# GOVERNING THE WORLD: INTERNATIONAL ORGANIZATIONS AS LAWMAKERS

*José E. Alvarez**

Thank you. I am very grateful to the students here and the editors of the *Suffolk Transnational Law Review* for inviting me. I am also grateful that they permitted me to alter the title of my talk somewhat from that of my book. My talk today, on "Governing the World," only refers to "international organizations as lawmakers" as a subtitle. You should know that my title today was actually the one that I originally proposed to Oxford University Press but that press, being more academic-oriented than capitalist, believed that "Governing the World" might appeal to a wider readership than the academics they believed would really be interested in my book. Thanks to Oxford, my book remains in law library land, along with other boring academic treatises, and remains unread by the more general public. The reason I wanted "Governing the World" was to suggest that inter-state organizations are a very important part of globalization. I wanted to suggest the importance of inter-governmental organizations created by treaty, having states as their principal stakeholders, and aspiring to universal participation. My principal subject is therefore those institutions that are part of the U.N. system, the international financial institutions such as the IMF or the World Bank, and the WTO.

For my talk today I want to go beyond what I say in my book on the very, very dubious proposition that some here might have actually read it and that I need something novel to hold your attention. I will, however, begin with the central theme of my book. My premise is that the turn to these organizations after World War II, led, intentionally or not, to other fundamental changes in international law. It has taken us some fifty years to realize what some of these have been.

---

* José E. Alvarez, J.D., Harvard Law School; B.A., Harvard College; B.A., Magdalen College, Oxford University. Professor Alvarez is the Hamilton Fish Professor of Law and Diplomacy and the Executive Director of the Center on Global Legal Problems at Columbia Law School. This article is an edited version of a speech that Professor Alvarez presented at Suffolk University Law School on November 5, 2007 as part of the Suffolk Transnational Law Review's Distinguished Speaker Series.

My contention is that the three hundred or so organizations (IOs) that now exist, which address the full spectrum of subjects that are also addressed by national law and extend to more than twenty international institutionalized tribunals or courts of various kinds, engage in global forms of law making. I contend that most states of the world—including some of the most powerful but especially those that are less powerful—find it difficult to escape their strictures. I argue that these organizations affect both those issues that appear to be mundane, such as international civil aviation, but that are not quite so pedestrian when you closely examine them, as well as matters that everyone, including political scientists, would label as subjects of "high politics" (such as access to some weapons and other matters relevant to national security). All states find themselves being governed now, increasingly, by these institutions. And yet, these organizations are not typically viewed this way.

If you pick up a basic treatise on international law, such as any edition of Ian Brownlie's *Principles of Public International Law*, you will find that these remain structured around the so-called basic sources of international law, namely treaties, custom, and general principles. The treatises suggest that the sources, content, and principal actors of international law remain basically the same as they were in the nineteenth century. The assumptions most treatise writers make is that a treaty in the twenty-first century still remains an inter-state compact not structurally different from that found in the nineteenth century; that custom still remains the familiar source grounded in historical state practice and evidence of *opinio juris* of prior centuries; and that general principles remain a source found most often in academic writing but only rarely in the real world. In the typical instance, modern treatises acknowledge, as they must, that IOs are now considered international legal persons but they rarely spend any time considering the consequences of that proposition. Brownlie's *Principles of Public International Law* devotes just a handful of pages in a treatise of over 700 pages, to IOs. Brownlie tells us that IOs are places where treaties get interpreted, where, on occasion, custom might get codified, and where, on occasion, you might find expert views or evidence to interpret other sources of law.

In the traditional account, IOs are seen as producing only one kind of law that is unique to them and to the age of IOs:

public administrative law. This kind of law is described as purely internal to these organizations, that is, it is described as internal law relevant only to how these organizations administer themselves. Internal administrative law is therefore usually seen as law that is only of interest to a handful of people who actually work for these organizations, because it deals with such specialized matters as the privileges and immunities of these organizations or their employees. The implication is that such internal administrative law has little or no "external" effect on the general rules of public international law that states are governed by. The implication is that only a lawyer who works for an IO could possibly have a need to know about its internal administrative law.

There are other implications of the traditional account of how international law emerges. It is suggested that these organizations rarely, if ever, produce their own generalizable obligations, or have an autonomous impact on the real sources of international obligation. It is suggested that this is true because there is very little evidence that states have delegated their lawmaking powers to such organizations and that when they have, it has been a very delimited form of delegation, such as what we find with respect to a handful of technical rules having no political consequence dealing with international civil aviation in the constitutive instrument of the International Civil Aviation Organization (ICAO).

I challenge this traditional account of modern international lawmaking. Modern multilateral treaties are no longer the same as they were in the nineteenth century. Modern forms of custom or of so-called "general principles of law" are no longer the same as they were before these organizations. The move to IOs has fundamentally changed those traditional sources. That move has also altered where we look to in order to find those traditional sources, and certainly to find the current meanings of those sources. It is no longer enough to look to see which treaties are in force as between states. To find what international obligations the United States may be subject to, it is no longer enough to canvass the U.S. State Department listing of Treaties in Force.

More importantly, the move to IOs has changed the character of international obligations. It is no longer enough to examine only treaties, custom, and general principles. There are

now many more obligations on the relevant actors that are harder to fit into those old categories. Although it remains possible to try to confine international obligations into the old wine bottles of "treaty," "custom," or "general principle," it is far more descriptively valuable to look for alternative conceptions to describe legally relevant norms that lack the pedigree of the old sources, such as allegedly oxymoronic terms like "soft law." International lawyers, who would today ignore the many forms of IO-generated forms of soft law that I address in my book, engage in professional malpractice. But the fundamental change is not just that there are new places to look for the law or that the forms of obligation are harder to confine to the traditional three-fold categories. Today's IO-generated international law is no longer subject to the "on" or "off" switch suggested by traditional treaties, custom, or general principles. It is no longer the *lex lata* versus *lex ferenda* of old, either binding law or not. Modern institutionally-derived international law exists along a spectrum of legally binding obligation and one of the roles of the modern international lawyer is to try to identify where along that spectrum a particular norm exists at a particular time. That is a very big change for both international law and for the role of international lawyers.

A second big change has occurred with respect to the content of international law. Irrespective of where the new rules are, how have these rules changed in terms of their content? It used to be true that public international law could be distinguished from national law by the absence of hierarchies. With the exception of a handful of rules dealing with successor treaties among like-parties or later-in-time rules, international law, it was said, lacked the hierarchies that ordered systems of national law, such as superior courts, rules of precedent, or trumping principles of constitutional law. The age of IOs has brought us some hierarchies. Modern international law is not all equal. It now has some hierarchies of value, however primitive.

The category of *jus cogens* is one such concept. *Jus cogens* is very much a product of the age of IOs. It was one product of a negotiation on rules to interpret treaties, namely the Vienna Convention on the Law of Treaties. That treaty was very much a product of the institutionalized organs that produced it: the U.N. General Assembly, along with distinct expert bodies such as its Sixth Committee and the International Law Commission.

The idea of norms that are more important than other international rules because they respond to values of a collective—an imagined international community—was very much the product of a institutionalized process for discourse and negotiation that elevated the concerns of the collective. While the content of *jus cogens* remains controversial, there is considerably less dispute that the category of such norms exists.

Other examples of IO-inspired hierarchies in international law include the concept of *erga omnes* obligations, that is, rules that permit broad standing rules such that any state can claim their violation. Thanks to IOs, we now also find hierarchies of value among specialized international law regimes, such as international labor law. The International Labor Organization (ILO) has been such a successful maker of treaties that it has needed to deal with treaty proliferation by defining so-called "core" labor obligations. It has produced a listing of particular ILO conventions, such as that dealing with child labor, for example, that are more important than others, thereby establishing a hierarchy within a specific regime.

Other changes in the content of international law include rules that would probably not exist but for the fact that the relevant obligations, whether codified in the form of treaties or otherwise, were negotiated within an IO. Consider the common but differentiated responsibilities that we find in certain regimes, such as trade and environmental law. These rules distinguish their normative impact on the basis of the relative wealth of their subjects, usually distinguishing developed from developing states. Other international regimes—as with respect to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), complaints brought before the World Bank's Inspection Panels and investor-state claims before the Bank's International Centre for Investment Disputes (ICSID) —collapse, as national law increasingly does, former distinctions between what used to be called "public" and "private" spheres of regulation and between public international law and international economic law.

The sheer abundance of institutionalized mechanisms for international dispute settlement and the ever-rising need for international judges to fill gaps in international law despite the proliferation of treaties now means that there are a great many more invocations by judges of ostensibly general principles of

international law. The content of that source of law has greatly expanded from the handful of examples once found only in academic writing among comparativists.

There are also new areas of international law whose content would be inconceivable absent the move to IOs. Today's international judges, across a wide spectrum of subjects from trade law to international criminal law, now invoke, for example, rules of international procedure drawn from the practice of other international courts or tribunals. These rules are obviously not the traditional "general principles of law" drawn from national law of old and they are not the rules of traditional custom drawn from the practice/*opinio juris* of states as such. Indeed, the judges who draw on such rules do not seem to care whether states as such agree with such rules; they only care that their judicial brethren have seen fit to deploy them.

As this last example suggests, some of the changes in international law's content occur because the existence of IOs blurs former distinctions between the making of law, its interpretation, and its application. That blurring has occurred because the institutions that are charged with doing all three do not usually have to distinguish between these functions or find it convenient to avoid them.

A third change has followed in the wake of the turn to IOs: the legally relevant actors are no longer the same as they once were. While it might have been fairly accurate once to describe states as the exclusive, and not only the primary, lawmaking actors, that is no longer the case today. As even the most traditional treatise now acknowledges, IOs are accepted, at least since the International Court of Justice's 1949 Advisory Opinion in the Reparation Case, as international legal persons. What is less widely recognized is that IOs are not merely the repository of state practices or the delegated agents of states. Their own practices matter and their actions have normative consequences beyond those that are explicitly delegated to them. IOs are new lawmaking actors in their own right and their normative impact cannot be reduced to those of their member states.

It is important to recognize as well that IOs breed. They proliferate, interact and reproduce themselves through multiple subsidiary organs. They sometimes even purport to establish other institutions that are ostensibly independent from themselves, as the Security Council purported to do when it estab-

lished two ad hoc war crimes tribunals. In regimes such as those dealing with arms control or human rights, entire organizational charts need to be produced to keep track of the sub-bodies now charged with their interpretation or enforcement.

The age of IOs has also aided and abetted another legally relevant actor: NGOs, such as Amnesty International. Although some describe IOs and NGOs as competitors, they are in many respects in symbiotic relationships. These actors need each other. IOs have enhanced the normative impact of NGOs by granting them observer or consultative status, access to documents, and even on occasion, other forms of institutional voice such as the power to distribute compromise legal texts during a treaty negotiation or to file amicus briefs in institutionalized dispute settlement forums. IOs have empowered NGOs, and NGOs, to that extent, have increased the legitimacy of IOs. Of course, as we all know, NGOs have used their new found authority at times to challenge the legitimacy of IOs.

IOs have also affected, positively or negatively, the power of another non-state actor: multinational corporations (MNCs). While some IOs continue to rely exclusively on government representatives and have kept MNCs at some distance from their venues, others have been more open to MNC participation in some respects, while yet others—such as the ILO's reliance on tripartite representation from governments, labor unions and employers—have MNCs built into their very soul. Some IOs, such as the WTO, have found ways to enforce standards produced by associations of governments and MNC representatives, such as those produced by the International Standards Organization (ISO). Other regimes, such as the WHO-FAO's Codex Alimentarius dealing with the marketing of food stuffs or ICAO's Standards and Recommended Practices (SARPs) rely on the cooperation of, among others, MNCs, for their enforcement.

Of course, the move to IOs has created a new category of actor on the world scene: international civil servants. These new non-state actors owe their power to their titles and function, whether we call them "secretary general," "U.N. expert," or "special rapporteur," or "international judge." Their capacity to act and their legitimacy as actors stem from the fact that they are agents of neutrality or of centralization. They are treated as legitimate insofar as they are not the mere agents of particular

states but the representative of all of them, and perhaps of the global public interest. These actors are supposed to be autonomous from the nations they come from.

And what of the actor that remains the focus of traditional accounts of international law making, namely the sovereign state? States have not remained unchanged in the modern world of IOs. Statehood or sovereignty today is not what it once was. Many states have had to undergo widespread reforms of their organizational structures or their domestic legal systems in order to be able to give effect to the demands of IOs such as the WTO. Domestic courts have had to change themselves in order to give effect to that regime's demands for the protection of intellectual property, for example. The WHO has led to the development of health ministries. Because of UNESCO, other states have had to create entire agencies or departments to attend to the world scripts provided for educational and cultural agendas. National executives or executive agencies have also enhanced their foreign affairs powers because of the opportunities to appoint officials to, or to engage with, IO officials.

In terms of the United States, IOs and the laws that they help to produce explain in part the imperial Presidency. Although all too frequently we perceive that international law and its institutions serve only as constraints on the power of our executive branch, the truth is more complex. IOs and the law that they produce, such as the law produced by the U.N. Security Council, can sometimes serve as a conduit of executive power, relative to other domestic actors such as the states of the United States or of the U.S. Congress. Since in the U.S. system, as in many other countries, the President holds most of the cards when it comes to foreign affairs, the President's ability to initiate and conclude treaty-making in particular organizations, choose representatives to such organizations, or engage in back room deals in these bodies constitute an important dimension of the President's ever-expanding powers.

All of these changes in sources, content, and legally relevant actors are changing the ways we comply with or enforce international law. While nations continue to comply with that law thanks to sticks and carrots, the nature of these has changed in the age of IOs. Today's sticks and carrots have institutional variants and accoutrements. The sticks and carrots inherent to the European Union's regional customs union help to explain

why so many European states feel compelled to adhere to rulings of the European Court of Human Rights. The alleged benefits brought by the institutionalization of the theory of comparative advantage help to explain why both the pre-WTO GATT regime and the current WTO regime are seen as relatively efficacious even in the absence of a free trade cop on the beat. IOs have enabled new tools of compliance.

Tangible inducements or the threat of punishment by particular states are no longer the only tools that make other states obey. Today, gun boat diplomacy sometimes gives way to other forms of hegemonic international law whereby a collective institution, such as the U.N. Security Council, becomes the vehicle for threats or inducements. As I have suggested previously, it may also be the case, as constructivists within political science tell us, that IO regimes are changing what states see as being in their interests. To the extent this is the case, compliance with IO-derived law may be internalized to such an extent that the use of sticks and carrots is no longer necessary.

The reasons states comply may no longer be accurately described as solely the product of rational deliberation. As Abram and Antonia Chayes suggested in their book, *The New Sovereignty* (1995), sovereignty today increasingly means status. As they argued, to be an effective sovereign today often means that the state must be a player; that is, a member in good standing in those IOs that make it feasible to participate in globalization along all its dimensions. Statehood today means being a member of the WTO or of the U.N. system or being a participant in institutionalized arbitration. States may be obeying with international law today not only because they are persuaded of its benefits, but because they are socialized by its institutions. For some states, or with respect to some topics, compliance with international norms, such as a rule to consult multilaterally prior to taking unilateral action, may be seen as a source of national pride rather than a constraint on their freedom of action.

Let's be a bit more specific about the changes in treaty making that have occurred in the wake of IOs. It is common today to note that we have many more multilateral treaties than in the nineteenth century and many more on-going negotiations for more of them. One common explanation is that we simply need more of them. While that might be the case, why ignore the fact that we have established entire institutions which, by

design, were intended to produce more treaties? Is it not possible that the existence of these institutions has itself encouraged more multilateral treaty negotiations and encouraged more states to ratify the treaties produced within such institutions? Consider as well the implications of four common aspects of institutionalized treaty making today.

### *1. U.N. Conferences*

Today, institutionalized venues for multilateral treaty making, such as U.N. treaty making conferences, follow established scripts on how such negotiations ought to be conducted. We no longer have to negotiate from day one of such conferences what the procedures need to be. Everybody knows more or less what the voting procedures are, who gets invited, how compromise formulations may be proposed, whether sub-groups of delegates will be organized and along what lines, whether or how NGOs will be permitted to participate, how consensus will be determined, and so on. Of course, the fact that many institutionalized treaty-making venues now include established forms of access for advocacy NGOs, such as the numerous bodies that put pressure on states negotiating in Rome on establishing an international criminal court or on states negotiating the Landmines Convention, also influence the treaty-making process and the prospects for success.

### *2. Reliance on Experts*

A second regular feature of IO treaty making today is recourse to experts. As is evident from the negotiations that produced the Rome Statute for the International Criminal Court, experts may include a diverse body of general international law experts such as those in the International Law Commission (whose draft text, albeit with some 2000 cases of bracketed material, formed the basis for the five final weeks of frantic negotiations in Rome). In other cases, the expert group may be differently composed, such as the specialized experts in the ILO or ICAO. Without such expert bodies and their accumulated wisdom and technocratic legitimacy, it is doubtful that many treaties would have emerged.

### 3. *Managerial Forms of Treaty Making*

Another phenomena found in the age of IOs are multilateral conventions that, at the outset, are mere frameworks for future discussion and elaboration. Consider the treaty regime governing ozone, for example. At the outset, states established merely a framework convention that sounded totally innocuous. That framework convention did not pose any clear threat to states and encouraged widespread ratification. Who could object to a treaty that merely committed states to exchange information and to meet regularly thereafter to see whether something could be done to determine whether there was a collective need to confront an ozone problem? But that framework convention's shrewd functional equivalent for establishing a formal IO, establishing regularized meetings of the parties capable of producing optional protocols whereby states have to opt out in order to avoid being bound by more detailed obligations, turned out to create a powerful managerial approach for inter-state cooperation. Framework conventions combine regularized mechanisms for discourse with interesting variants on the traditional requirement of state consent. Today, formal IOs, such as the WHO and its Framework Convention on Tobacco Control, are deploying the managerial approach to treaty making outside the environmental area.

### 4. *Treaty Making with Strings Attached*

As suggested, optional protocols whereby parties to an original framework convention need to opt out if they wish not to be found obligated to the protocol's more stringent rules, rely on a more attenuated concept of the need for state consent. Another attenuation of the traditional reliance on state consent occurs when IOs, such as in the ILO, require members to present treaties produced under the organization's auspices to domestic processes for ratification and to report periodically to the organization on their reasons for non-ratification. While such attempts at institutional peer pressure may not always produce the desired number of treaty ratifications, or may produce hypocritical ratifications that are not reflected in corresponding incorporation of treaty obligations into national law, such efforts at producing treaties with strings attached are efforts to appeal to distinct groups within states that might be more favorable to the goals of certain treaties. The obvious intent behind such provi-

sions in the ILO's constitution is to puncture the opaqueness of states and to appeal, more democratically, to those groups within states, such as trade unions, that might have greater sympathy for the organization's lawmaking efforts and thereby encourage ratification even by reluctant governments.

While not all IOs deploy all these mechanisms or do so to good effect, the cumulative impact of the turn to institutional venues for multilateral treaty making may be more important than the particulars. One reason why today more than half the multilateral treaties that are negotiated are produced in the venue of an international organization surely has something to do with the fact that these organizations facilitate the conclusion of treaties by serving as forums for iteration, access to information, the reduction of transaction costs, and self-enforcing behavior. Institutional venues for treaty making create property rights, encourage issue linkages, and facilitate package deals. All of these features are familiar from contract theory at the national level. IOs simply make it easier for states to conclude treaties.

At the same time, however, the turn to IO venues for treaty making makes it harder to evaluate the quality of modern multilateral treaties. Some have suggested, for example, that the quality of such treaties today have declined because the turn to universal forums for negotiation combined with the institutional pressures for concluding a treaty, any treaty, tend to produce valueless compacts that appeal to the lowest common denominator. If a treaty's text is filled with vague injunctions or imprecise obligations, this might be seen as confirmation that the treaty is barely worth the paper it is written on. Another common and even more objective test for quality is simply to examine the number of treaty ratifications. Obviously a treaty intended to be ratified by the world could not be said to be a success if the number of states ratifying it turns out to be low. But in the modern age these tests of lack of precision or number of ratifications are no longer reliable determinants of success. These shortcuts to evaluate whether treaties have achieved their purposes are no longer quite so reliable.

Vagueness of obligation may not be a good test if the treaty also relies upon some institutional mechanism to interpret its terms—whether officials within the IO who assume this role or formal dispute settlers who are assigned it. The number of rati-

fying parties may also prove a less-than-reliable indicator if states are nonetheless complying with a treaty's terms because of their participation in its negotiation, because they have developed a self-interest in compliance, or because the treaty reflects a global script for conduct that renders formal ratification unnecessary. In other cases, socialization may elicit hypocritical ratifications unconnected to actual compliance. Formal rates of ratification, especially in the age of IOs, may be both under and over inclusive measures of actual compliance.

But what makes the quality or success of modern multilateral treaties especially difficult to determine is the factor of time. Before IOs, it was not implausible to attempt to take a snapshot of a treaty's effectiveness at a single moment in time. It was easier to determine whether states were in compliance with their terms as well as which states were subject to them. But today, because of the dynamism of the conferences that negotiate such treaties, and the institutional processes that continue to be involved in their interpretation and enforcement, that snapshot needs to be replaced by a video camera to better reflect the dynamic forms of law making over time that many such treaties have become. Institutionally grounded treaties are continuing exercises in legislation.

## BEYOND TREATY OBLIGATIONS

As I have suggested above, IOs have also produced a range of international obligations beyond treaties. I will briefly survey of these here. These include resolutions produced by the U.N. Security Council addressing national measures to counter terrorism or to control access to weapons of mass destruction. These resolutions, particularly Resolutions 1373 and 1540, are legislative in tone. While they seek to bind states under Chapter VII of the U.N. Charter, they are not, unlike prior Chapter VII resolutions, targeting the behavior of one state whose actions threaten the peace. These resolutions purport to address and to bind all states and appear to short circuit the tried and true method for prior global regulation: namely multilateral treaty making.

The Codex Alimentarius is another global lawmaking effort that addresses the marketing of food stuffs, a subject that once would have been seen as purely within the domestic jurisdiction of states and not the subject of international regulation at all.

Unlike nineteenth-century forms of international law but like at least some forms of IO-influenced law, the Codex involves private companies, MNCs, both in its elaboration and its enforcement.

ICAO's SARPs cover a number of matters from passport control to the safety features of modern aircraft. Like many IO legal products, the efficacy of SARPs is not evident from their formally non-binding nature. Indeed, ICAO's constitution does not indicate that SARPs are binding and only suggests that members ought to warn the organization when they choose not to abide by them. Yet for a number of reasons—from formal incorporation into national law to the dictates of the commercial aviation industry—these SARPs are effectively binding and may be more so than many a binding treaty. You may find that you are not permitted to land at an international airport unless your aircraft or your pilot complies with the relevant SARPs.

Similarly hard to explain in terms of the traditional sources of international law are the many guidelines issued by the World Bank or the conditions imposed under the structural adjustment loans of the IMF. Although these Bank guidelines and IMF conditions extend over a wide gamut of once sacredly sovereign prerogatives, from rules governing governmental bribery to other best practices on good governance, these rules are effectively imposed on states under conditions that make the contention that states have "consented" to them appear somewhat artificial. At least some of the Bank's Guidelines, such as those governing the treatment of indigenous peoples, were, at least before the Bank's use of them, formally only "soft law" having the backing of, for example, the U.N. General Assembly. At the same time, no one would suggest that these rules can be ignored by states without drastic financial consequences.

The blurring of the lines between "hard" and "soft" forms of international regulation is also evident with respect to such diverse IO products as the IAEA's advisory standards—as with respect to the handling of the transport of radioactive material—IAEA recommendations, ILO recommendations on the interpretation of ILO Conventions, the FAO's and UNEP's Prior Consent Regime for the handling of hazardous chemicals and pesticides, or the WTO's Doha Declaration on making available generic AIDs drugs.

The World Health Organization's Code on the Marketing of Breast Milk Substitutes is a particularly wonderful example of the challenge the new lawmaking actors pose for the traditional sources and subjects of law. Nestlé, the MNC, made the mistake of marketing breast milk substitutes in the developing world where it is common to have contaminated drinking water. It was alleged that Nestlé even had its sales people dressed as nurses, standing outside of certain supermarkets in the Third World. And those "nurses" and Nestlé's advertising campaign suggested that the best modern practice was not to use breast milk. Nestlé suggested that women in advanced countries increasingly used its product because this was the modern and healthier thing to do. Of course, Nestlé's product, mixed with contaminated water, produced bad results. The outcome was a huge lobbying campaign by NGOs with a very catchy, short and effective slogan: "Nestlé Kills Babies." NGOs led a consumer boycott of all Nestlé products. Nestlé made this easy since it conveniently labeled all its products "Nes" something. Consumers knew what to avoid and the company caved in the face of this effective campaign. It signed a contract with the leading representative of the NGOs, indicating that it would no longer use certain techniques to market breast milk substitutes. The World Health Organization in turn blessed this contract, which was of course entered into by two entities neither of which was an international legal person. Over time, once it became an official WHO product, the Code came to be incorporated in a number of states as domestic law. While today there are doubts about whether states are in compliance with the Code (as there is with respect to many more traditional forms of international obligation), it seems clear that this institutional work product, which defies categorization under any of the traditional sources of international law, should not be ignored by any practicing lawyer engaged in relevant practice.

As I suggested with respect to institutionalized treaty making, it is important to recognize that the turn to such non-traditional forms of international regulation give rise to broader conclusions. The first is that in some cases, international law making now involves political organs of IOs, and not only those parts of the institutions that are formally given some role in lawmaking such as experts charged with proposing treaty drafts. As is suggested by a number of international rules that have been

the product of action by the U.N. General Assembly, the U.N. Security Council, or both of these political organs acting as "good cop" or "bad cop," as occurred during decades of struggle over South Africa's apartheid regime, even those organs of these institutions that are not formally given general lawmaking powers may take action with powerful normative effects. While those effects can be cabined within traditional sources of law by arguing that what these organs do constitute on-going interpretations of the U.N. Charter or constitute the component parts of traditional custom, it is probably more accurate to acknowledge that the normative impact of such processes is unique to these institutions. We credit what these organs do as having a consequence in law at least in part because the organ in question has a unique status, that is, because the U.N. General Assembly is seen as a representative of the international community or because the Security Council is seen as the most legitimate enforcer of the international peace we have. As international lawyers we should be willing to recognize that, in fact, we have created new vehicles for new forms of global legislation that emerge from the interaction of IO political bodies, states, and other non-state actors.

We should also recognize a second consequence: the reality of "mission creep" across all or most of our IOs. Closer attention to the legally relevant output of IOs indicates that these organizations are now engaged in activities that are often at far remove from those anticipated at their birth. The World Bank, for example, has expanded its original mission, which was simply to build infrastructure projects in devastated European countries after World War II. Today, that organization sees as its mission promoting free trade and liberal capital flows, encouraging the efficient settlement of contract disputes and business establishment, facilitating more equitable income distribution, encouraging environmental sustainability, protecting indigenous peoples, eliminating corruption, and encouraging all forms of "good governance," including through the reforms of tax systems and privatization in all the countries that want its assistance. Similar forms of mission creep exist with respect to U.N. system organizations and the WTO. Law is implicated in all or most of these activities.

A third conclusion that emerges from all of this is the challenge these developments present to the once irrefutable basis

for the legitimacy of all forms of international obligation: clear evidence that states have consented to such obligations. If you are a state that has been forced to comply with a wide number of IMF conditions, you certainly have consented to these, but effectively because of economic coercion. What choice does a state really have except to accept the dictates of many IOs if it wishes to enjoy the full benefits of statehood, including a thriving economy?

A fourth conclusion is suggested by the diverse means IOs now have available to enforce the law. There is now much greater potential than ever before that some forms of international law will be subject to adjudication by some independent court, national or international, or to enforcement by some non-state actor, including the market. Compliance with international law is no longer a matter that is exclusively up to a unitary government actor, namely the executive, to determine.

For some, such as a number of academics working at New York University Law School, such as Benedict Kingsbury and Richard Stewart, one way of describing these changes in international law, including many produced by other law makers that are not my subject here such as transnational networks of government regulators, is to call it by a new name, "global administrative law." While I have some hesitations about putting it all under that one label, this description, particularly for a U.S. audience, captures some of the consequences in a nutshell.

## IMPLICATIONS

What are the normative implications of all of these changes? If you are an international lawyer in love with global forms of governance, all of this sounds wonderful. But the realities are far more complex. There are a number of legitimacy problems emerging from the new forms of governance. I describe the challenges for ease of reference under four categories: vertical, horizontal, ideological, and principal/agent gaps.

### *1. Vertical*

The vertical governance gap emerges from the perception that there is a lack of legitimating connection between law making at the international level and law making at the domestic level. Many of us, particularly in the West, call this vertical gap a "democratic deficit." Of course, democracy means many dif-

ferent things to different people so we should not be surprised if the democratic deficit of IOs are described from at least four different perspectives.

For some, democracy means first, electoral politics. Democratic laws, on this view, are laws that result from the actions of representatives duly elected in periodic elections. Of course, there is a disconnect between law produced by elected representatives at the national level and law produced by the actions of state representatives to IOs, mostly selected by the executive branches of governments, or experts in IOs, international civil servants, international judges, or any of a number of other IO-embedded actors, none of whom are elected by any recognized polity.

Second, democracy might be defined as government subject to structural checks and balances or, under the U.S. conception, subject to the separation of powers among branches of government. On this view, IOs have a democratic deficit to the extent no comparable checks and balances exist at the international level, for example, no judicial review of the U.N. Security Council. This legitimacy gap may also appear to the extent IO forms of governance appear to destabilize national checks and balances, as where IO governance enhances the power of the executive branch at the expense of other branches of government.

For those for whom democracy is all about discourse and participation, IOs have a democratic deficit for a third reason: because IOs have delimited forms of discourse or restrict deliberative participation to certain groups. For these critics, the relevant question is whether those that are affected by lawmaking efforts have a say in formulating the law. For these critics many IOs fail this test because of the absence of transparency or other restrictions on the participation of representatives of international civil society, relevant national interest groups, or MNCs.

A fourth democratic gap appears for those for whom democracy is defined by respect for certain rights, especially for those in the West, civil and political rights. Entities like, for example, the U.N. Security Council, who fail to respect the rights of due process before it punishes individuals that it puts on its list of alleged terorrists or their material supporters, fail this criterion. For others, IOs are not legitimate when they trample on collective rights such as the rights to a sustainable environment or those of indigenous peoples.

All these democratic critiques of IOs appear in the literature of a number of revisionist scholars in the United States, including Jack Goldsmith and Paul Stephan. Their critiques of modern treaties and rules of custom often rest on some form of these democratic critiques.

### 2. *Horizontal*

But a second type of problem that other critics, often from outside the United States, address, is a horizontal problem. This is a disconnect not between the international and national levels but among states. The horizontal critique is the contention that IOs and the lawmaking processes they license do not respect the sovereign equality of states. The horizontal critique rests on the argument that many of these organizations are dominated by the North or the West and that this domination is often built into their structures—as by weighed voting techniques in organizations as different as the U.N. Security Council and the IMF or because of traditional practices, such as the custom that Permanent Members of the Security Council are always entitled to choose their own national judges on the International Court of Justice or that Europe and the United States get to choose one of their nationals as the leaders of the IMF and the World Bank, respectively.

### 3. *Ideology*

The horizontal critique is related to but distinct from the criticism that IOs and their lawmaking processes reflect ideological predispositions. IOs such as the IMF or the World Bank have been criticized for reflecting the ideology of the West, or if you prefer the "Washington Consensus" model for development, that is, a preference for free markets, privatization, and a preference for civil and political rights over economic and social rights. IOs might be criticized as well for reflecting hegemony or deference to military power, as through hegemonic expressions of law promulgated by the Security Council or the IAEA. Ideological critiques of IOs can target their processes, their substantive outcomes, or both, as does the feminist critique that IOs reflect the male-dominated preferences of the mostly male-dominated states that form them. The critique that IOs are gendered targets both the blinkered forms of discourse that these organizations permit as well as the delimited rules for gov-

ernance that they produce, such as ineffective regimes to control the conduct of rights-violating U.N. peacekeepers, that sustain glass ceilings within the international civil service, or condone unfair policies within refugee camps, all of which pose adverse consequences on women.

### *4. Principal/Agent*

A final way to critique the operation of IOs is to view their operation as a variant on familiar principal/agent gaps. There are many areas in national law which can be accurately described as presenting a principal/agent problem, that is, a disconnect between the principal wants and what his/her agent does. This particularly happens when we have collective principals all of whom want to issue orders to an agent. In cases of collective principals, we know that the actions of the agent may prove unsatisfactory not only because their agents may be unreliable or untrustworthy, but because the principals fail to agree among themselves and do not give clear orders. In other cases, problems emerge because the agent has received conflicting orders from distinct principals or parts of them, that is, different parts of the organization. In yet other cases, problems result from the simple fact that the agent gets his or her orders only at the end of a long chain of delegation by which time the original coherent order has become garbled. Any of a number of disastrous U.N. peacekeeping missions might be explained in these terms.

None of these challenges to IOs—vertical, horizontal, ideological, principal/agent—are new to international law. All existed in some form even before we turned to IOs. I would contend, however, that the post-World War II move to IOs has exacerbated these challenges or at least increased the perception that these problems exist.

## RESOLUTIONS

How do we resolve these challenges? Here are two bad solutions.

The first one is inspired by some of the work of my predecessor as President of the ASIL, Anne-Marie Slaughter. Slaughter's work on transnational networks, capped by her book, *A New World Order*, suggests what some have described as a new medievalism, a turn to nearly a pre-Westphalian world order in

which the most significant actors are neither states nor state-dominated institutions like IOs, but parts of states, such as transnational networks of government regulators or central bankers. For advocates of this new world order, one solution to IOs' democratic deficit might indeed be to avoid them altogether or at least to deflect much of their regulatory work to transnational networks. The solution to the democratic deficit, in this view, is to avoid formal IOs and undemocratic IO-centered law.

In the rosiest depiction of the new medievalism, groups of persons like the Basel Committee of Central Bankers, the Financial Task Force to combat money laundering, or the United States's Proliferation Security Initiative to combat weapons of mass destruction, along with various public/private consortia, such as the Global Fund on AIDs, and forums for private ordering, such as the International Standards Organization, would displace undemocratic organizations like the U.N., the IMF or the World Bank. But, as some criticisms of Slaughter's book have noted, whatever other merits these networks have, they are not necessarily more democratic on virtually any dimension of what a "democracy" is. The possibility that these networks might be more efficient or less bureaucratic than formal intergovernmental organizations does not mean that they are necessarily perceived to be more democratic or accountable than democracies. Indeed, democratic governance may be notoriously inefficient; few people defend it on that basis. Nor do the networks that Slaughter describes resolve the horizontal, ideological or principal/agent dilemmas that I have canvassed.

Finally, while I agree with Slaughter that all of these groups are part of globalization and an important contributor to the new forms of global law that I describe, I would not consider these to be substitutes for, or alternatives to, the formal IOs that I have been addressing. When you examine closely most of the forms of transnational regulation that Slaughter addresses, a surprising amount of them exist alongside with or in cooperation with IO forms of regulation.

But if Slaughter's new medievalism suggests that the solution ought to be to avoid formal law or formal institutions, some European positivists have gone to the other extreme: the "more law" solution. According to good, solid European international lawyers the solution to the IO legitimacy problem is to take seri-

ously the proposition that IOs are fully fledged international legal persons. According to this view, since international organizations are entitled to the rights of other international legal persons, they, like states, ought to be treated as having legal duties as well as rights to engage with international law. The solution to IOs' legitimacy gap from this perspective is to make IOs legally liable just like other international legal persons. Accordingly, a current project of the U.N.'s International Law Commission (ILC) is to elaborate a code delineating the responsibility of international organizations.

The ILC has been at this project for six years. They have released a number of their draft articles of IO responsibility. What the ILC has done is essentially to take the ILC's previous, and highly successful, effort to delineate articles of state responsibility and do a "global search and replace" so that anywhere the word "state" appeared in the old articles, the word "international organization" now appears. The point is to suggest that, for example, when the U.N. Security Council failed to act with respect to the 1994 genocide in Rwanda, henceforth it should be easy to conclude that such omissions will trigger the legal responsibility of the Council no less than it would that of states who themselves violate their duty to prevent genocide.

There are a number of problems with this easy solution. Legal liability is not the same as democracy. We should not confuse democracy with accountability. Even if it were possible to make IOs legally liable for violating international law, that alone will not solve the numerous vertical, horizontal, or ideological problems—although it might make the collective principals a bit more careful about the orders that they issue, or fail to do so, with respect to their agent, especially if what is envisioned is that the principals remain at least secondarily liable for what their organizational agents do, or fail to do. I have some doubts, though, about a positivist legal solution that might be seen as imposing legal liability on organizational agents that, for the most part, lack the financial recourses available to most states, or at least to the states that are most influential within IOs. I can easily see this approach being misused by some states seeking to avoid paying their U.N. dues on the premise that this is necessary to sanction an organization that has failed in its duty to protect.

But a more fundamental problem with the ILC's proposal is that I am not sure that the principals here, namely the states, ever intended to make their organizations liable. It is certainly tenable that most IOs were created in part to avoid legal liability or at least to create entities capable of doing some things that are denied to any one state, such as the Security Council's unique ability to brand some matters to be threats to the international peace and to take some measures that are denied to anyone except that collective body. There are analogies here to the reasons we create corporations as distinct legal persons under national law. Neither the ICJ nor anyone else ever said that IOs were identical to nation states, even if we brand both for some purposes as international legal persons. It is not clear to me that those who established the U.N. ever meant that this institution, or its sub-organ the Security Council, should be held responsible should it fail to garner the necessary votes required to take action. The voting requirements in the U.N. Charter are themselves rules of international law and should not be treated as comparable states' domestic law. While the latter provides no excuse for violating international law under international law, the former are part of the international rules themselves.

While it is an attractive idea to use positive law to make organs like the Security Council more accountable, difficulties in operationalizing this idea abound. What is the Security Council? Is it the Secretary General who did not expeditiously act to demand additional peacekeepers for Rwanda? Or is it the nine states who failed to muster the political will to send those troops? Or is it the rest of the U.N. members who acquiesced in this decision or failed to protest? Or the most powerful U.N. member, the United States, who alone could have supplied the troops, if not the leadership, to convince the rest of the Council?

There are also difficulties in finding the positive law that the Council is alleged to have violated. The U.N., like most IOs, is not permitted to be a party to the Convention on the Prevention and Punishment of the Crime of Genocide or most other human rights instruments. Which of the substantive rules of international law that ostensibly trigger the legal responsibility of states apply to the U.N.? Should we assume that customary international law fills this gap, and if it does, isn't it evidently the case that the duties that apply to states, e.g., the duty to make

genocide a crime in the Genocide Convention, need considerable adjustment when we attempt to apply them to IOs?

As these questions suggest, the premise that a blanket approach to legal responsibility can be found to apply to all IOs, irrespective of the differing structures and purposes of such organizations, seems fatally flawed. While it may indeed be possible to render some institutional actors, such as U.N. peacekeepers, accountable before the positive law and some progress has been made in discrete areas of IO law along those lines, including with respect to the legal liability of organs of the European Union, a neat and generalized solution to IO accountability is not likely to emerge anytime soon. I would not expect relevant actors to agree anytime soon that IOs as distinct as the WTO and the IMF are both legally responsible for fulfilling the numerous obligations contained in the International Covenant on Economic, Social and Cultural Rights, for example, at least absent arduous negotiations to amend those IOs' respective charters to so provide.

So what are more promising answers to the various legitimacy deficits of IOs? Redressing vertical disconnects must be attentive to the specific democratic deficits in question. That may turn not only on the IO critic, it may turn on the specific IO. Not all IOs are undemocratic along all democratic dimensions as others. For those for whom electoral participation is key, one modest, if inadequate, remedy might be to enhance democratic participation through more regularized parliamentary and NGO involvement in IO processes, including by naming parliamentarians as representatives to IOs. Trade legislation in the United States goes a little way towards this direction as it now anticipates greater Congressional involvement earlier in the negotiation of WTO trade rounds, for example. That legislation also anticipates greater involvement by state officials of U.S. states whenever cases are brought in the WTO dispute settlement system accusing the United States of WTO violations based on state laws within the United States. The last addresses in a very small way, some of the checks and balances concerns expressed by some IO critics. Of course, many have proposed a number of IO remedies, from greater transparency to greater access for NGOs, to the extent particular IOs are accused of denying participation rights or insufficient democratic deliberation. There are those who think, for example, that the discourse

in the ILO, premised on a dialogue among only government representatives, members of trade unions and employer groups within member states, artificially restricts the discourse to only some of the relevant constituencies, at least compared to what is now expected at the national level whenever labor issues are addressed.

The horizontal critiques of IOs lead naturally to reform proposals for how we choose the heads of the World Bank or the IMF or how we think about the veto in the Security Council or weighted voting in other IOs. Agency slippage problems might be addressed by borrowing a page from how this problem is remedied at the national level. This leads to proposals for better screening of our IO agents, better monitoring techniques on hiring, better punishment and reward systems, better institutionalized checks and balances, or even incipient creation of IO separation of powers, as by insisting on prior consultation among IOs or between organs prior to taking action. We are certainly starting to see some of these concerns as expressed by demands for more careful selection of who leads our IOs or greater accountability requirements for financial programs, as emerging from the U.N.'s Oil-for-Food scandal. In some cases, there may be pressures to restrict or remove IO privileges and immunities at the national level to permit rewards and punishments to be inflicted on IO agents when they go outside their mandates.

None of this is to suggest that ameliorating the vertical or horizontal difficulties will be easy. Indeed, it may well be that ameliorating the first, as by permitting the U.S. Congress to have a greater say in IO decisions, may exacerbate the second. It also be, however, that at least some of the changes in the international legal process suggested by the first part of my lecture may themselves help redress some of the legitimacy concerns. Consider the views of Orly Lobel, whose article, *The Renew Deal* (89 MINN. L. REV. 342 (2005)) delineated the essential features of what she called traditional regulation in the United States as opposed to the features of the new forms of public regulation which emerged in the wake of Franklin Roosevelt's New Deal in the 1940s. As I suggest in my book, it is not entirely far-fetched to suggest that Lobel's comparison applies with respect to some forms of international regulation.

It is plausible to describe the world of nineteenth century international law before the turn to IOs using the features that Lobel uses to describe "traditional regulation." Pre-IO treaties or customary rules might be described, to use Lobel's terms, as centralized commands directed at states; the nature of such law might be, as she suggests, principally modeled on command and control, subject to uniform, fixed rules subject to generalized application. It is also plausible to see international law as traditionally conceived by positivists as top-down and formal, with the central actors being governments acting only on the public sphere. It is not implausible to describe pre-IO forms of international lawmaking to be—as Lobel describes traditional regulation—static, one shot, and rigid. Nor is it implausible to describe what nineteenth-century international lawyers had in mind in terms of international courts to be like the adjudication process that Lobel describes in the pre–New Deal world. They had in mind that ideally international law enforcement would be subject to an adjudication process that could award damages against the liable state actors through an after the fact judgment. Suitably modified to take into account the lack of hierarchy in the international system, Lobel's description of the essential features of traditional regulation is not a bad description of the pre-IO world of international law.

At least for some forms of modern IO regulation, as with respect to international regulation in the form of ICAO's SARPs, for example, Lobel's description of the essential feature of New Deal legislation is also apt. As some of my colleagues at Columbia Law School would describe it, some forms of modern public administrative law in the United States is more likely to be described as a kind of "democratic experimentalism." To put it in Lobel's terms, the new forms of regulation, and I would argue some of the forms of IO regulation that I have described, have very different essential features. This law is decentralized. There is a greater attention paid to the need to coordinate or orchestrate conflicting rules. The rules themselves are more flexible or adaptable, more diverse in nature, and permit more contextualized variances, as through doctrines of subsidiarity, margins of appreciation, or common but differentiated responsibilities. As Lobel suggests is true for some post-New Deal regulation, the new forms of global administrative law may rely more often on horizontal networks, including Slaughter's transna-

tional networks working in conjunction with IOs, entail greater decentralization, and rely more often on informal standards, e.g., "soft law." The new institutionally embedded forms of international regulation, as Lobel suggests is true for some New Deal regulation, are more often directed at multiple levels of government and public and private actors. As I have suggested is true of modern treaties, but may also be true of modern IO-influenced forms of custom, the new international lawmaking process may be, as Lobel indicates, more dynamic, experimental, or innovative, with a greater stress on iterative or repeat learning techniques. And finally, modern institutionalized dispute settlement processes may engage in not only after the fact damages judgments but in what Lobel describes as on-going benchmarking techniques. In my book, that is indeed how I describe many of the non-judicialized forms of international dispute settlement that we are now seeing among a number of IOs, as in the ILO or in WTO settlements that occur before submission to more adversarial, formal WTO dispute settlement.

To the extent Lobel's descriptions fit some forms of international regulation, it may be possible to respond to some of the vertical and horizontal critiques with the claim that international law today engages in democratic experimentalism.

Another response to legitimacy complaints, not inconsistent with Lobel's approach but complementary to it, would be to consider the lessons posed by national forms of administrative law. This notion has inspired the work of Benedict Kingsbury, Nico Kirsch, and Richard B. Stewart, as in their article *The Emergence of Global Administrative Law* (68 L. & CONTEMP. PROBL. 15 (2005)). They define "global administrative law" as "rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties." This definition would encompass much that I have addressed here today but would also extend to the types of regulation or adjudication emerging from Slaughter's transnational networks. The perception that much of international regulation today consists of a global form of national administrative law leads Kingsbury and his colleagues at New York University Law School to suggestions that the remedy for IO legitimacy gaps lies in adapting national controls for administrative action to the international sphere. They would suggest that we are now starting to see emerging principles of global administrative law, including

formal requirements for procedural participation and transparency, reasoned decisions, and review of action taken. They would also argue that we are starting to see the application of substantive standards for review, including rules requiring that regulation be proportional, apply means-end rationality, avoid unnecessarily restrictive means, and satisfy the legitimate expectations of those affected. The new global administrative lawyers also spell out, consistent with Lobel's description of a tendency to rely on more horizontal divisions of labor in regulation, a number of entities that would apply these principles, including domestic institutions, such as courts, internal IO mechanisms, or global disciplines applicable across distinct forms of international regulation.

## CONCLUSION

Although my lecture addresses a complex feature of globalization, at the end of the day, my principal message is quite simple. My efforts here today are intended to make us take IOs and global governance seriously. At a time when U.N. officials, like those of states, are alleged to take bribes, when U.N. peacekeepers, like our own military or military contractors, sometimes violate the rights of those that they are there to protect, when what some international courts say are treated seriously by other international courts, and even sometimes by our own, we need to begin taking seriously the idea that global forms of lawmaking exist. We also need to consider the possibility that global law and its institutions can be made more democratic and that there are ways to achieve this without insisting that only democratic states be permitted to participate in global governance. Thank you.