

Research Report No. 29/2013

Theorising Global Governance Inside Out: A Response to Professor Ladeur

Sujith Xavier

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/clpe>

Recommended Citation

Xavier, Sujith, "Theorising Global Governance Inside Out: A Response to Professor Ladeur" (2013). *Comparative Research in Law & Political Economy. Research Paper No. 29/2013*.
<http://digitalcommons.osgoode.yorku.ca/clpe/275>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Comparative Research in Law & Political Economy by an authorized administrator of Osgoode Digital Commons.



OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

OSGOODE HALL LAW SCHOOL

Comparative Research in Law & Political Economy

RESEARCH PAPER SERIES

Research Paper No. 29/2013

Theorising Global Governance Inside Out: A Response to Professor Ladeur

Sujith Xavier

Editors:

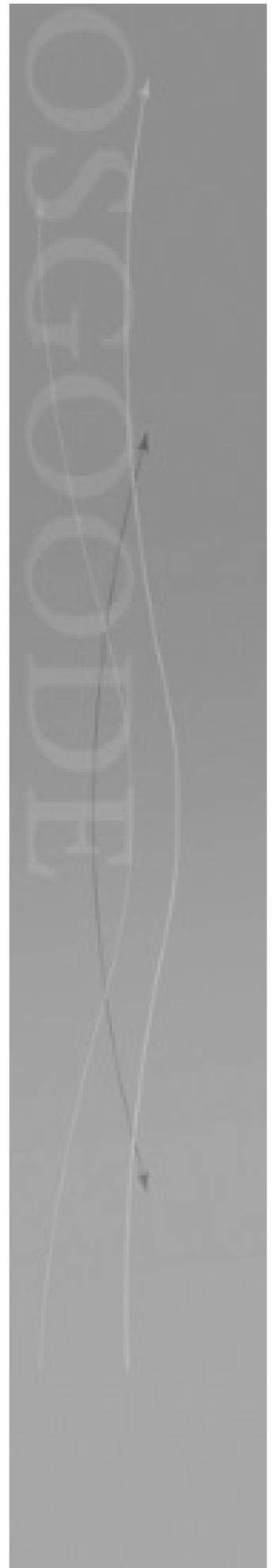
Peer Zumbansen (Osgoode Hall Law School, Toronto, Director Comparative
Research in Law and Political Economy)

John W. Cioffi (University of California at Riverside)

Leeanne Footman (Osgoode Hall Law School, Toronto, Production Editor)



Comparative Research in
Law & Political Economy



Theorising Global Governance Inside Out: A Response to Professor Ladeur*

Sujith Xavier**

Abstract

Professor Ladeur argues that administrative law's postmodernism (and by extension Global Administrative Law) necessitates that we move beyond relying on ideas of delegation, accountability and legitimacy. Global Governance, particularly Global Administrative Law and Global Constitutionalism, should try to adapt and experiment with the changing nature of the postmodern legality and support the creation of norms that will adapt to the complexities of globalisation. Ladeur's contestation, similar to GAL's propositions, can be challenged. By taking the International Criminal Tribunal for Rwanda, a significant contributor to the field of international criminal law, as an example, it is suggested that the creation of networks that Ladeur makes visible may not account for 'regulatory capture'. This paper will argue that from the outside, the proliferation of networks may suggest that spontaneous accountability is possible. A closer look, however, drawing on anthropological insights from the ICTR, reveals that international institutions are susceptible to capture by special interests. Furthermore, there are two central themes that animate the response to Professor Ladeur: the political nature of international institutions and the history of international law, and the role of institutions in this history.

INTRODUCTION

The multiplication of international and transnational interactions in recent years has prompted a reimagining of the global order. This new image reflects the dense web of inchoate regulatory regimes, actors, norms and processes,¹ rather than the simple

* Karl-Heinz Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation', this volume.

** BA, LLB (Law and Human Rights), LLM, PhD (Cand), Senior Fellow, Critical Research Laboratory in Law & Society/Graduate Fellow, Nathanson Centre For Crime, Human Rights and Security, York University & Student-at-Law (2013), Jackman and Associates, Toronto, Canada. I would like to thank Amar Bhatia, Igor Gontcharov, Mazen Masri, Shanthi Sente and Peer Zumbansen for their insightful comments. All errors are mine.

¹ Peer Zumbansen, 'Transnational Law, Evolving' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2012) 898.

intercourse between sovereign states. The task of mapping, describing and theorising different networks and webs is difficult, complicated and, often, politically contested. In this context, there is a surge in scholarship that conceptualises Global Governance through the lens of, for example, constitutional law,² transnational law,³ legal pluralism⁴ and, more recently, administrative law.⁵

Professor Ladeur demonstrates Global Administrative Law's (GAL's) utility whilst simultaneously providing incisive adjustments to its central tenets.⁶ Ladeur argues that administrative law's (and, by extension, GAL's) postmodernism necessitates that we move beyond relying on ideas of delegation, accountability and legitimacy. Global Governance, particularly GAL and Global Constitutionalism, should try to adapt and experiment with the changing nature of postmodern legality and support the creation of norms that will adapt to the complexities of globalisation. Ladeur's contestation, similar to GAL's propositions, can be challenged. By taking the International Criminal Tribunal for Rwanda (ICTR)—a significant contributor to the field of international criminal law—as an example, it is suggested that the creation of networks that Ladeur makes visible may not account for 'regulatory capture'. This paper will argue that from the outside, the proliferation of networks may suggest that spontaneous accountability is possible. A closer look, however, drawing on anthropological insights from the ICTR, reveals that international institutions are susceptible to capture by special interests. Moreover, there are two central themes that animate the response to Professor Ladeur: the political nature of international institutions, and the history of international law and the role of institutions in this history. In what follows, I will briefly describe Ladeur's central arguments and situate these claims vis-à-vis the already complicated but burgeoning body of scholarship on GAL. Thereafter the analysis will draw on empirical studies from the ICTR to suggest that networks (in this instance international criminal justice institutions) are susceptible to capture by special interests.

2 Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009); Ronald St John Macdonald and Douglas M Johnston, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Martinus Nijhoff, 2005); Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16(2) *Indiana Journal of Global Legal Studies* 621. But see José E Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38(3) *Texas International Law Journal* 421.

3 Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1(2) *Transnational Legal Theory* 141.

4 Paul Schiff Berman, *Global Legal Pluralism* (Cambridge University Press, 2012).

5 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1; Benedict Kingsbury, 'The Administrative Law Frontier in Global Governance' (2005) *ASIL Proceedings* 143; Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20(1) *European Journal of International Law* 23.

6 Karl-Heinz Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation', this volume, 245–9.

LADEUR'S EVOLUTIONARY PROCESS
IN ADMINISTRATIVE LAW AND GAL

Professor Ladeur's contribution seeks to confront the recent attempts in global governance to map and shape⁷ the existing international legal order based on our understanding of the nation state. For example, Global Constitutionalism scholars use the nation state as a potential solution to the legitimacy crisis. Global Constitutionalism and the search for unity is an attempt to bring the formality of the state to the international scale as a potential mechanism for the 'startlingly facile resolution of conflict[s] and contestation[s]'.⁸ Yet given the fragmentation of private and public spheres and the transformation of the legal system, which undoubtedly affect our conceptions of democratic governance, Ladeur suggests that GAL may provide a much more meaningful way to manage and stabilise the complexities of the emerging regimes. The focus should therefore turn to the 'fragmented like character of law as it is'.⁹ In particular there ought to be greater reflection on the self-construction and auto-constitution of the legal order in international legal theory.¹⁰

Ladeur tests his hypothesis by considering the 'evolution of modern administrative law' to examine how progress in this field can help us to understand domestic, transnational and global law. One of the central tenets is that 'administration', rather than the legislators and courts, produce domestic administrative law. Ladeur thus suggests that the paradigms of administrative law have undergone serious changes over the last decade from 'constructing and deciding individual "cases" to industry-related "regulation"'.¹¹ There is a new postmodern model of administrative action that is motivated by experimentation and learning, reflecting the transformation of culture. The proliferation of different forms of communication and the rise of information technology have managed to break down existing modes of communication. The change in communication has resulted in specialised epistemic communities and highly specialised networks, or a society of networks.¹²

Within this postmodern reality, the role of the state has been dramatically altered, yet the state has not lost its relevance. The state does not retreat or vanish. Rather it has assumed the 'role of a player with the responsibility for the rules of the game' to regulate the 'polycentric practices of experimentation in the "private" realm [which] produce lock-ins as well as perverse effects'.¹³ Based on this societal transformation, Ladeur

7 Mattias Kumm *et al*, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1(1) *Global Constitutionalism* 1.

8 Ladeur (n 6) 256.

9 *Ibid*, 244.

10 *Ibid*.

11 *Ibid*.

12 Karl-Heinz Ladeur, 'Constitutionalism and the State of the "Society of Networks": The Design of a New "Control Project" for a Fragmented Legal System' (2011) 2(4) *Transnational Legal Theory* 463.

13 Ladeur (n 6) 239.

theorises a new perspective for GAL as a possibility. The network-like character of transnational administrative law is not new, rather it is a continuation 'of the fragmentation and, as a consequence, the increasingly loose coupling of the different layers of the normative system of postmodernity which can be observed at the domestic level'.¹⁴ Once we understand that the domestic system is not structured by a unified normative order, it is much easier to fathom its expansion to the international and transnational levels.

Ladeur's arguments thus far seem somewhat different from the central tenets of GAL. GAL's central goal is to deploy administration as Global Governance. Such a positioning allows those working under the auspice of GAL to 'recast many standard concerns about the legitimacy of international institutions in a more specific and focused way'.¹⁵ This approach, the supporters of GAL argue, enables the unsettling of orthodox understandings of the concept of law within the transnational space.

If GAL is to describe law in the international setting, Kingsbury suggests, then it is a claim that 'diverges from, and can be sharply in tension with the classical models of consent-based inter-state international law and most models of national law'.¹⁶ He then elucidates the concept of law that is implicated within GAL, which takes on a transnational character, uprooted from the nation state. Within this context, GAL is something that is wholly different from administrative law found within national jurisdictions. National administrative law is a product of political compromises between legitimate political actors, whilst international law emanates from a dizzying array of actors and norm producers.

Such an account is in contrast to Ladeur's conceptualisation of the evolutionary process shaping domestic notions of law and resulting in overlapping and interconnected dimensions in the production of the legal order. Ladeur, unlike other supporters of GAL, suggests that the democratic nature of law should not be over-emphasised. Prior to the development of postmodern administrative law, arguably a direct link could be made between law's accountability to its democratic constituents and its goals. Moreover Ladeur notes that within the context of domestic administrative governance, accountability cannot be reduced 'to the control of compliance rules'.¹⁷ The postmodern nature of society has thus had a fundamental effect on the relationship between law and 'its cognitive infrastructure', precipitating the evolution of the legal system with the creation of new accountability regimes called 'entangled hierarchies'.¹⁸ These are characterised by the erosion between the design of the rules and their application. As a direct result, there is the emergence of spontaneous accountability generated by networks. These regimes are not defined in advance but rather are constituted through a process of network activ-

¹⁴ *Ibid.*, 245.

¹⁵ Kingsbury 2009 (n 5) 27.

¹⁶ *Ibid.*

¹⁷ Ladeur (n 6) 255.

¹⁸ *Ibid.*, 253.

ity. The control mechanisms conceptualised at the state level cannot help in this instance and thus a reconfiguration is necessary.

The notion that law must have a public law element, particularly in light of post-modern insights, may also seem misleading. The postmodern nature of law, given the rise of the society of organisations and then networks,¹⁹ necessitated that administrative law adapt and give way to new explicit 'reformulations and remodellings of the entire architecture of the normative system'.²⁰ In a similar vein, questions about 'lawness' of GAL must take stock of the changing nature of domestic law within the postmodern moment. Thus for Ladeur there are striking similarities between domestic and transnational administrative law which undoubtedly have an effect on the way we conceptualise GAL.

The democratic deficit in international organisations is one of GAL's central motivators. Ladeur argues that such a perspective is overstated. By taking a sharp look at the democratic function of law, Ladeur argues that the role of the state at times requires interfering with individual rights where parliamentary oversight is necessary. Simultaneously, the state is involved in norm creation which 'transform[s] the conditions for the use of rights but do[es] not infringe upon subjective rights in the traditional sense'.²¹ Thus the new addressees of administrative action are more and more complex networks. The rise of global administrative structures and the fast emerging norms that regulate these networks subsequently strengthen the 'autonomy of administrative function'. In this sense, global law must be thought of in procedural terms ('as a law which produces its own preconditions for validity and recognition, beyond the sphere of the state')²² that is part and parcel of a fragmented context which is 'characterised by a random coming together of national, conventional international and self-organised global law, on the one hand, and similarly heterogeneous cognitive rules [on the other]'.²³

Ladeur's GAL can therefore draw on 'components of both the more hybrid loosely coupled type of the law of networks, which emerges at the domestic level, and on components of the new public international law which shatters the hitherto established clear separation from the state-based law'.²³ Fundamentally, the source of law can no longer be viewed as stemming from canonical texts. Instead, Ladeur suggests that legal meaning must be generated from several overlapping texts and practices which encompasses an 'experimental approach' that includes both domestic and transnational contexts. He uses different examples (from investment protection and environmental governance) to suggest that in these fields, GAL may allow 'for the development of rules below the rather rigid structure of public international law'.²⁴

¹⁹ Ladeur (n 12).

²⁰ Ladeur (n 6) 257.

²¹ *Ibid*, 252.

²² *Ibid*, 253.

²³ *Ibid*, 247.

²⁴ *Ibid*, 264.

This account, however, does not demonstrate the role of special interests (or narrow interest) in the evolutionary process in society.²⁵ Ladeur, while noting and taking stock of the dynamic shifts within the domestic and national accounts of administration, does not illustrate glimpses of ‘who’s in and who’s out’ in this process that describes the move from cases to regulation. Ladeur’s version of the evolutionary process within the national narratives of specific fields of law, as a move away from the legislators and the judges to one that is governed by networks, simply omits to mention the embedded power structures within and amongst these networks that is reflected in contemporary societal structures.²⁶

Ladeur is correct in identifying the rise of networks, but this does not necessarily imply that these networks are impregnable to regulatory capture by special interest groups or narrow interests. For international relations theorists, regulatory capture denotes the control of the ‘regulatory process by those whom it is supposed to regulate’ or by a small group of those affected by regulation, ‘with the consequence that regulatory outcomes favor the narrow “few” at the expense of society as a whole.’²⁷ Similar to the realist accounts of the common law legal framework’s partiality for large-scale capitalist American economy of the nineteenth century²⁸ and critical international law scholars’ use of history to trace international law’s complicity in colonialism,²⁹ universalist characterisations of Global Governance devoid of interdisciplinary insights about the nature of globalisation must be challenged.

Ladeur may be accurate in identifying the global administrative space and its ability to generate self-regulation (as a form of spontaneous accountability). Accountability, however, is tied to specific biases endemic in those interests that have captured the spontaneous accountability producing mechanisms.³⁰ For example, the United Nations Security Council’s attempts to deliver justice and end impunity in the former Balkans and Rwanda led to the creation of the two ad hoc international criminal tribunals.

25 W Mattli and N Woods, ‘In Whose Benefit? Explaining Regulatory Change in Global Politics’ in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 5; David Charney, ‘Illusions of a Spontaneous Order: “Norms” in Contractual Relationships’ (1996) 144 *University of Pennsylvania Law Review* 1841; Patricia J Williams, *Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991).

26 Charney, *ibid.*

27 Mattli and Woods (n 25) 14.

28 Roscoe Pound, ‘A Call for a Realist Jurisprudence’ (1931) 44 *Harvard Law Review* 697; Felix Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia Law Review* 809; Elizabeth Mensch, ‘The History of Mainstream Legal Thought’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 1998) 21.

29 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

30 David Kennedy, ‘The Mystery of Global Governance’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World; Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009).

These tribunals have nonetheless been captured by special interests³¹ bent on prosecuting those most responsible for the heinous crimes, even in cases where there is a clear lack of evidentiary basis to proceed.³² Moreover, and building on the political nature of spontaneous accountability creation, insights from a historical perspective of international law demonstrate the use of international law to universalise a specific set of values and traditions.³³ Such insights reveal that international law is not neutral in how it operates. Rather, there are embedded politics that are prevalent within the structure of international law.³⁴ ICTR witness testimony is an illustrative example in which there is regulatory capture by interests that want to facilitate and expedite the prosecutions of alleged perpetrators of international crimes, which may be analogous to the use of international law to further colonial expansion and imperialism as witnessed through the civilising mission. Particularly when the objectivity of adjudicators, litigators and witnesses is pried open and interrogated, there seems to be a marked absence of understanding and accurate interpretation of witness testimony that supports the decisions rendered.

Ladeur's contribution seeks to clarify and add to a central feature of GAL, as conceptualised thus far by its proponents. The primary concern raised above of who's in and who's out nonetheless remains. In what follows, ICTR will be presented as an example of Ladeur's self-organised network which was forged by those who were part of the new network of judges, UN officials and other stakeholders (civil society activists and government officials, amongst others) in trying to stop impunity. By taking the ICTR as an example, this paper will demonstrate that these networks are susceptible to capture, both by institutional bias and by political interests that run deep within the very structure of international law.³⁵ Professor Ladeur's insights are a significant contribution to the existing GAL literature. Such insights must, however, take account of the rise of special interests, particularly in light of the rise of the knowledge society, if they are to depict the ascertainable reality within the international institutions.³⁶

31 Elena A Baylis, 'Tribunal-Hopping with the Post-Conflict Justice Junkies' (2008) 10 *Oregon Review of International Law* 361.

32 Nancy A Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010).

33 Anghie (n 29).

34 Makau Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31; Antony Anghie, 'What is TWAIL: Comment' (2000) 94 *American Society of International Law Proceedings* 39; Obiora C Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2010) 10 *International Community Law Review* 37; JT Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' (2011) 3(1) *Trade, Law & Development* 26.

35 Anghie (n 29); Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Oxford University Press, 2011).

36 Samuel Moyn, 'Judith Shklar on the Philosophy of International Criminal Law' (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148437 (accessed 19 December 2012).

ICTR: AN EXAMPLE OF 'SPONTANEOUS ACCOUNTABILITY'?

The nascent field of international criminal law has progressed by leaps and bounds. The ICTR³⁷ was one of the first international criminal institutions to be established by the United Nations Security Council through its Chapter VII Charter powers to maintain peace and security.³⁸ The creation of this institution was made possible by the collapse of the Soviet Union and the end of the Cold War. The long struggle of the international human rights movement(s)³⁹ to create legal mechanisms to enforce the applicable international criminal law that had evolved through state practice and custom made a significant contribution to the creation of this institution. The networks of international human rights movement(s), along with sympathetic Member States of the United Nations, worked hard to fill, based on their political and ideological perspectives, the accountability gap for mass human rights violations. The ICTR (as set out in the respective resolution⁴⁰) sought to bring to justice persons allegedly responsible for the violation of international humanitarian law, to render justice to the victims, to deter future crimes, and to restore peace by ending impunity in the region.⁴¹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created prior to the ICTR, but in a similar manner.

The International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East were the first international criminal fora for prosecuting war crimes, crimes against humanity and other crimes committed during armed conflict. Since then, numerous international criminal legal doctrines have been forged to combat impunity (such as the crime of genocide⁴² and more recently the crime of aggression⁴³). The creation of these two international ad hoc mechanisms paved the way for an international criminal court.⁴⁴ In 1996, the United Nations General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court. The Committee, within two years, drafted the Statute and in July 1998 the Statute was adopted by 120 votes to seven. The Statute entered into force on 1 July 2002. Simultaneously, there were numerous other special international mechanisms created to tackle the

37 R Lee, 'The Rwanda Tribunal' (1996) 9 *Leiden Journal of International Law* 37. The Rwandan tribunal shares the appeal chamber and the prosecutor with the ICTY.

38 United Nations Charter, 26 June 1945, 39 AJIL 190 Supp (entered into force 24 October 1945).

39 Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

40 United Nations Security Council Resolution 827, UNSCOR, 3217th Meeting, S/RES/827 (1993); United Nations Security Council Resolution 955, UNSCOR, 49th Session, 3453rd Meeting, UN Doc S/RES/955 (1994).

41 Sarah Williams, 'ICTY and ICTR (Completion Strategy)' in Antonio Cassese (ed), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 362–3.

42 *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 1951.

43 Christoph Safferling, *International Criminal Procedure* (Oxford University Press, 2012).

44 *Ibid*, 48.

growing demand for international justice. For example, the Special Panels for Serious Crime for East Timor (SPSC), the Special Court for Sierra Leone (SCSL), the Extraordinary Chamber in the Court of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) were created between 1999 and 2007. The SPSC was set up through the United Nations Transitional Administration in East Timor, while the United Nations and the respective governments of Sierra Leone and Cambodia created the SCSL and ECCC. The UN Security Council established the STL using its Charter powers. As these international criminal institutions mete out judgments, the politics of international criminal justice is becoming evident, particularly as it relates to who is selected for prosecution. Moreover, the development of procedural law within these institutions points to the political nature of international prosecutions, which is further embedded within the politics of international law.

The statutes of the ICTY and ICTR respectively require the judges to draft and adopt Rules of Evidence and Procedure (REP) for the ‘conduct of the pre-trial phase of the proceedings, trials and appeals, the admissions of evidence, the protection of victims and witness and other appropriate matters.’⁴⁵ Moreover, the ICTR Statute enables it to adopt the REP of the ICTY.⁴⁶ ICTY judges, in drafting the rules, included a provision that allowed for amendments to the rules based on the day-to-day needs of the tribunal. This practice has evolved and has culminated in a streamlined process through the Rules Committee.⁴⁷ Proposal for amendments are made by Judges, the Prosecutor and/or the Registrar and these amendments can be adopted at the plenary meeting of the Tribunal (closed sessions) or unanimously adopted with the approval of the Permanent Judges. The REP may illustrate Ladeur’s ideas of the self-regulating network that is able to generate its own form of accountability.

Focusing on the issue of witness testimony, the Rules Committee has amended and revised on numerous occasions the rules relating to the standard of admitting evidence and witness testimony generally. Yet empirical evidence from the field suggests that these changes to the rules have not been successful, either in terms of flexibility or expeditious trials or—more importantly—in protecting the rights of the accused.⁴⁸ Rather, the anomalies reported by insights from the field may be attributable to the flexible nature of the rules and the role of the judges.⁴⁹ The discussion below will use empirical evi-

⁴⁵ Art 15 United Nations Security Council Resolution 827, UNSCOR, 3217th Meeting, S/RES/827 (1993).

⁴⁶ Art 14 United Nations Security Council Resolution 955, UNSCOR, 49th Session, 3453rd Meeting, UN Doc S/RES/955 (1994).

⁴⁷ Megan A Fairlie, ‘Rulemaking from the Bench: A Place for Minimalism at the ICTY’ (2003–4) 39 *Texas International Law Journal* 262.

⁴⁸ Mazimo Langer and Joseph W Doherty, ‘Managerial Judging Goes International but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms’ (2011) 36(2) *Yale Journal of International Law* 242.

⁴⁹ Combs (n 32); Kamari M Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009); Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press, 2009).

dence from the ICTR to show that spontaneous legitimacy is not possible, given the pro-conviction bias of the tribunal. On the heels of this discussion, the paper will turn to explore the regulatory capture of transnational criminal space by special interest groups that seek to end impunity, even though adequate evidence to substantiate the rationale for conviction is lacking.

LOCATING THE CULTURAL LOCAL: WITNESS TESTIMONY IN ADMINISTERING JUSTICE

Recent studies have made available divergent accounts of how the ICTR functions. In this regard, what emerges from within is in stark contrast to claims to spontaneous accountability endemic in networks as suggested by Ladeur. The networks that Ladeur chooses (investment protection regimes and environmental governance⁵⁰) bear striking resemblances to the international criminal justice networks described earlier. My assertion is premised on the culture and context in which this institution operates. The central concern is the inability of witnesses to accurately convey their stories to the trier of fact. This inability stems from the specific culture of Rwanda and its colonial past.⁵¹ Moreover, the use of the adjudicatory process is an imposition of Western understandings of how to conduct investigations and trials and elicit witness testimony, which may diverge from the local customs and conceptions of the people involved.⁵²

Nancy Combs reviews the transcripts of witness testimony from the ICTR.⁵³ She points to a systematic hurdle that has plagued the institution: how to grapple with local witnesses? More relevantly, she demonstrates that there is a direct disjuncture between evidence that is provided by witnesses and the adjudicatory process. 'In sum, Trial Chambers often seem content to base convictions on highly problematic witness testimony.'⁵⁴ As a result, the Chambers fail to find 'reasonable doubt in some of the most doubtful instances and as a consequence, convict just about every defendant who comes before them.'⁵⁵ Through a painstaking review of trial transcripts, Combs identifies that witnesses are often unable to provide detailed accounts of the dates, times and specific location of the events or, more importantly, place the perpetrator accurately at the scene of the crime. Combs notes that these discrepancies are a result of educational, cultural and translation related factors.

⁵⁰ Ladeur (n 6).

⁵¹ Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism and Genocide in Rwanda* (Princeton University Press, 2002).

⁵² Combs (n 32) 3.

⁵³ *Ibid*, 4.

⁵⁴ *Ibid*, 222.

⁵⁵ *Ibid*; Importantly, Combs suggests that the judges are not 'convicting innocent defendants'. Rather what she is suggesting is 'that the Trial Chambers' cavalier attitude towards fact finding impediments is inconsistent with the beyond-a-reasonable-doubt standard of proof as that standard is traditionally understood'.

In our understanding of domestic criminal prosecutions, witnesses called in to testify are expected to provide a detailed account of who did what to whom. Scholars working in domestic criminal law, however, have pointed out that witness testimony is deeply flawed because of numerous insights, particularly from race, gender and mental health angles.⁵⁶ Comparative criminal law suggests that certain national jurisdictions are protective of the rights of the accused and thus prohibit the use of the death penalty in cases that rely solely on eyewitness testimony.⁵⁷ Examples from specific jurisdictions in the United States illustrate that each State must produce DNA evidence, which can be buttressed by witness testimony in order to avail of the death penalty.⁵⁸ Such insights into the unreliability of witness testimony have yet to find their way into international criminal law.

Within international criminal law debates, the primary focus has been on the substantive legality of international criminal adjudication. The literature thus far has concentrated on setting out and developing specific areas of substantive international criminal law.⁵⁹ Even though there are numerous accounts of problematic features of institutional practices from defence counsel⁶⁰ and academics with specific institutional knowledge of international mechanisms,⁶¹ and interdisciplinary insights from political scientists and anthropologists,⁶² the focus on the mechanics of the institutions, especially as they relate to international criminal procedure, is minimal.⁶³ There are various calls to incorporate diversity into the existing framework⁶⁴ and criticisms of the problematic nature of admitting faulty evidence;⁶⁵ nonetheless, very little attention is paid to the critical insights emerging from domestic criminal jurisdictions with regard to witness testimony.

56 David M Tanovich, 'The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System' (2008) 40 *Supreme Court Law Review* (2d) 655; David M Tanovich, 'Moving Beyond "Driving While Black": Race, Suspect Description and Selection' (2005) 36 *Ottawa Law Review* 315; Sandra G Thompson, 'Judicial Gatekeeping of Police-Generated Witness Testimony' (2011) *University of Houston Law Center* No 2011-A-8.

57 Thompson, *ibid.*

58 *Ibid.*

59 See eg M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Press, 2004); Antonio Cassese (ed), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009); Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003); Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010).

60 Wayne Jordash, 'The Practice of "Witness Proofing" in International Criminal Tribunals: Why the International Criminal Court should Prohibit the Practice' (2009) *Leiden Journal of International Law* 22.

61 Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press, 2009).

62 Clarke (n 49); Kelsall (n 49).

63 Safferling (n 43).

64 Jessica Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings' (2006) 4(4) *Journal of International Criminal Justice* 745.

65 Alexander Zahar, 'The Problem of False Testimony at the International Criminal Tribunal for Rwanda' in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals Vol 25: International Criminal Tribunal For Rwanda* (Intersentia, 2006) 509.

The rationale behind the absence of this type of analysis is twofold. First, unlike the Nuremberg Tribunal Prosecutors, who relied exclusively on documents prepared by Nazi officials to establish guilt, ICTR prosecutors rely exclusively on witness testimony.⁶⁶ Modern day international criminals, especially those indicted by the ICTR, did not leave a trail of documentary evidence that could be used by the Prosecution. Secondly, the REP of the ad hoc tribunals were drafted and amended by the judges, prosecutors and other officials of the tribunals. The conversations have therefore focused on the institutional and meritorious aspects of the REP and the degree to which common law and civil law traditions have influenced the development of these rules.⁶⁷ Ultimately the exclusion of critical insights from the domestic context, which questions the viability of using witness testimony, were left out or ignored. The role of experts in this development is significant.

Even though ICTR witnesses understand that the Rwandan President's plane was shot down on 6 April 1994, precipitating the genocide (the most significant date for the Tribunal), they are not able to place perpetrators at the scene of the crime on a specific date. The rationale is simply cultural. Some witnesses cannot relay events based on the Western calendar, or they lack formal western-style education to respond to questions about specific dates and times. The prosecutors and most international staff conducting the investigations, trials and legal research are western.⁶⁸ For example, in the Nahimana proceedings, a trial witness testified that Colonel Rwendeye had attended two death-squad meetings in 1993–4. When the witness was confronted with evidence that the Colonel had in fact died in 1990, the witness rejected the evidence and maintained that the Colonel had in fact died in 1992. 'When it was pointed out that the [witness's] revision nonetheless made [the Colonel] the only dead man at the meetings, [the witness] claimed that he had testified that the meetings had taken place at the end of 1992 and 1993.'⁶⁹

More importantly, and often, witnesses use cultural practices to identify events (for example, the seasons determine the time of year). These practices are culturally specific and contingent. Similarly, the notion of temporality or temporal sequences of events is arguably another issue of contention, where witnesses are unable to provide the exact timeline along which the alleged incitement to genocide occurred.

Problematically, the judges of the Tribunal have proceeded to accept 'faulty witness testimonies' for compelling reasons. Often the accused perpetrators were clearly

⁶⁶ Combs (n 32) 6.

⁶⁷ Gabrielle K McDonald, 'Trial Procedures and Practices' in Gabrielle K McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (Kluwer, 2000); Fausto Pocar, 'Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?' in Janet Walker and Oscar G Chase (eds), *Common Law, Civil Law and the Future of Categories* (LexisNexis, 2010); Patrick L Robinson, 'The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia' (2009) 16 *ILSA Journal of International and Comparative Law* 5.

⁶⁸ Baylis (n 31).

⁶⁹ Combs (n 32) 27.

involved in the Rwandan genocide given their political affiliations, which is the central basis for conviction. The judges rely on these factors to credit witness testimonies. There is an 85 per cent conviction rate in the ICTR, which clearly corroborates Combs' claims. Even when there are glaring inconsistencies in testimonies, Combs notes that the '[T]rial Chambers explain these away as products of the passage of time, the frailty of memory and errors introduced by investigators and interpreters'.⁷⁰

From a broader perspective, the adjudicatory process envisioned by these tribunals is predicated on western common law (adversarial) and civil law (inquisitorial) traditions.⁷¹ Both traditions rely heavily on witness testimony and the judges (and the Tribunal as whole) have adopted these traditions as the *modus operandi*. Thus, by using the western trial form, 'international criminal proceedings cloak themselves in the form's garb of fact-finding competence, but it is only a cloak, for many of the key assumptions that underlie the Western trial form do not exist in the international context'.⁷²

As noted earlier, the UN Security Council granted the judges of the two *ad hoc* tribunals the power to draft (and amend) their own respective rules of evidence and procedure, which may have provided the perfect tool to rectify—or in Lateur's words, self-regulate—these anomalies. Moreover, the very design of the trial process (and even pre-trial investigation) was left up to the judges of the two tribunals to determine as they saw fit. Given these conclusions, what we have right now is a disconnect between the substantive evidence (based on witness testimonies) and the mandate of the tribunals to prosecute those with the gravest responsibility for the mass atrocities, whilst respecting the rights of the accused to due process.

The changes to the rules are predicated, however, on efficiency and expeditious trials that would not run up the costs of international justice. This disconnect is based on the bias of the judges (and the tribunals).⁷³ The pro-conviction bias of the judges may possibly stem from their personal background and their expertise. Within the Rwandan context, political affiliations signal to the tribunals the potential culpability of the accused. These factors ultimately lend support to the belief that the accused participated in the genocide, even without the 'beyond-reasonable-doubt' threshold given the faulty witness testimonies.

REGULATORY CAPTURE: WHO'S IN AND WHO'S OUT?

The employees of these tribunals are central to the pro-conviction bias dealt with earlier. Judges are selected from a pool of candidates through the United Nations, and approved by the United Nations Security Council as set out by the Statute and the respective rules

⁷⁰ *Ibid*, 221.

⁷¹ Pocar (n 67).

⁷² Combs (n 32) 179.

⁷³ *Ibid*, 167–88, 221.

of each tribunal. Most judges move from one tribunal to another given the scarcity of expertise in international criminal law.⁷⁴

The tribunal is staffed by United Nations employees (from legal associates and prosecution attorneys to in-house translators). In this regard, there has emerged a class of international employees who work on ‘post-conflict justice issues and who maintain an itinerant lifestyle in pursuit of that work’, moving from one hotspot to another within these tribunals.⁷⁵ For example, Elena Baylis tells the story of young aspiring activists and advocates trying to make a difference by transferring their social activist legal training from western institutions to conflict hotspots and international criminal institutions. These good intentions, however, are clouded by what Baylis demonstrates as the known unknowns.⁷⁶ These known unknowns are characterised as a ‘lack of local knowledge of post-conflict settings, whether that is knowledge of the local legal system, local facts, local culture or any other relevant information’.⁷⁷ Moreover, Baylis argues that these known unknowns are notoriously hard to deal with since there are issues of lack of timing, false expertise, complexity, and size of the local context. False expertise stems from the very nature of the work that is undertaken and the ability to transfer these skills to other hotspots. These international experts spend no more than two to three years at each tribunal as they follow the spread of international criminal justice.

In this context, the role of experts within networks, contrary to Lateur’s propositions, is not value neutral. David Kennedy’s insights indeed suggest that the background norms of institutions are more important in global governance than originally thought.⁷⁸ The political values of experts within the tribunals in effect shape the outcome of the process. These experts manage the background norms that permeate the value structure of the tribunals. As Kennedy has highlighted, what really matters at the global governance level is not what is in the foreground (the tribunals) or the context (Rwanda and the Former Yugoslavia). Rather,

the work of the background has colonized the foreground and the context. The foreground increasingly seems a mere spectacle—a performance to which we attribute agency, interest and ideology. At the same time, it is difficult to locate elements of context, which are not constructed by people managing background norms and institutions. Indeed, the foreground and the context may well turn out to be effects of background practices.⁷⁹

It does matter that the judges and their experts have a pro-conviction bias, which may be rooted inherently in the way international law is constructed, as part of the civilising

⁷⁴ Baylis (n 31) 361–89.

⁷⁵ *Ibid.*, 364; I am deeply indebted to Michelle McKinley for this suggestion.

⁷⁶ *Ibid.*, 383.

⁷⁷ *Ibid.*

⁷⁸ David Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27 *Sydney Journal of International Law* 8.

⁷⁹ *Ibid.*, 12.

mission.⁸⁰ Lack of training and cultural competencies with regard to the local context has a significant influence on outcomes. This bias within the network does have a detrimental effect on those theorising about the possibility of Global Governance and the creation of spontaneous accountability within the global administrative space. The detriment, therefore, is that the regulatory capture of any network is potentially inevitable and represents one of the significant problematic features of Global Governance.

CONCLUSION: THEORISING INTERNATIONAL LAW INSIDE OUT

The history of international law demonstrates that there are discrepancies between universal legal concepts, their rationality and their contemporary application. For example, Grotius' attempts to curtail the raw power of the sovereign by creating new rules in the form of international law is a universal claim rooted in Eurocentrism.⁸¹ International legal historians, however, have revealed that international law, and sovereignty doctrine in particular, was used largely to regulate encounters between local inhabitants of the new world and the European colonisers.⁸² As international law evolved, moving away from natural law to positivism, a new field was concretised.⁸³ Yet what is undeniable is that this development of international law in the seventeenth and eighteenth centuries is closely tied to the continuation of colonialism and imperialism.⁸⁴ By the late nineteenth and twentieth centuries, the accelerated drive of international law had resulted in an abundance of international institutions set up to deal with the world's problems, such as delivering aid to those in need and dealing with health related issues. This created a new international space that necessitated describing and then theorising the international space, given the push of globalisation and the changing nature of the nation state. GAL, as part of the Global Governance debate, is one incarnation of these attempts to describe the existing international landscape using domestic understanding of administration as potentially embodied by administrative law that includes principles such as transparency and accountability, amongst others.

International law scholars have used vast amounts of ink trying first to articulate, and subsequently to study and describe, the international legal order. The foregoing analysis suggests that Global Governance debates that attempt to describe the international legal architecture may succumb to a peripheral reading of international institutions. These characterisations do not adequately reflect the inherent realities of these institutions. The analysis focused on the recent field of GAL and Ladeur's contribution to GAL, as a

⁸⁰ Anghie (n 29).

⁸¹ Gathii (n 34).

⁸² Anghie (n 29).

⁸³ Lassa Oppenheim, 'The Science of International Law: Its Task, Its Method' (1908) 2 *American Journal of International Law* 313.

⁸⁴ Mutua (n 34); Anghie (n 34); Okafor (n 34); Gathii (n 34).

possible distinct description of the international legal order. In so doing, this paper introduced the ICTR as a case study to illustrate, on the one hand, how Global Governance and GAL may portray the contemporary international space that is seen by international scholars from a cursory top-down perspective. On the other hand, the analysis demonstrated how conceptions of Global Governance broadly, and GAL specifically, elides, obscures and effaces the underlying context within the international legal order.

More concretely, Professor Ladeur has made a significant contribution to our existing understanding of GAL as part of the Global Governance discussion. As highlighted earlier, Ladeur suggests that GAL must take account of administrative law's postmodernism and thus existing articulations of GAL must transcend notions of delegation, accountability and legitimacy as means to secure legitimacy within the global space. These concepts, Ladeur notes, are wedded to older understanding of the nation state that do not account for societal transformation. The new societal transformation, as part of the evolutionary process, has ushered in the creation of spontaneous accountability by networks. GAL's focus, therefore, should not be on generating control of compliance rules. Rather, by focusing on the entangled hierarchies and generating spontaneous accountability through the rise of networks, GAL can take postmodern understandings of administration and open up new vistas in Global Governance thinking. Ladeur uses environmental governance as a potential site to illustrate his articulation of GAL. What he ignores is that environmental protection regimes cannot simply adopt western state-centric perspectives to protect environmental resources. Rather, context specific insights (for example indigenous knowledge and political economy claims) must be incorporated into the existing understandings of environmental protection.

In this regard, Ladeur is correct in pointing to the rise of networks and their potential to generate accountability. Yet what is undeniable, as illustrated by the ICTR case study, is that networks are susceptible to regulatory capture by special interest groups. The foregoing examination of witness testimony and the role of experts within the ICTR reveals that special interests have managed to take over by insisting on prosecuting those most responsible for the crimes, even in cases where there is insufficient or unsound evidence to proceed. Such regulatory capture coincides with historical insights into the nature of international law and its potential for universalising specific narratives. For example, the sovereignty doctrine was forged to regulate the encounter between Europeans and uncivilised locals. The doctrine developed within a specific socio-political context in which European empires sought to control their newly acquired territories and inhabitants.⁸⁵ Importantly, the origins of international law foster a specific 'set of structures that continually repeat themselves at various stages in the history of the discipline'.⁸⁶ This particular dynamic of international law therefore encourages regulatory capture by emphasising specific sets of values and traditions. Arguably, Combs' study drives home

⁸⁵ Anghie (n 29) 7.

⁸⁶ *Ibid.*

the notion that there are explicit decisions being made on the ground which may push against and most often contradict the facts deployed by Global Governance experts, especially GAL scholars.

Ultimately, these characterisations of international institutions and the various international regulatory bodies are missing the mark by focusing solely on the top-down perspective, rather than embracing the internal truths emblematic of these institutions. Depicting a very singular narrative that focuses on the facts, as witnessed by those in Berlin, Hamburg, London and New York, and theorising from this perspective may not yield any results that actually help us to understand the different political compromises involved and how these institutions are created and operate. The description of the international legal order cannot be a single story.