International Organizations as Law-makers

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This book is dedicated to
the memory of my first mentor in all things,
Maria J. Alvarez

Acknowledgments

This book is the product of over a decade of teaching courses on international organizations at various law schools in the United States. For much of this period I used, as my basic classroom text, editions of Frederic L. Kirgis's *International Organizations in Their Legal Setting*, and the impact of that book, and Professor Kirgis's perceptive questions throughout his text, will be evident to readers of this book. Indeed, much here seeks to provide my answers (as well as those provided by my students over the years) to Professor Kirgis's inquiries, and I am grateful, as are all students of international organizations, for his efforts to treat this subject seriously and from a legal standpoint. I also owe debts to colleagues from Michigan and Columbia Law Schools who read and commented on portions of this book through various iterations over the years, especially Michael Doyle, Kal Raustiala, and Eric Stein. They are not, of course, responsible for remaining errors. For financial support I owe debts to the Cook research funds of Michigan Law School, which sustained me through several Ann Arbor summers, as well as the Bernard H. Kayden Faculty Research Fund at Columbia Law School. I also owe a debt of gratitude to many student research assistants over the years, all of whom presumably worked not for the ridiculously low wages offered but for the love of the subject, most recently Christos Ravanides, and finally to my administrative assistant at Columbia, Lenge Hong, who made the last-minute editing tasks almost pleasant.

Perceptive readers will see that I have reproduced substantial portions of an editorial comment published in the American Journal of International Law, "Hegemonic International Law Revisited," in Section 4.2,[1] as well as an essay, first published in 2001, on "constitutional interpretation in international organizations," as Chapter 2.[2] Some of the themes in this book were also considered in prior articles.[3]

No book—like no man—is an island and I am grateful to my spouse, Susan M. Damplo, and son, Gabriel, for tolerating many lost weekends and summers along the way.

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[2] *See* José E. Alvarez, "Constitutional interpretation in international organizations," in Jean-Marc Coicaud and Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo, Japan: United Nations Press, 2001).

[3] *See, in particular*, José E. Alvarez, "The New Treaty Makers," XXV *Boston College Int'l & Comp. L. Rev.* 213 (2002) and "The WTO as Linkage Machine," 96 *AJIL* 146 (2002).

Preface

Seeking Organizational Insights

A UN report on climate change documents a growing consensus among atmospheric scientists that human activity both is responsible for and can help reduce climate change, helping to buttress multilateral treaty negotiations to achieve this end.

The Security Council gives Iraq one final opportunity to comply with that body's own disarmament obligations, suggesting that Iraq has materially breached those obligations and leading to subsequent U.S. claims that it has unilateral authority to use military action to topple the Hussein regime.

The International Narcotics Control Board, a UN agency, releases a report canvassing such diverse issues as the dramatic increase in the use of Ritalin to temper the behavior of children in the U.S.; documenting how illegal LSD laboratories in the U.S. are becoming major suppliers to that drug in Europe; praising tighter drug laws in India, Sri Lanka, Nepal, and Bangladesh; and suggesting weaknesses in other national laws directed at money laundering related to the drug trade.

The World Bank extends a number of loans to developing countries intended to promote an end to sex bias in education, nutrition, health, and agricultural policies but refuses to attach such gender-sensitive conditions to all its loans.

The World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) announce a new joint initiative to help least-developed countries maximize the "benefits" of intellectual property protection.

The International Court of Justice (ICJ) issues an Advisory Opinion calling nuclear weapons the "ultimate evil" but stopping short, in its majority opinion, of finding a threat to use such weapons in self-defense to be illegal.

Restrictions in trade in alcohol, brooms, buses, cars, cement, coconut, coffee, computers, footwear, gasoline, leather, macaroni, rice, scallops, steel, tomatoes, and underwear are among the targets of some 200 challenges filed by states against each other in the WTO's dispute settlement system from 1995 through 2000.

Taiwan places an advertisement in the *New York Times* calling for parallel representation in the UN, noting that its 21 million people are "not represented" even though they are part of a vibrant multiparty democracy with a vigorous free press.

The UN Secretary-General orders an internal investigation to determine how many UN peacekeepers may have hired child prostitutes during their assignments.

The World Health Organization (WHO) convenes an international conference to hammer out an international treaty that would, among other things, impose restrictions on how cigarettes are marketed around the world.

As is suggested by these press reports, international organizations (IOs) have a pervasive impact on the promulgation and implementation of law across all the various sub-specialities of international (and some national) law, and even across

the divides that supposedly separate the worlds of "public" and "private" regulation. As the first example on climate change suggests, IOs may both identify a problem and help guide the world to a multilateral solution, such as the conclusion of a treaty. But as the second example on Iraq suggests, inter-governmental processes may also help legitimize unilateral assertions of power. While IOs are often seen as beneficent servants of the "international community," they have often responded to the realities of power, including (or especially) the demands of great powers.

Networks of treaties, rules, guidelines, and other legally significant standard-setting techniques exist among IOs and states or among these organizations, including important regimes concerning technical and financial assistance, UN peacekeeping, nuclear power safeguards, international aviation law, international trade law, international labor law, and counter-terrorism. A large portion of the rules that we have to govern nations, both those that are formally legally binding and those that are not, are now initiated, formulated, negotiated, interpreted, and often implemented through the efforts of IOs. As of 1995, of some 1,500 multilateral treaties in existence, nearly half were attributable to UN system organization, and the rate of production of new treaties undertaken within the auspices of IOs appears to be steadily increasing.[1] Many other sources of international obligation involve IOs as parties or beneficiaries, including rules relating to the interpretation of their charter instruments, their legal personality, or to the privileges and immunities enjoyed by them or persons associated with them. And an even larger body of international rules, most of it generated by these organizations, is now subject to various forms of institutionalized dispute settlement, formal and informal, creating an ever increasing body of judicial and quasi-judicial opinions in discrete areas of the law.

Although we have turned to such institutions for the making of much of today's international law, the lawyers most familiar with such rules remain in the grip of a positivistic preoccupation with an ostensibly sacrosanct doctrine of sources, now codified in article 38 of the Statute of the International Court of Justice, which originated before most modern IOs were established and which, not surprisingly, does not mention them. International lawyers wrangle endlessly over the scope and interpretation of treaties, custom, or general principles and address only secondarily the impact of global institutions created since World War II on the formation and interpretation of international obligations, including these classic sources. To the extent international lawyers or others acknowledge that IOs have an impact on what is regarded as "real" international law—usually defined narrowly to embrace only norms governing states in their relations inter se—we continue to pour an increasingly rich normative output into old bottles labeled "treaty," "custom," or (much more rarely) "general principles." Few bother

[1] Paul Szasz, "General Law-Making Processes," in Oscar Schachter and Christopher Joyner, eds., *United Nations Legal Order*, 35, at 59 (Washington DC: American Society of International Law, 1995). *See also* Charlotte Ku, "Global Governance and the Changing Face of International Law: The 2001 John W. Holmes Memorial Lecture," *ACUNS Rep. & Papers 2001*, no. 2.

to ask whether these state-centric sources of international law, designed for the use of judges engaged in a particular task, remain viable or exhaustive descriptions of the types of international obligations that matter to a variety of actors in the age of modern IOs.[2]

Even when organizational processes are addressed, it is usually in the context of a specific regime, such as the role of the Security Council on the rules governing use of force, the impact of the International Criminal Tribunal for the Former Yugoslavia on the definition of international crimes, or the impact of the WTO's Appellate Body on the interpretation of the GATT-covered agreements. Organizational insights, to the extent they exist, remain largely regime-specific—at least within the legal literature. Perhaps, due to the ever increasing depth of particular regimes and the resulting degree of specialization among public international lawyers, few of us look across institutionalized regimes. We can count on trade lawyers knowing something about the WTO and its forms of dispute settlement and that those interested in national security will look at the Security Council, but few are apt to look at both—or at how other regimes affect the making of treaties or the settling of disputes. Cross-cutting questions—as with respect to the relative impact of institutionalized dispute settlement—are less frequently asked.[3] Except for a narrow breed of practitioners who work for IOs, few people pay much attention either to common institutional dilemmas faced by these inter-governmental organizations or to the broader implications of the rise, over the past half century, of a new sub-field of international law, namely "international institutional law."[4] Principles of treaty interpretation as they relate to the charters of these organizations, the rules regarding their legal personality or their financing, are generally regarded as derivative of comparable principles used by and for nation states and not really anything special. The notion that these doctrines as applied to IOs are mere parasitical variations on familiar rules applied to states reflects a prevailing assumption that such organizations are merely the agents of states and not in any real sense autonomous entities. International lawyers' perspective on how their law gets made and enforced remains, more than a half century after establishment of the UN system, remarkably uncurious about the impact of institutionalization.

This book responds to the resulting gaps in our descriptions, in our theoretical frameworks, and in our prescriptions for improving the law. Its central theme is that traditional inter-governmental organizations, especially those of the UN system created after World War II, remain today an essential part of how nations govern themselves and help to explain when they fail to do so. The study of IOs rewards

[2] *But see* Onuma Yasuaki, "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law," in Nisuke Ando et al., eds., *Liber Amicorum Judge Shigeru Oda* at 191 (New York: Kluwer Law International, 2002) (casting doubt on the traditional reliance on article 38 sources).

[3] Political scientists, and lawyers who work with them, pay more attention to such matters. *See, e.g.*, "Legalization and World Politics: A Special Issue of *International Organization*," 54 *Int'l. Org.* 385 (2000).

[4] *See generally* Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Boston: Martinus Nijhoff, 2003).

us with better descriptions of how international rules are now made, transformed, and applied; firmer theoretical groundings of how international law works or fails to work; and more accurate prescriptions for improvements in implementation, compliance, and effectiveness.

Better Description

IOs have helped spur the expansion of subjects deemed suitable for international regulation as well as inspire new methods for international standard-setting. It is not an exaggeration to say that "[m]ost changes in international law since 1945 have occurred within the framework of international organizations."[5] Perceptive scholars have noted that contemporary international relations is marked by "the move to institutions,"[6] and this book examines more closely some of the consequences.

The focus here is on those inter-governmental organizations that aspire to universal participation and therefore to global reach. It does not purport to be a complete picture of modern international law-making processes. There are other significant actors now involved in aspects of global governance, including IOs that are not this book's primary focus, including powerful regional bodies like those of the European Community, and non-state actors such as non-governmental organizations, NGOs, multinational corporations, other transnational networks (such as associations of sub-units of governments like central bankers, other government regulators, or private enterprises such as those which set product standards), as well as gatherings of governments that can only with some difficulty be encompassed within traditional definitions of IOs. Each of these actors has generated a rich literature, particularly within political science and by lawyers who work in tandem with them.[7] Much of the speculation concerning the ostensible decline in the power of the nation state or the erosion of sovereignty reflects the growing normative impact of all of them, including international organizations.[8] There is

[5] Schermers and Blokker, *supra* note 4, at 6.

[6] David Kennedy, "The Move to Institutions," 8 *Cardozo L. Rev.* 841 (1987).

[7] For an introduction to the huge literature on NGOs, see Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998). On government networks, see, e.g., Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); *id.* "Government Networks: Governing the Global Economy through Government Networks," in Michael Byers, ed., *The Role of Law in International Politics* at 177 (Oxford, U.K. and New York: Oxford University Press, 2000). For a discussion of the impact of global economic actors, see, e.g., Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996). On the EU, see generally Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, U.K. and New York: Oxford University Press, 1999). For an interesting case study of the establishment of international soft law through the joint efforts of NGOs, IOs, and TNCs, see Kathryn Sikkink, "Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code," 40 *Int'l Org.* 815 (1986) (describing the agreement between WHO and Nestlé on the marketing of breast milk substitutes).

[8] *See, e.g.*, Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (New York: Free Press Paperbacks, 1995); Sassen, *supra* note 7; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, U.K. and New York: Cambridge University Press, 1996).

in particular a vast and growing literature on the rising import of members of "international civil society" (variously defined to include one of more of these non-state actors) on "global governance."[9] This book does not assume that the particular IOs that are its focus are necessarily the most important innovation in international law-making techniques over the past 50 years.

Nor does this book provide a comprehensive look at its own subject matter: the diverse world of inter-governmental organizations. It is neither an encyclopedic description of these organizations nor a comprehensive look at all their law-making activities, from forms of regulation to attempts at enforcement.[10] Instead it re-examines select examples of IO activity whose normative impact is often ignored or under-estimated within three broad categories: (1) international institutional law (Part I); (2) treaty-making conducted under IO auspices (Part II); and (3) institutionalized dispute settlement (Part III). The premise—that these three categories are especially relevant to how the world governs itself—may appear dubious to many readers (and not only because if the world is governing itself, it is manifestly not doing a very good job). The legal literature does not, after all, generally characterize these phenomena as "law-making," whether global or otherwise. International institutional law tends to be dismissed as merely dealing with routine household matters, of little external normative relevance, or at best with "technocratic" problems of small political import. Global modes of treaty-making, although widely acknowledged to be a principal activity for many IOs and the reason many were established, are rarely seen as having any distinctive normative impact: a treaty, whether negotiated under the auspices of an IO or not, remains merely a consensual contract to which states may choose to agree (or not). And international modes for dispute settlement are not usually regarded as part of "law-making" at all and are only indirectly connected to the study of IOs. Much of the motivation for this book is precisely to dispel such views.

As do many works examining the impact of NGOs, this book contends that we need to reconsider the state-centric ways in which public international law-making processes are described. This conclusion may appear odd for a book that focuses on entities that are composed largely if not entirely of states. Inter-governmental organizations lend themselves to state-centric description. We continue to

[9] For a bibliography, see Ann M. Florini, ed., *The Third Force: The Rise of Transnational Civil Society* at 241–76 (Nihon Kokusai Koryu Senta: Carnegie Endowment for International Peace, 2000). For more critical views, see Kenneth Anderson, "The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society," 11 *EJIL* 91 (2000); Peter J. Spiro, "New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace," 18 *Cardozo L. Rev.* 957 (1996).

[10] For more comprehensive treatments, see, e.g., Schermers and Blokker, *supra* note 4; Jan Klabbers, *An Introduction to International Institutional Law* at 202 (Cambridge, U.K. and New York: Cambridge University Press, 2002); Oscar Schachter and Christopher Joyner, eds., *United Nations Legal Order* (Washington DC: American Society of International Law, 1995); Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 5th edn., 2001); C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, U.K. and New York: Cambridge University Press, 1996); Frederic C. Kirgis, Jr., *International Organizations in Their Legal Setting* (St. Paul, MN: West Publications, 2nd edn., 1993).

assume, to a surprising extent given the decades-long experience we have now had with these organizations, that these organizations are merely "new settings for old techniques of diplomacy."[11] To the extent we examine the origins of particular treaty regimes—from trade to international civil aviation—we tend to focus on the policy evolutions within member governments, paying less attention to the possibility that organizational processes structure and transform the responses of international actors, including states.[12]

A descriptive gap exists even for those, perhaps the majority of international lawyers, for whom the categorization of sources of international law in article 38 is and should remain unaffected by the post-World War II move to institutions. This book addresses how IOs have had and are having an impact on the making and interpretation of treaties. It also contends that the new forms of treaty-making involving the rise of IOs themselves as "actors" or "subjects of international law," the institutionalization of dispute settlement, and the evolution of international institutional law have all had an impact on the ways in which customary international law is formed or proven. It also addresses how the proliferation of institutional dispute settlers (in fora as diverse as WTO panels and human rights tribunals) have affected other sources of law, including general principles of law, while transforming the nature (and not just the number) of judicial opinions that positivists see as a subsidiary or evidentiary source of law.

Organizational law-making has also affected the other types of evidence relevant to proving the existence of or interpreting article 38 sources of law. IOs have inspired or organized the "teachings of publicists" and the practices of merchants ("*lex mercatoria*") through the activity of expert groups such as the UN's Legal Subcommittee of the Outer Space Committee, the International Law Commission (ILC), and the UN Commission for International Trade Law (UNCITRAL). Even those who are persuaded that article 38 sources of law exhaust the methods of international law-making are likely to find the processes of normative change within IOs, occurring at the periphery of those sources, of interest. The contemporary conception and use of treaties, custom, and general principles cannot be understood without some idea of the constitutional evolution of organizational charters—of how or why the GATT turned into the WTO, why the UN Security Council has come to have an impact on the development of human rights law, or more generally why it might credibly be said that the UN Charter has undergone more changes in fifty years than the U.S. Constitution has seen in over 200.[13]

But, more fundamentally, IOs should be of interest to anyone willing to re-evaluate the monopoly long exercised by our article 38 totem. Anyone trying to

[11] Lawrence T. Farley, *Change Processes in International Organizations* at 2 (Cambridge, MA: Schenkman Publishing Company, 1982) (quoting Hans J. Morgenthau).

[12] Political scientists, especially those identifying themselves as "constructivists," have been far more attentive to this possibility. *See, e.g.*, Robert O. Keohane, "International Institutions: Two Approaches," 32 *Int'l Studies Q.* 379, at 382 (1988) and *infra*, Chapter 1.

[13] Louis Sohn, "Interpreting the Law" in Schachter and Joyner, *supra* note 1, 169, at 227. *See also* Chapter 2, *infra.*

understand national law-making needs to go beyond a static list of hierarchically arranged sources of law consisting of a national constitution, statutes, and judicial decisions. Anyone seriously interested in learning how national legal systems work needs to take a serious look at the institutions that give rise to them. The same applies at the global level. We should not expect that the static list of types of international obligations in article 38 remains an adequate description for an age that relies so heavily on international institutions.

Organizations have changed both the process by which international law is made as well as its content. A static list of sources tells us nothing about distinctions within each type of source resulting from organizational processes of law creation. In the real world, all treaty-making processes are not equal (or alike). An international charter like the UN Charter or a series of interwoven obligations subject to binding institutionalized dispute settlement like the WTO covered agreements, or a modern environmental framework convention continuously revised through periodic meetings of the parties, is each subject to a significantly different interpretative process than is the bilateral treaty-contract between two states. Treaties produced under such institutionalized mechanisms can not be equated with treaties of old. A multilateral treaty convention negotiated under UN auspices is the product of a significantly different process from an agreement reached after an ad hoc conference in the 19th century or a contract premised on tit-for-tat reciprocity resulting from bilateral negotiations. A treaty produced through modern collective processes is likely to be different not merely in its origins, but also in its final text and in its subsequent evolution. Process affects substance.

And it is not only new law produced in the age of IOs that is affected. Old rules of international law may be transformed utterly when applied to collective bodies of states deemed representative of (an ambiguously defined) "international community." Familiar rules initially designed to be applied as between sovereign state actors, including rules for the interpretation of treaties or concepts like "legal personality," take on new dimensions and pose new challenges when applied by or for the benefit of IOs. Vague principles such as "sovereign equality" and "self determination," frequently included in the instruments that establish IOs, take on more concrete form thanks to iterative attention by repeat players who are forced by circumstances—as by the Trusteeship Council during the course of decolonization or by the Secretary-General reacting to requests for election assistance or supervision. Inchoate goals evolve into more cognizable "rights" (whether for the benefit of states or individuals) thanks to the group dynamics within IOs, as well as their associations with other actors.[14]

[14] *See, e.g.*, James C.N. Paul, "The United Nations and the Creation of an International Law of Development," 36 *Harv. Int'l L. J.* 307 (1995); Karl Doehring, "Self-Determination," in Bruno Simma, ed., 1 *The Charter of the United Nations: A Commentary* 47 (Oxford, U.K. and New York: Oxford University Press, 2002); Hurst Hannum, "Human Rights," in Christopher Joyner, ed., *The United Nations and International Law* 131 (Cambridge, U.K.: Cambridge University Press, 1997).

Permanent bodies associated with the collective also inspire new types of rules that presuppose the values of (and the reaction by) an "international community"—such as duties to negotiate multilaterally or to consult prior to taking unilateral action,[15] duties to report subject to collective scrutiny,[16] and obligations *erga omnes* as well as principles of *jus cogens*.[17] Such rules would probably not have emerged but for the 20th century's move to institutions.

Better Theory

This book also raises broader questions that tend to be overlooked in the absence of an institutional perspective. The student of international organization, whether or not she ultimately accepts the continuing utility of the traditional article 38 sources of law, is more likely to raise questions about the fundamental premises underlying these sources, such as the assumption that international obligations are the exclusive province of nation states or that all international obligations are the product of the consent of states. IOs challenge the primacy of the nation state as sole actor and consent as legitimating rationale. The student of international organization is also more likely to question whether customary international law remains today the primarily unwritten, incidental accumulation of bilateral actions/reactions of states over an extended period of time suggested by traditional doctrine, raising new questions about that source's legitimacy and function, especially within national legal systems. She is also likely to question whether the third source of law in article 38, general principles of law, are still that rarely encountered, perhaps mythical, source of international obligation found only in learned treatises. Awareness of organizational forms of law-making are also likely to provoke debate about whether, or to what extent, international obligations now reflect "community" interests, whether of the global, regional, or more specialized kind, and whether those that create the new kinds of international law are accountable to a distinct "demos" separate from that addressed by national constitutions.

Organizational insights also provide grist for the perennial jurisprudential inquiry which still needs to be posed for public international law, namely, "Is it law?" The world of IOs provide abundant examples of how the international

[15] *See, e.g., US—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, para. 166 (October 12, 1998) (reprinted in 38 *ILM* 118 (1999)) (finding such a duty in the WTO covered agreements); Frederic L. Kirgis, Jr., "NATO Consultations as a Component of National Decisionmaking," 73 *AJIL* 372 (1979)(finding such an obligatory norm in certain instances within NATO).

[16] *See, e.g.*, Abram and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* at 154–96 (Cambridge, MA: Harvard University Press, 1995)(describing a variety of institutionalized reporting, verification, and monitoring obligations and their impact).

[17] *See, e.g., Barcelona Traction case (Second Phase)*, 1970 ICJ Rep. 3, at 32; Ian Brownlie, *Principles of Public International Law* at 512–15 (Oxford, U.K. and New York: Oxford University Press, 4th edn., 1990).

legal system generates norms and attempts to secure compliance without either legislature or sovereign enforcer. IOs provide new ways to answer a question that has interested international lawyers for centuries: namely, "Why do states obey?" Whether the answer given is process-based legitimacy (Franck), more amorphous forms of collective legitimization (Claude), or because the norms they produce reflect the will of the international community (Jenks, Lauterpacht), the common purposes of participants (De Vissher, Hoffman), shared expectations as to authority (MacDougal), or systemic goals (Kaplan and Katzenbach), IOs provide richer explanations for the sense of obligation than is given by positivists' parsimonious reliance on consent.[18] At the same time, the pathologies of IOs may help to explain when or why states fail to comply with or to implement those international rules to which they have subscribed or the many gaps in the law.

The study of organizational "soft" and "hard" law raises concerns about the firmness of the line between black letter law that is (*lex lata*) and progressive law that might be (*lex ferenda*), as well as questions about the legitimacy of legal rules whose binding authority appears to lie along a spectrum. A focus on institutions raises anew familiar questions about the relative autonomy of law as distinct from politics.[19] It also directs attention to issues that preoccupied earlier generations of international lawyers but which now merit renewed scrutiny, such as whether the piecemeal creation of organizational regimes, including the proliferation of international tribunals, is conducive to "world federalism by installments," or, on the contrary, undermines the prospects both for global governance and harmonious or uniform law.[20]

Organizational inquiries encourage cross-disciplinary analysis. Theoretical frameworks now deployed in many other areas of (national) law, such as law and economics and public choice theory, are grounded in the study of institutions or other forms of collective action. Such theoretical insights are more readily adaptable to international law once we direct our attention to international forms of collective action. We can see more clearly the values of independence and centralization, for example, when we examine permanent structures, like the WTO, that permit iterative action and reaction, promote path dependencies, or permit the pooling of resources or information.[21]

[18] *See, e.g.*, Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford, U.K. and New York: Oxford University Press, 1990); Inis L. Claude, Jr., "Collective Legitimization as a Political Function of the United Nations," 20 *Int'l Org.* 367 (1966). For a summary of the other views identified in the text, see Oscar Schachter, "Towards a Theory of International Obligation," 8 *Va. J. Int'l L.* 300, at 301 (1968).

[19] It is no accident that the second chapter of Georg Schwarzenberger's classic text on *International Constitutional Law*—Vol. III of *International Law as Applied by International Courts and Tribunals* (Boulder, CO: Westview Press, 1976)—for example, is devoted to examining the "political element in international institutions."

[20] *Compare* David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966), *with* Benedict Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?," 31 *NYU J. Int'l L. & Pol.* 679 (1999). *See also* Chapter 1, *infra*.

[21] *See, e.g.*, Kenneth W. Abbott and Duncan Snidal, "Why States Act Through Formal International Organizations," 42 *J. Conflict Res.* 3 (1998); José E. Alvarez, "Symposium, The Boundaries of the WTO," 96 *AJIL* 1 (2002).

The study of organizations permits us to see as well their many failings and especially their shortcomings from the perspective of democratic theory. Examining their impact on law forces us to consider their democratic deficits: the alleged absence of accountability of their political bodies, experts, and even their international judges.[22] The disjunctures or parallels between the emerging systems of global governance based in IOs and the national rule of law become more apparent. While some have justifiably questioned the relevance of analogues to national law and institutions to the study of international organization, it is hard to escape such comparisons as the subject matter of international law expands. As the missions of these organizations intrude more deeply into the fabric of domestic law, as more national judges, parliamentarians, and executive agencies are required to deal with rules produced at the international level, and as more individuals are affected by them, it makes sense to many to ask whether domestic legal doctrines—such as principles relating to "separation of powers" or "improper delegation"—should pose limits on the incorporation or enforcement of international law within national law.[23]

As the chasm between the subject matter of national and international law shrinks, the gaps between the frameworks that we use for discussing each decreases as well. The resulting benefits of cross-fertilization are not all in one direction. A more organizationally grounded discipline of public international law may pose challenges to national law. As more courts, international and domestic, are required to deal with the interpretation of treaties, national legal doctrines such as federalism, the separation of powers, or improper delegation, may require reconsideration, along with interpretative principles national courts have long used to mediate between national and international rules.[24] For these reasons, both national and international lawyers may benefit from closer scrutiny of IOs' impact on law-making.

Better Prescriptions

While this book does not attempt to present grand blueprints for organizational reform along the lines of those advocated by those "present at the creation" of the UN,[25] it does have some modest prescriptive aspirations. The study of international law's organizations may suggest directions for more effective international

[22] *See, e.g.*, Eric Stein, "International Integration and Democracy: No Love at First Sight," 95 *AJIL* 489 (2001).

[23] *See, e.g.*, Curtis A. Bradley, "International Delegations, The Structural Constitution, and Non-Self-Execution," 55 *Stan. L. Rev.* 1557 (2003).

[24] *See, e.g.*, Jonathan Turley, "Dualistic Values in the Age of International Legisprudence," 44 *Hastings L. J.* 185 (1993)(applying a public choice critique to the *Charming Betsy* canon of construction and the presumption against extraterritoriality).

[25] *See, e.g.*, Grenville Clark and Louis B. Sohn, *Peace Through Disarmament and Charter Revision: Detailed Proposals for Revision of the UN Charter* (Dublin, NH: Privately Published, 1953).

regulation.[26] Even the compilation of comparative organizational experiences with respect to select problems in international institutional law is likely to generate useful guidance for institutional reformers. As Louis Sohn noted long ago, even those working within IOs stand to benefit from attempts to compile experiences from other organizations, as "even the best of them have only limited knowledge of the practice of other international organizations."[27]

This book devotes some attention to distinct approaches now being undertaken, as with respect to treaty-making in Chapters 5 and 6 and various forms of dispute settlement in Chapters 7 to 9, to secure compliance with international norms and considers whether some forms of international cooperation work better than others or at least how such inquiries might proceed. It appears that in some cases IOs learn from each other's mistakes. We may, in turn, learn to devise better law if we learn about how organizations learn.

Organizational insights are also helpful in suggesting possible reasons for the lack of cooperation or failures in national implementation or compliance. As is discussed in Chapter 6, some have argued that current procedures for multilateral treaty-making within organizational venues make concluding treaties all too easy and that the results are agreements that exist only on paper but that fail to reflect what states are actually willing to consent to or to actually implement.[28] Others have suggested that IOs, like all bureaucracies, reflect certain pathologies that may contribute to the unmaking of international law.[29]

As Robert Keohane has warned, the study of the forms of international cooperation should not be confused with their celebration.[30] Learning about IOs may help us to understand how they hinder, as well as facilitate, inter-state cooperation. Careful attention to IOs may prove a useful corrective to the common bias shared by many international lawyers: few of us have ever encountered an IO or an international court that we did not like. Examining IOs does not imply a commitment to them or even to multilateral as opposed to national (or "unilateral") solutions. Looking to IOs' legal effects does not mean endorsing their normative reach. It does not signal a commitment to expanding the power of the UN Secretary-General or other IOs. The study of institutional forms of global governance should not be restricted to card-carrying members of the World Federalist Society. It may well be that the more we learn about these organizations, including their capacity to serve as

[26] *See, e.g.*, Geoffrey Palmer, "New Ways to Make International Environmental Law," 86 *AJIL* 259 (1992) (drawing upon a number of institutional insights, including the usefulness of "soft law").

[27] Louis B. Sohn, "The Growth of the Science of International Organizations," in Karl W. Deutsch and Stanley Hoffmann, eds., *The Relevance of International Law* 251, at 269 (Cambridge, MA: Schenkman Publishing Company, 1968).

[28] Bruno Simma, "Consent: Strains in the Treaty System," in R.St.J. Macdonald and D.M. Johnston, eds., *The Structure and Process of International Law* at 487, 494 (Boston: Martinus Nijhoff, 1983).

[29] *See, e.g.*, Michael N. Barnett and Martha Finnemore, "The Politics, Power and Pathologies of International Organizations," 53 *Int'l Org.* 699 (1999).

[30] Robert O. Keohane, "International Institutions: Two Approaches," 32 *Int'l Studies Q.* 379, at 380 (1988).

agents of ideology and power, the more reason we will have to question their efficacy, legitimacy, or competence.

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Chapter 1 begins to fill the descriptive, theoretical and prescriptive gaps by defining international inter-governmental organizations. It identifies the common legal attributes that tie these disparate entities together, suggesting why it makes sense to collectively examine the legal impact of organizations with such disparate purposes as the UN and the WTO. That chapter also establishes some parameters for addressing how organizations that aspire to global membership make law and surveys some of the theoretical frameworks scholars have used to assess the impact of these organizations.

Part I on international institutional law addresses select aspects of the so-called "internal" law of these organizations, such as the rules governing their financing, as well the modes for setting standards or rendering decisions that appear to have more "external" effects on general international law. The three chapters in this section demonstrate through concrete example some of the challenges these organizations pose to fundamental tenets that originally applied only to nation states, such as rules governing the interpretation of treaties and legal personality, or rules that served to protect "sovereignty," such as "sovereign equality" and non-intervention in states' "domestic" affairs. Chapter 2 looks at the interpretation of organizational charters and how forms of "constitutional interpretation" affect the lawyers' standard tools of treaty interpretation reflected in the Vienna Convention on the Law of Treaties. That chapter suggests how the interpretation of organizational charters has generally served to expand organizational powers and the scope of operations for many of these organizations. Chapter 3 canvasses IO charter provisions that purport to delegate authority to IOs to make law and thereafter revisits questions initially canvassed by Rosalyn Higgins, namely how the UN's political organs have used their delegated authority. Chapter 4 takes another look at the UN Security Council's law-making powers, using it as a case-study to delineate the distinct law-making functions of that body as well as the line between political power and law. It thereafter describes standard-setting techniques in other IOs that are not obvious from a reading of their respective charters.

These chapters begin to identify how IOs have emerged as relevant law-making actors and subjects. They suggest how IOs, or more specially bodies within them, transform themselves into something more than the mere agents of nation states, namely international legal persons with their own special attributes or powers. At the same time, these chapters introduce the blurred outlines of our artificial divisions between "internal" and "external" forms of organizational law-making and the difficulties of describing their output in terms of the traditional sources of international obligation.

Chapters 5 to 9 consider the role of IO-generated law in two other areas: the making of treaties and international dispute settlement. Chapter 5 canvasses the

role of IOs as venues for the negotiation and conclusion of what many consider to be the principal source of expanding international regulation: multilateral treaties. This chapter explains why the rise of these organizations has generally coincided with and encouraged the rise of multilateral treaty negotiations on a multitude of topics. It also enumerates the ways these organizations have changed the nature of those negotiations. Chapter 6 addresses whether organizational involvement has improved the quality of the resulting agreements or the prospects for subsequent ratification by nation states.

Chapter 7 considers the surprising diversity of venues for dispute settlement not involving judges that now exist, including organs to which states report and Secretariat officials, as well as the normative impact of such activity. Chapter 8 examines institutionalized forms of more judicialized dispute settlement, including the proliferation of formal tribunals in fields as diverse as trade and international criminal law. That chapter enumerates the varieties of adjudicative law-creation that occurs with respect to (1) the specific legal regime in which the adjudicator is embedded; (2) "general" public international law; (3) other sources of potential international obligation, including varieties of "soft law;" and (4) national law. Chapter 9 explores the underlying nature of institutionalized dispute settlement as well as the factors that help explain the degree of law-making that occurs in its wake.

A final chapter considers the larger implications of the move to institutions.