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How “Public” is Public International Law? Towards a Typology of NGOs and Civil Society Actors

*Simon Chesterman**

How “public” is public international law? Despite its natural law origins, international law has long privileged the role of the state. Today, NGOs and civil society actors play an increasingly important role — offering a voice for the disenfranchised through their advocacy, and a helping hand for the disadvantaged through their operations. Calls for accountability of these actors are understandable, but often founder on their diversity. This paper therefore develops a typology of such actors, based on their activities and their drivers. That typology better reflects the reasons for and circumstances in which accountability is appropriate. In addition, it suggests a possible evolution in the international order where the *status* of an actor (state, intergovernmental organization, NGO, etc) is less important than its *function*.

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Introduction

The subject of "public international law" embodies within its very name a series of hypocrisies.

The most remarked upon tends to be whether this discipline really achieves the august status of truly being "law". Treaties may be written, advocates may put on robes and appear in court, but when push comes to shove states will do as they wish. "Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."[1] So observed Thucydides two and a half thousand years ago, and realists and neo-realists continue to raise an eyebrow or turn their nose up at international lawyers today.[2]

A second hypocrisy at the heart of public international law is its claim to being truly "international". Anthea Roberts has recently published a book-length treatment of this question, challenging the discipline's claim to universality in application and the suggestion that its practitioners exist as a kind of invisible college.[3] As a public international lawyer based in Asia, this is not exactly a revelation. One of the reasons why Asian states lack a regional organization and remain suspicious of international regimes is that they were rarely the author of or invited to play a lead role in those regimes.[4]

For present purposes, however, it is the remaining word that will be my focus in this essay: international law's claim to being "public", in the sense of concerning the people as a whole. Here we find a tension between substance and form. In substance, the natural law origins of public international law were very much concerned with order and the reduction of human suffering. In form, however, since the Peace of Westphalia in 1648, the vehicle for addressing those concerns has been *states*.

The essay first recounts briefly how states are generally regarded to have become the central and defining actors in international law. Secondly, I will show how that history obscures the role of individuals and other actors, in particular the role of humanitarian organizations and

[1] Thucydides, *The Peloponnesian War* (London: J.M. Dent, 1910).

[2] For a critique from within the invisible college of international law, see Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2007).

[3] Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017).

[4] Simon Chesterman, "Asia's Ambivalence About International Law and Institutions: Past, Present and Futures," *European Journal of International Law* 27 (2016): 945.

civil society. Thirdly, I will outline the halting steps today towards such actors being recognized not merely as objects but also as subjects of international law.

As signposts along the way, I will organize these observations around three locations that encapsulate the story being told: Westphalia, Solferino, and Rome.

1 Westphalia, 1648: The Pre-Eminence of the State

The man often called the father of international law, Hugo Grotius, wrote his master work *De jure belli ac pacis* in the early seventeenth century.[5]

Though he drew heavily on the work of earlier theorists,[6] the intellectual heritage of Grotius, and in particular the idea of the "international society" which he described, continue to inform our understanding of the law of nations.[7] This conception of what Hedley Bull came to term the "anarchical society"[8] of states provided an alternative world view to both the entirely chaotic state of nature as described by Machiavelli and later Hobbes, and the attempts to bring this chaos under centralized control by restoring the institutions of Latin Christendom,[9] or through the construction of new institutions seeking a perpetual peace through human progress as ultimately articulated by Immanuel Kant.[10]

[5] Hugo Grotius, *De iure belli ac pacis libri tres* [1646], translated by Francis W. Kelsey, Classics of International Law (Oxford: Clarendon Press, 1925).

[6]See Coleman Phillipson, 'Introduction' in Alberico Gentili, *De jure belli* ([1612] Classics of International Law; Rolfe trans; Oxford: Clarendon Press, 1933) vol 2, 9*a*, 12*a*.

[7] Hedley Bull, "The Importance of Grotius in the Study of International Relations", in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 65, p. 71.

[8]See generally Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977).

[9]One issue on which both Hobbes and Grotius were as one was the authority of the state over the church.

[10]See Immanuel Kant, 'Toward Perpetual Peace' in Immanuel Kant, *Practical Philosophy* ([1795] Gregor trans; Cambridge: Cambridge UP, 1996) 311. For a modern articulation of Kantian international legal theory, see Fernando R Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

Central to this view was that sovereignty and the state went together. "That power is called sovereign," he wrote, "whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will."[11]

A century later, Jean-Jacques Rousseau argued that Grotius tended to argue by offering fact as proof of right: "It is possible to imagine a more logical method," he concluded, "but not one more favorable to tyrants."[12]

Grotius wrote his treatise in a period of transition. Europe was emerging from the medieval period and the vertically structured hierarchies under Pope and Emperor, entering the modern period of horizontally organized sovereign states that was formally established in the 1648 Peace of Westphalia.[13] That treaty provided the foundation for the balance of power policies that remained substantially unchanged until the French Revolution and the Napoleonic wars.[14] Ending the Wars or Religion, it affirmed the right of rulers to determine the confessional allegiance of their states and subject (*cuius regio, eius religio*) and the corresponding secular supremacy of territorial rulers over their dominions (*Rex in regno suo est Imperator regni sui*).[15] This effectively brought an end to interventions for purely religious differences in Western Europe, though religion remained an important factor in the East.[16]

Today, states continue to command a privileged position over other (recognized) international persons. Only states are recognized as full members of the United Nations, only states may bring contentious claims before the International Court of Justice,[17] and only states are entitled to the benefits of territorial integrity and sovereign immunity.[18] The state

[11] Grotius, *De iure belli*5.

[12] Jean-Jacques Rousseau, *The Social Contract* [1762], translated by G.D.H. Cole (London: J.M. Dent, 1923).

[13]See, eg, Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), pp. 34-38.

[14] Norman Davies, *Europe: A History* (London: Pimlico, 1997), pp. 581-582, 661.

[15]See John Gerard Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations," *International Organization* 47 (1993): 139, p. 157.

[16] Geoffrey Butler and Simon Maccoby, *The Development of International Law* (London: Longmans, Green, 1928), p. 69.

[17] Statute of the International Court of Justice, Art 34(1). Cf *Mavrommatis Palestine Concessions Case (Jurisdiction) (Greece v United Kingdom)* [1924] PCIJ (ser A), No 2, 12.

[18] United Nations Charter, Art 2(7).

is therefore the dominant actor on the international plane, but if states are theoretically equal then some are clearly more equal than others.[19]

The greatest potential for challenge to this paradigm came after decolonization, as the one-third of humanity that did not govern itself when the promises of the UN Charter were made assumed independence. In part due to fear of disorder and in part for want of any choice, the postcolonial leaders accepted the borders and many of the institutions bequeathed to them.[20]

There are, to be sure, exceptions. The Holy See and the Vatican City, for example, have caused much head-scratching over the years on the part of academics: they enter into treaties and have observer status at the UN, but lack a permanent population and, in the case of the Holy See, any territory — or at least any *earthly* territory, as such.[21]

These and other exceptional cases like the Knights of Malta notwithstanding, the history of public international law is commonly regarded as a history written by states and for states.

2 Solferino, 1859: Enter Civil Society

Yet such an account is, of course, a partial one at best. It brings me to my second locale: Solferino.

In an age where the promise and the perils of globalization mean that public goods like the Internet and threats from terrorism to climate change operate independently of states, the notion that states are the only politically relevant actor is risible. Yet the role of civil society existed long before the shrinking and the flattening of the world.[22]

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[19] See, eg, Alain Pellet, "The Normative Dilemma: Will and Consent in International Law-Making," *Australian Yearbook of International Law* 12 (1992): 22, pp. 42-45.

[20] See generally Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

[21] See, eg, Ian Brownlie, *Principles of Public International Law*, 5th edn (Oxford: Clarendon Press, 1998), pp. 64-65; Malcolm N. Shaw, *International Law*, 4th edn (Cambridge: Cambridge University Press, 1997), p. 172.

[22] Stefan Kirchner, "The Subjects of Public International Law in a Globalized World," *Baltic Journal of Law & Politics* 2, no. 1 (2009): 83.

The origins of modern international humanitarian law in particular lie in a kind of civil society. The modern form of the problematic body of rules designed to limit suffering in time of war can be traced back to the Austro-Italian War of 1859. Henry Dunant, a Swiss businessman, happened to arrive in Castiglione della Pieve on the same day that the Battle of Solferino was fought nearby — a “mere tourist”, as he wrote in the memoir of what he witnessed. The brutality of the battle was not untypical of its time, but Dunant’s depiction of the human misery was graphic and pointed. In particular, he focused on the aftermath of battle, the wounded men whose numbers overwhelmed the army medical services and began to fill the town:

> Men of all nations lay side by side on the flagstone floors of the churches of Castiglione — Frenchmen and Arabs, Germans and Slavs. Ranged for the time being close together inside the chapels, they no longer had the strength to move, or if they had there was no room for them to do so. Oaths, curses and cries such as no words can describe resounded from the vaulting of the sacred buildings.[23]

Dunant called for the establishment of “relief societies for the purpose of having care given to the wounded in wartime”, and “international principles” to serve as the basis and support for these societies — precursors to the International Committee of the Red Cross (ICRC) and international humanitarian law. This set the stage for the more formal convention on the laws and customs of war adopted at The Hague International Peace Conferences of 1899 and 1907.

It is a function of the human condition that we view the present as unique, but the role of civil society in international law dates back to at least this time. Indeed, by 1912 a draft proposal had been written to regulate the status of what we now term international NGOs.[24] Through the course of the twentieth century, humanitarian organizations and civil society played vital roles as advocates and providers, pushing states to act in their enlightened self-interest and filling the gaps when they failed to do so.

Their role in consultative processes was legitimized in 1945 by the UN Charter, article 71 of which provides that the Economic and Social Council (ECOSOC) may “may make suitable arrangements for consultation” with NGOs.[25] Over the next quarter century, a few hundred such bodies registered. During the 1970s, however, a series of multilateral conferences saw a

[23] Henry Dunant, *Un souvenir de Solférino* (Geneva: Jules-Guillaume Fick, 1862).

[24] Rephael H. Ben-Ari, *The Legal Status of International Non-Governmental Organizations: Analysis of Past and Present Initiatives (1912–2012)* (Leiden: Martinus Nijhoff, 2013), pp. 5-7.

[25] Sigfrido Burgos Cáceres, "NGOs, IGOs, and International Law: Gaining Credibility and Legitimacy through Lobbying and Results", *Law & Ethics* (Winter/Spring 2012): 79.

rise in the number of NGOs. That trend has accelerated in the past decade and today there are almost five thousand NGOs holding consultative status with ECOSOC.[26] The total number of NGOs worldwide is difficult to estimate, but some put it at about ten million.

In addition to proliferating in number, the impact of NGOs and civil society could be seen in other key developments, in particular in international humanitarian law. One of the most significant was the Ottawa Land Mines convention of 1997. This was remarkable in part because it was the first time in a century that a widely used conventional weapon was banned outright. But it was also remarkable for the key role that international civil society played in diplomatic and law-making processes that had previously been reserved for states.[27] This success paved the way for the role that civil society played in an even more important legal development, which took place the following year in the last city of my modest tour.

3 Rome, 1998: NGOs Ascendant

The adoption of the Rome Statute of the International Criminal Court was another achievement of civil society.[28] But as a landmark it was also a triumph for the rule of law. Despite evident limitations, the Statute offers the possibility of criminal sanctions against individuals who perpetrate war crimes and crimes against humanity, in place of the more ambiguous sanctions against states that authorize them.

Three months after the Rome Statute came into force, UN Secretary-General Kofi Annan acknowledged the important role that civil society had come to play in intergovernmental processes and established a high-level panel to make recommendations on managing such relationships.[29] The report — *We the Peoples*[30] — endorsed greater involvement on the part

[26] See http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false

[27] Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society," *European Journal of International Law* 11, no. 1 (2000): 91.

[28] Heidi Nichols Haddad, "After the Norm Cascade: NGO Mission Expansion and the Coalition for the International Criminal Court," *Global Governance* 19 (2013): 187.

[29] UN Doc A/57/387 (2002).

[30] UN Doc A/58/817 (2004).

of civil society, but was somewhat impractical when attempting to outline how that might happen.[31]

Today, a major intergovernmental conference without civil society participation would be regarded as incomplete. Similarly, the idea that a warzone or humanitarian disaster could completely exclude NGOs is almost nonsensical[32] — indeed, a growing number of treaties envisage specific roles for NGOs.[33] As we think about the roles that such actors can play, however, it is useful to offer some categories that might help focus our discussion and some of the issues that arise, in particular the extent to which such actors can and should be held accountable for their actions. It is common to think of NGOs in terms of their issue areas or spheres of operation. But for our purposes, a more abstract level of analysis may be appropriate.

Accountability is not just an end in itself. Accountability, in the sense of being required to give an account of one's actions and be held responsible for that account, may be desirable for various reasons: to punish and deter abuse, to improve transparency of decision-making, and to improve the quality of decisions.[34] Focusing on the possibility of being held responsible, key factors in the allocation of fault tend to be *what* was being done and *why*.[35] Here, I propose a two dimensional model of NGOs and other civil society actors based on their *activities* and their *drivers*.

In terms of *activities*, we can think of NGOs as existing on a spectrum. At one end is the role of civil society as a vehicle for advocacy. At the other extreme is the role that some

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[31] Peter Willetts, "The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?," *Global Governance* 12, no. 3 (2006): 305.

[32] See generally Anna-Karin Lindblom, *Non-Governmental Organizations in International Law* (Cambridge: Cambridge University Press, 2005); Sergey Ripinsky and Peter Van den Bossche, *NGO Involvement in International Organizations* (London: British Institute of International and Comparative Law, 2007); Anton Vedder (ed), *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Leiden: Martinus Nijhoff, 2007); Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Cheltenham: Edward Elgar, 2008).

[33] See Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Leiden: Martinus Nijhoff, 2014), pp. 5-6.

[34] See further Simon Chesterman, *One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty* (Oxford: Oxford University Press, 2011), pp. 207-213.

[35] This is analogous to the two aspects of most criminal law: the actions (*actus reus*) and intent or mental element (*mens rea*).

humanitarian NGOs play in operations. A detailed model might have subtle gradations but for present purposes I will confine myself to two broad categories.

A second axis, I would propose, reflects the *drivers* that motivate NGOs and their stakeholders. Again there is a spectrum, ranging from those that have a specific agenda to achieve, which I term subjective or *supply*-driven, and those that are more objective or responsive to *demand*. Again, fine-grained divisions might be possible, but I limit the analysis here to a loose categorization as either primarily motivated by *supply* — that is, pursuing an agenda or supporting a specific population — or *demand* — that is, motivated primarily by an objective assessment of need.

We have, then, a two-by-two matrix. In the bottom left are the issue-driven advocates, whom I will term "partisans". In the international humanitarian law context, this might include groups such as the Coalition for the International Criminal Court and the International Campaign to Abolish Nuclear Weapons (ICAN). In the top right, we have operational responders driven by demand, whom I will term "Samaritans". Archetypal actors here would be the ICRC and Médecins sans Frontières (MSF). In the top left, we have policy activists holding themselves out as objective, whom I will term "experts". Indicative groups would be the Stockholm International Peace Research Institute (SIPRI) and the World Justice Project.[36] In the bottom right, we have operational actors driven at least in part by subjective concerns such as religious affiliation. I will term these "kinsmen" — though I note that many such organizations strive to act regardless of faith or other considerations. Examples might include Islamic Relief Worldwide and Catholic Relief Services.

[36] Disclosure: the author is a director of World Justice Project Ltd.

Typology of NGOs

Figure 1. Typology of NGOs in Conflict Zones

One could argue about the placement of NGOs within the various cells, but such a matrix is helpful because it clarifies some of the demands for accountability that are routinely made of such actors.

Insofar as they contribute to debate, *partisans* — the advocacy NGOs and the individuals that make them up — are entitled to their opinions and the promotion of their views. An interesting marginal case is raised by the fact that it is well-known that activist NGOs occasionally play an outsize role in the foreign policy of small states. This is most evident in treaty conferences in which delegations of small states are routinely supported by NGOs. It has also been known to happen in the context of international disputes, as when it was widely believed that the suit brought before the ICJ by the Marshall Islands[37] was at the behest of

[37] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom; Marshall Islands v. India; Marshall Islands v. Pakistan) (Preliminary Objections)* (International Court of Justice, 5 October 2016).

NGOs.[38] Nonetheless, such political projects are most appropriately addressed through political means of contestation, rather than treating them as analogous to other categories of actors.

As NGOs purport to be more objective, for example — holding themselves out as *experts* — it is appropriate to hold them to a higher standard. Bodies such as SIPRI and the World Justice Project stake their credibility on the rigor of their analysis and the impartiality of their views.[39]

When we consider the operational NGOs in the context of conflict zones, the arguments for accountability are far stronger as such entities are not merely operating in the realm of ideas but may be effectively responsible for the lives of hundreds or thousands of individuals. In such circumstances it is entirely appropriate for them to be accountable for their actions. The problem is that those with the greatest leverage over such actors may have the least interest in accountability, while those with the greatest interest may have the least leverage.

Donors — individuals as well as governments — want to see their money spent well, but are unlikely to be in a position to critique decisions on the ground. Recipients, by contrast, have a clear interest but often no mechanism for challenging decisions.[40] There have been various efforts to address this imbalance, often more rhetorical than normative. In the 1990s it became common to refer to a "rights-based" approach to humanitarian relief and development.[41] Yet it was never clear that "rights-based" meant anything more than that humanitarian relief is important. Around the same time, the language of "ownership" came to be used in development and humanitarian contexts, though the precise content of such a term was rarely specified.[42]

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[38] See, eg, "ICJ judgement and Marshall Islands", *The Nation* (Pakistan), 1 November 2016. See generally Anna Spain, "International Dispute Resolution in an Era of Globalization", in Andrew Byrnes, Mika Hayashi, and Christopher Michaelsen (eds), *International Law in the New Age of Globalization* (Leiden: Martinus Nijhoff, 2013), 41.

[39] Both, for example, stress their independence in the first sentence describing themselves: "About SIPRI", Stockholm International Peace Research Institute, available at https://www.sipri.org/about; "About Us", World Justice Project, available at https://worldjusticeproject.org/about-us.

[40] Cf Mark Fathi Massoud, "Work Rules: How International NGOs Build Law in War-Torn Societies," *Law & Society Review* 49, no. 2 (2015): 333 (describing the normative environment of local civil society actors in South Sudan).

[41] See, eg, Andrea Cornwall and Celestine Nyamu-Musembi, "Putting the 'Rights-Based Approach' to Development into Perspective," *Third World Quarterly* 25, no. 8 (2004): 1415.

[42] See Simon Chesterman, "Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations," *Journal of Intervention and Statebuilding* 1, no. 1 (2007): 3.

It is, perhaps, telling that the accountability I am calling for increases as NGOs and civil society occupy roles that might previously have been arrogated to the state or perhaps an IGO, but which for present purposes might simply be termed "public".

4 Conclusion: From Status to Function?

Some years ago, while doing field research on post-conflict administration in Afghanistan, I met an Afghan NGO worker who bemoaned the proliferation of foreign NGOs. He acknowledged that they were trying to help, but much of their work seemed geared towards raising funds and justifying expenses. He memorably described such NGOs as "cows that drink their own milk".[43]

There is no question today that humanitarian organizations and civil society play vital roles in conflict zones. This essay has provided a potted history of how that came to pass, but also the manner in which this evolution calls into question how "public" public international law really is.

Let me conclude with two observations on possible implications for the role of NGOs and civil society in the future.

The first is that legal status is less important than legal personality. It is true that some NGOs have taken on roles previously arrogated to the state, even including measures of diplomatic immunity.[44] Yet efforts to define a formal status for NGOs — in the sense of "subjects" and "objects" of the law — are futile.[45] In the various definitions that are proffered for NGOs, the one consistent aspect lies in the name: they are *not* government organizations. Much as NGOs and other civil society actors exist on a spectrum, so their legal status will be contingent on their activities. The more operational they are, the more legal powers they are likely to exercise. This is entirely consistent with existing international law, which allows for varying

[43] Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004), p. 186.

[44] Davinia Aziz, "Global Public-Private Partnerships in International Law," *Asian Journal of International Law* 2, no. 2 (2012): 339.

[45] Cf Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), pp. 49-50.

degrees of personality — a position accepted by the ICJ in the *Reparations* case in 1949.[46] (It is noteworthy that the Geneva Conventions of the same year also accorded rights and responsibilities to the ICRC.)

This leads to my second concluding point: that legitimacy and accountability go hand in hand. For NGOs, this is linked to both their activities and their drivers. The more operational they are or the more objective they claim to be, the higher the standard to which they should be held. A partisan advocate driven by passion should muster good arguments if she wishes to prevail. But if her policy arguments are weak she has committed no wrong. An NGO purporting to run a refugee camp for a hundred thousand people, by contrast, should have an obligation to those refugees as well as to the donors who fund it.[47]

As for international law, it is possible that we are at the beginning of a transformation similar to that experienced by domestic law several centuries ago. In medieval times, one's legal position in society was largely ascribed by the group to which one belonged — slave, serf, free man, and so on. Modern law recognized a degree of autonomy in choosing those relations, a transformation that Henry Sumner Maine famously described as the move from status to contract.[48]

It is possible that, at the international level, we are now seeing something similar. As the legal order of states gives way to something much more fluid, we may be seeing a move from status to *function*. As diverse entities take on public powers, it is appropriate to impose greater accountability on those entities — an obligation to provide an account to those for whose benefit the power is exercised, with concomitant calls for transparency, participation, and review of the powers so exercised.[49]

Otherwise, like the cow that drinks its own milk, such actors are primarily concerned with themselves, running the risk of being at best a distraction, at worst a drain on scarce resources when they are needed most.

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[46] See Simon Chesterman, "Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person," *Singapore Year Book of International Law* XII (2008): 199.

[47] Cf Harmen van der Wilt, "'Sadder but Wiser'? NGOs and Universal Jurisdiction for International Crimes," *Journal of International Criminal Justice* 13 (2015): 237.

[48] Henry Maine, *Ancient Law* (London: J.M. Dent, 1861).

[49] Simon Chesterman, "Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law," *Global Governance* 14 (2008): 39.