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 248.

5. Among the manifold components shaping the rule-of-law principle, rationality (besides their democratic facet, reason-giving or reasoned decisions also have a nomocratic facet)[80] and proportionality play a crucial role for global administrative law processes. To some extent, the rule of law can be equated to a rule of reason, calling for knowledge-based governance and highlighting the relevance of (scientific) expertise,[81] obviously without simply endorsing an expertocracy.[82] Weighing approaches and proportionality tests give specific responses to the different (legal) interests determining a certain decision. Global administrative law actors might be inspired by the rather categorical way in which the US Supreme Court has developed three "tiers" or levels of scrutiny: strict scrutiny, intermediate scrutiny and the rational-basis review.[83] European Courts and administration tend to apply a more flexibly structured proportionality approach that seems to be even more suitable for administrative processes within the global space. They look for the legitimate purpose of the action taken, and they ask whether it is suitable for reaching the purpose, whether the impairment is minimal and whether proportionality "stricto sensu" (weighing all interests involved) is given.[84] It goes without saying that administrative actors need sufficient flexibility to calibrate the intensity of their review.[85]
6. Many further rule-of-law-based legitimacy criteria for administrative decision-making beyond the state could be mentioned, and each of them would call for a theory-sensitive in-depth analysis. For the paper at hand, some keywords will have to suffice. One of the most existential experi-

80 See B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 41 ff.

81 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107.

82 E Erikson, The Accountability of Expertise. Making the Un-elected Safe for Democracy (Routledge, 2022).

83 A Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668.

84 G Huscroft et al., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014); V Jackson, 'Constitutional Law in the Age of Proportionality' (2014) 124 *Yale Law Journal* 3094; A Barak, *Proportionality - Constitutional Rights and Their Limitations* (Cambridge University Press, 2013); J Bomhoff, *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press, 2013); M Klatt/M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012).

85 R Dixon, 'Calibrated Proportionality' (2020) 48 *Federal Law Review* 92.

ences of injustice is being at the mercy of arbitrariness. It arises wherever rule does not have to legitimize itself, knows no boundaries and eludes all control.[86] The prohibition of such arbitrariness is closely related to the principles of equality, accountability and impartiality. Avoiding arbitrariness would not be possible without sufficiently effective control. The latter requires a certain degree of power-sharing between the different responsible actors. In other words: What mixed actors do need, in order to be legitimized in their interaction, is power-sharing between different rulers. In the tradition of Montesquieu, the separation-of-powers model might serve as a useful blueprint.[87]

7. Finally, some method-related aspects of legitimacy must be paid attention to. Administrative precedents can help to build foreseeability, continuity, stability and thus a degree of legal certainty in global administrative processes.[88] Law comparison can provide some source of legitimacy, too. It is important to note that a comparative approach is anything but an unreflected copy-paste from foreign samples. On the contrary, it is all about gaining *own* knowledge by "thinking" or "comparing" out of the box. In that sense, comparison can be described as both a *knowledge-creating technique* and a *knowledge-oriented discovery process* that aims at unfolding the embeddedness of administrative decision-making processes in their national, transnational, international and global multiperspectivity.[89] The *telos* that *Ernst Rabel* classically postulated for comparative law is decisive: "The name of its goal is simply: knowledge."[90] Comparison enables informed decision-making processes. Last, but not least, and itself related to comparative insights, contestation instead of an only alleged consensus can strengthen the legitimacy of decisions and compromises reached. *Ch. Möllers* makes it quite clear that "the future of international law lies in contestation and not in consensus".[91] Since

86 In general, see J Schapp, *Freiheit, Moral und Recht* (Mohr-Siebeck, 2nd edn., 2017).

87 C Möllers, The Three Branches. A Comparative Model of Separation of Powers (Oxford University Press, 2013).

88 See N Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008).

89 On the multi-perspective nature of jurisprudence, see O Lepsius, 'Themes of a Theory of Jurisprudence' in M Jestaed/O Lepsius (eds), *Rechtswissenschaftstheorie* (Mohr-Siebeck, 2008) 1 (10).

90 E Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung' in HG Leser (ed), E Rabel/H Ernst, *Gesammelte Aufsätze, vol. III* (Mohr-Siebeck, 1967) 1.

91 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 117, refer-

the "democratic merit of consensus" at the transnational, international or global level "would depend on the coherent democratic legitimacy of all participating states", which obviously is not given, "the merit of politics must be sought through other features: the generation of alternatives in a decision-making process, or the possibility to openly challenge and revise decisions. Especially for the administrative level, political legitimacy may then be created by transparent conflicts between different regulatory regimes."[92] Contestation paves the way to solutions that ultimately might be commonly agreed on.[93] The theoretical-conceptual proximity to the aforementioned principles of transparency and rationality (reason-giving) is obvious.

IV. Instead of a Conclusion: An Ongoing Quest for Legitimacy

Global administrative law, existing "within the context of a larger system of public and constitutional law",[94] and hence "inter-public law",[95] describes itself as less ambitious than constitutionalist approaches to global governance.[96] It aims to establish a legitimacy framework for global governance which is not based on axiological assumptions or whichever notion of global democracy,[97] but primarily on procedural standards (which leave room for deliberation and cooperation as well as contestation). Divergent

ring to N Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *AJIL* 1.

92 Again C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 117; more generally, see I Ley, *Opposition im Völkerrecht* (Springer, 2015). Concerning the high relevance of political alternatives, see P Häberle, 'Demokratische Verfassungstheorie im Lichte des Möglichkeitsdenkens' (1977) 102 *Archiv des öffentlichen Rechts* 27 ff.

93 A Wiener, *A Theory of Contestation* (Springer, 2014).

94 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 57.

95 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 55.

96 See C Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner/M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 245.

97 A Golia, 'Judicial Review, Foreign Relations and Global Administrative Law. The Administrative Function of Courts in Foreign Relations' (2020) no. 2020-20 *MPIL Research Paper Series* 8.

regulatory purposes that will never result in a "perfect", but "contested", mutually challenged and continuously-to-be-renegotiated balance need to be reconciled.[98] If global administrative law wants to give "the answer to the question about the legitimacy of global governance", as stated above,[99] it can only do so if conceived as an open process and ongoing procedure-driven quest for a global "bonum commune" that is in itself contested.[100] This quest, for sure, is worthwhile.

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98 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 266.

99 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in A Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328.

100 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 12, emphazise the "contested nature of public interests".

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