The Move from Institutions?[1]

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I am very grateful to Columbia Society of International Law, Michael Doyle, and Lori Damrosch for organizing this conference and for inviting me to open it. I am honored – especially since the theme the students have chosen -- reflect not only my own concerns but those of Wolfgang Friedman who cared more about whether international law actually accomplished its societal goals – especially with respect to developing countries and the global poor – than about the professional preoccupations of the invisible college of international lawyers. Although I did not know Professor Friedman personally, my suspicion is that if he were with us today he would be among those questioning "who makes the rules" and with what real world consequences.

In a 1987 article that inspired the title for my own remarks, "The Move to Institutions," David Kennedy describes how the US

[1] Based on a forthcoming article, "International Organizations, Then and Now" (AJIL 2007).

and its allies established by treaty an incredible array of inter-governmental organizations (IOs) in the wake of WWII. Kennedy focused on the messianic, quasi-religious sensibility of those "present at the creation" of the UN and Bretton Woods systems. He showed how the Euro-American lawyers who led the charge to institutionalize carried forward a reformist agenda for parliamentary, administrative, and judicial mechanisms inspired by developments that had begun around the turn of the 20th century. He showed how the UN was built upon the earlier Congress of Vienna's concert system and aspirations for a pseudo global parliament; how the UN specialized agencies reflected 19th century public administrative unions and river commissions that suggested the potential for international administration and global regulation; how the PCIJ and ICJ were built on hopes for a "third" judicial branch inspired by the Permanent Court of Arbitration.

The post-World War II establishment of these IOs, and in 1994, the creation of the WTO, was a continuation, with mid-course corrections and embellishments, of the hopes of legal elites

who wanted to achieve very concrete, albeit idealistic, goals: to replace empire with institutions that would promote economic development of the colonized, end war through international dispute settlement, affirm human rights and other "community" goals through discourse, advance "democratic" governance at both the national and international levels, and codify and progressively develop, on the basis of "scientific principles," international law.

These were the hopes of those who sought to displace backroom (often bilateral) diplomacy, leveraged by power, with permanent institutions aspiring to global membership that would govern -- and be governed by -- law.

The move away from informality and to institutions worked. Public international lawyers replaced the failed League of Nations with a more formidable system of institutions. They have largely achieved their dreams to institutionalize, if not their idealist goals.

Today nearly 300 IOs – regional or global – and nearly 40 institutionalized international dispute settlers address virtually every field of human endeavor, including matters once regarded as

exclusively subject to national law. As I discuss in my recent book, IOs have exceeded the expectations of those who created them in terms of their legal impact. IOs are not merely the agents of their collective principals but, like other such agents, have some discretion to interpret the conflicting or vague mandates that they are given. They have become entities capable of autonomous action that have transformed the forms in which international legal obligations are found and changed their content. IOs have fueled revolutionary changes in the law-making actors -- including by transforming the state itself and how it sees the nature of sovereignty and by empowering a range of non-state actors, from NGOs to international civil servants. The age of IOs is also the age of new actors who are to a considerable extent outside states: Secretaries Generals, UN experts and monitors, WTO panelists and UN peacekeepers. If, as Henkin famously proclaimed, the "S' word (that is sovereignty) should be banned, IOs have done much to degrade its potency.

The most powerful IOs – the IMF, the World Bank, WTO – have expanded their mandates to such an extent that their missions today bear little resemblance to what their framers anticipated. Thanks to "mission creep," the international financial organizations consider not only the stability of currencies or the wisdom of infrastructure projects but pronounce on a wide gamut of governmental policies, including opining on what "good governance" is. And as we know the WTO now deals with non-tariff barriers such as subsidies, tax policy, intellectual property protections, and environmental, health and safety standards.

Rule by IO is not limited to 'like-minded' coalitions. The aspiration to universal participation is very close to realization. Membership in the WTO now exceeds 140 countries; in 2000 alone, the IMF had programs in 60 countries, 1/3 of which were in the developing world. Today, as Abe and Antonia Chayes point out, sovereignty is status; states – even erstwhile rogues like Libya – increasingly measure their worth not by their autonomy but by their membership and participation in IOs.

These institutions have also changed our understanding of what it means to comply with international law. If, as Henkin also stated, most states comply with most of international rules most of the time, the reason may be that most belong to IOs. Compliance is no longer just a matter of carrots and sticks. IOs "socialize" states and other actors into compliance, including through benchmarking and other "ground-up" managerial methods touted by democratic experimentalists. Although we who live in the greatest superpower usually fail to realize it because, unlike most nations, the US can most afford to act on its own – most of the other peoples of the world live in a world structured by IO-generated law. They live in a world where global institutions such as the World Bank, the IMF, and the WTO encourage and lead market forces that dictate how to run their economies, what their currencies can buy, or their openness to trade and investment flows. On matters both mundane and consequential – from the access enjoyed by a nation's airliners to whether tourists will be warned away from their shores because of SARs – those who

exercise national authority face severe policy constraints not merely because of "globalization" but because of globalization's agents – including the rules and processes promulgated by UN specialized agencies and other agents of what the folks down in NYU call "global administrative law." Truth to tell, even the US faces many of these constraints itself.

IO-generated rules do not stay away from subjects that political scientists characterize as those of "high politics." The Security Council and the IAEA try to dictate what weapons states may possess, as well as whether alleged terrorists can have access to their bank accounts or travel abroad. And the reign of these institutions is not limited to "foreign relations" as traditionally understood. IOs – from UN experts to human rights courts -- proclaim what rights governments need to respect for their citizens (and not just for their alien investors). Despite article 2(7) of the UN Charter, there is little left of an untouchable, sacred "domestic jurisdiction" -- not when UN election monitors can and do

pronounce on whether a nation's elections were conducted fairly and openly.

The 20th century's move to institutions reflects the views of technocratic and legal elites, largely in the West. The UN, Bretton Woods institutions, and the WTO institutionalize a noble Grotian tradition that among other things, tries to subject the totality of international relations to the rule of law, attempts to make even the most powerful state subject to it, and sees itself and its practitioners as instruments of scientific progress and their opponents as primitive sovereigntists mired in the past.

Most of today's international lawyers continue to be proud heirs of this "progressive" tradition. Most continue to presume that states exist in anarchy with but a thin layer of law; that international matters are mostly politics riddled with legal gaps that desperately need filling. We continue to presume that we need to establish more formal IOs to make ever more international law, whether through judges, more multilateral treaties, or other forms

of regulation -- albeit without replacing the Westphalian system with world government.

Many of us continue to propose the creation of new IOs, such as to regulate refugee flows, environmental concerns, or better counter terrorism. Or we continue to propose institutional reforms to correct the 'birth defects' of the IOs that we now have – and what we usually intend involves formalizing or hardening the remedies within these regimes. Like those who pinned their faith on the League of Nations, the majority of international lawyers and fellow travelers rarely see an IO or an international tribunal, proposed or existing, that we do not like. We continue to believe that IOs "bring out the best in the international community and rescue it from its worst instincts;" that they "level the playing field" between the powerful and the weak, the rich and the poor by promoting recourse to the "neutral" discourse of law. Developments like the establishment of the International Criminal Court or the hardening of trade dispute settlement after the Uruguay Round quicken our heartbeats. We celebrate such

developments as "new constitutional moments" for "the international community." Today's self-designated cosmopolitans continue to believe "in the possibility, although not the inevitability of progress" and that institutionalized international governance is itself a mark of civilization's progress.

Much IO scholarship continues to reflect this progress narrative, this faith in going beyond politics by expanding the domain of international law-making and formal adversarial dispute settlement. It is reflected in Ernst Petersman's prescriptions for how best to "constitutionalize" the UN and the WTO by recognizing a right to trade and permitting individuals to bring claims for it; or in Helfer's and Slaughter's recipes for reforming the UN human rights system to make it operate more like the European Court of Human Rights; or in proposals to recognize and enforce a global "duty to protect" through standing UN forces as part of a new deal for "conditional sovereignty."

But the more innovative IO scholarship of our day wrestles with the structural and systemic challenges brought about by the

Grotians' success. It is this scholarship and its insights that I think the organizers took to heart in this year's Friedman conference.

As those present at the creation of IOs pass from the scene, a second generation of scholars and policymakers confront grave legitimacy concerns – all of which stem from the recognition that IOs have become law-makers. This scholarship comes from a very different place. It arises not from the premise that there are too few IOs or too little international rules but too much of both – or at least too much possibly of the wrong kind. The result is skepticism of the Grotian project deeper than any since the US Congress faced off President Wilson over the League of Nations. We may be in the midst of a turn **away** from global institutions as profound and consequential as the 20th century's move **towards** them.

The most familiar challenge, invoked by opponents of distinct IOs on the political right or the left and not only within the United States, concerns the "democratic" credentials of the new international law produced in the age of IOs. Much contemporary

scholarship deals with a chorus of complaints that particular IOs fail to represent domestic constituencies in the way elected representatives within democracies do, or that their processes for law-making are insufficiently transparent or insufficiently open to participation to national interest groups or members of transnational civil society, or that IOs fail to respect individual rights associated with democracies.

Although these forms of "democratic" critiques are not consistent with each other, they challenge the bona fides of IOs as varied as the WTO and the International Criminal Court for failing to make the necessary "vertical" or top-down connections between their forms of governance and those at the national level.

Other critiques of IOs, most commonly made by developing countries, challenge them for failing to respect **in practice** the sovereign equality that they so frequently invoke – but only in word. These "horizontal" complaints, whether directed at institutional organs that enjoy weighted forms of voting (such as the UN Security Council, the World Bank, or the IMF) or

institutions that may privilege in more subtle ways the interests of some states over others (such as the WTO Appellate Body or even ad hoc war crimes tribunals) often merge with "vertical" democratic critiques in practice. The results are incoherent, even violent, public protests on the streets where these IOs live or revisionist defenses of old-fashioned sovereignty on the pages of our law reviews -- this time sovereignty as tool to protect against IO-inflicted inequalities.

Ironically, those IOs regarded as having been most successful in the Grotian enterprise of creating or enforcing ever more international law – such as the WTO – have been the subject of the most vociferous complaints -- precisely on the grounds that they have done the most to undermine the power of (some) states to govern themselves.

IOs are also under challenge because of ideology. Some contend, for example, that some IOs are instruments of hegemonic law or devices to promote Gramsican collaboration on the part of the victimized.

As you know, the heirs of Grotius have been quick to respond with possible remedies. Proposed reforms to address the various kinds of "democratic deficits" range from the radical and highly unlikely – such as creating a parliamentary assembly of elected representatives of the peoples of the world to function alongside the present General Assembly – to the more easily accommodated, such as greater acceptance of amicus briefs before international adjudicators, enhanced parliamentary involvement in decisions to accede to these regimes or their law-making processes, inspection panels within IOs, or greater transparency and access generally for members of international civil society. Others propose dealing with the proliferation of IO-induced "global administrative law" head-on – by turning to analogous features within national administrative law that serve to patrol its domain, such as web-based notice and comment opportunities prior to promulgation of global regulations. Concerns over interstate equity drive proposed reforms to the weighted voting schemes of the international financial institutions or to size of and exercise of

the veto within the UN Security Council. Although critiques that IOs embody particular ideologies pose more difficult challenges, European positivists have responded with calls for legal constraints on IOs, including the UN Security Council.

But the vertical, horizontal and ideological complaints against IOs persist not only because most of these proposed reforms have yet to emerge or because they fall short. The push to enhance "voice" is particularly insistent precisely because international lawyers have been so relatively successful in discouraging "exit" from IOs. Continued participation in the UN and Bretton Woods institutions in particular is today regarded as so intrinsic to the enjoyment of sovereignty that exit is no longer an option for most states most of the time.

More troubling for the future of IOs is that many of the challenges now being voiced strike at the foundational premises of those who established them. Today's critiques go much further than those once advanced by realist skeptics of international law. Contemporary critiques do not merely question, as did President

Wilson's critics, whether there really exists an "international community" sharing common values. They do not just question the merits of those IOs that purport to deal with issues at the heart of sovereignty such as the use of force. Today, thanks in part to a very public (and not merely academic) backlash generated by institutionalization, every aspect of the Grotian tradition is contested; no IO escapes critical scrutiny.

The value of **universal participation** has been tainted, on the one hand, by the participation of undemocratic states (as in the UN Human Rights Commission) and, on the other hand, by the extent to which universal participation, when paired with certain forms of voting by consensus, may leave undisturbed rule by the powerful (as is suggested by vague lowest common denominator IO-generated treaty provisions). The **proliferation of law-making actors** in the age of IOs is no longer regarded as an unalloyed good, at least not by those who see the "decentralization" of the state as producing unaccountable results. It is harder to contend that those who now defend the values of traditional sovereignty

and resist the penetration of the state – such as Benedict Kingsbury or Jeb Rubenfeld – are primitive non-cosmopolitans when they are either card carrying members of our own invisible college or colleagues on the liberal progressive "left" that so many international lawyers associate themselves with.

The fact that IOs mobilize internal interest groups within liberal states has a darker edge – for those who suggest that IO processes have empowered primarily Western-based NGOs or multinational corporations or, alternatively, for those who contend that certain IO processes have increased the power of national interest groups (including trade protectionists) to the detriment of global welfare. This is of course the subject of our first panel after lunch.

Our second panel is inspired by contemporary criticisms of our institutionalized adjudicators. Our international judges and arbitrators have been criticized either because they are too similar to "unaccountable" judges in otherwise democratic states or because they are too distinct in their features to share the

legitimacy of national judges who are made accountable to the electorates of democratic states through a variety of mechanisms. As this suggests, even that supposed great leveler of power within some organizations, institutionalized dispute settlement, has come under challenge: because of asymmetric rules and procedures, the power dynamics that determine which ambiguous treaty-contract issues will be "completed" by adjudicators, the unequal power of states to operate in the shadow of dispute settlement, or states' unequal abilities to access it or to avoid its judgments. Such doubts feed deep skepticism about the value of "constitionalization" (as with respect to the WTO), or the merits of promoting legalization by granting private parties access to international dispute resolution, or the virtues of ever-harder forms of dispute settlement remedies such as the specific damages permitted ICSID arbitrators.

Our final panel stems from a number of criticisms targeting the Grotians' faith in technocratic expertise. That faith has been shaken by a public choice literature that emphasizes the risks of

delegating authority to the “unaccountable” agents of IOs – including codification experts in the ILC or UNCITRAL. Or the likely damage to global welfare caused by capture, rent-seeking, and log-rolling. Trust in international civil servants has been in addition undermined by contemporary revelations (e.g., from the UN’s oil for food scandal to widely publicized rapes attributed to its peacekeepers) as well as application of Weberian insights into the pathologies of all bureaucracies, international and national.

All of these panels relate in turn to larger debates. The **development agenda** of IOs has been characterized as a continuation of the colonialist enterprise, albeit with more politically correct rhetoric. Or for more moderate writers like our own Joseph Stiezlitz or Harvard’s Dani Rodrik, for slavish devotion to changing fads among economists, the latest being an unnuanced application of the ‘Washington consensus.’ **Faith in functionalism** as the engine for institutionalized cooperation has been shaken by the premise that the problems attendant to globalization do not consist only of “market failures” requiring

ever rising forms of international regulation, but also emerge, as Paul Stephan contends, because of self-inflicted “government failures” produced by global legal elites entrusted with ineffectual or counterproductive codification efforts.

Confidence in **permanent venues for international discourse** has been undermined by critical takes on who engages in that discourse and with what prospects for success.

Grotian hopes for greater **compliance through “socialization”** have been shaken by empirical scholarship that questions the level of compliance with IO rules, as well as contentions that to the extent IOs are indeed remaking states or changing their own perceived self interests, they are changing them “in ways that favor the interests of transnational capital” and not always in favor of the interests of the populations most affected. IO-induced socialization, when it works, may be inducing states to do things against their own good – such as signing ever more strict bilateral investment treaties - like unthinking teenagers following the latest fad.

Some of the skepticism about the value of IOs as "neutral" venues for regulation or discourse stem from post-modern doubts about the **law's neutrality**. As is clear from critical work about the potential harms undertaken in the name of international humanitarian work, including by international criminal courts and human rights regimes, there is now considerable skepticism in many quarters that any law, including international law, is "above" or "beyond" politics.

Even the once innocuous idea that IOs serve as **disseminators of innovation** is no longer regarded with as an undoubted good – not by those who contend that IO notions of good governance, including ideas about the proper separation of powers, the central role of independent courts, the proper sphere for regulating business, or desirable technical standards are all unwisely influenced by the United States or by elites intent on expanding their turf vis-à-vis national regulators, including national parliaments.

Much of the contemporary hostility towards IOs reflects a growing recognition that what they do best – enable states to centralize their resources ("centralization") and establish mechanisms for "neutral" action not perceived to be in the interest of any one state ("independence")– may not distribute their benefits equally. There is a growing awareness, particularly as IOs centralize their own power as well as concentrate the power of their most powerful members, that institutionalization may not have truly "**leveled the playing field**" as advertised, even though the relative powers of rich/poor, West and "other" are, in the age of IOs, undoubtedly more equal than before, when the bulk of today's states were deemed outside the domain of law at all. John Jackson may be right when he argues that the WTO is a substantial improvement over the unequal status quo prior to its creation. But the touted progress that IOs have achieved is less obvious if the starting point for comparison is not the 19th century – when most peoples of the world were not considered "civilized" enough to count – but the 21st and if the question asked is, as fellow

Columbian Thomas Pogge puts it, a distributional one such as whether rich countries' actions, through today's IOs, are actually helping or hurting the poorest of the world's poor.

All of this has undermined the **progress narrative** that characterized the original move to IOs. The ability of states, particularly powerful ones, to forum shop among IOs, the increasing powers of private attorneys general (usually MNCs based in the West) through ICSID's investor-state dispute settlement, multilateral forms of conditionality (as by the IMF), expressive but selective condemnations of "rogue" states (as by IAEA or the Security Council), or alleged unequal access to some institutionalized dispute settlers.

All of these raise considerable doubts about whether the new conception of sovereignty as "status" and the new ways states are now being made to "behave" really constitute progress or really constitute enough progress. Enthusiasm for institutionalization has waned as more states find that the "progress" that IOs bring

increasingly makes them unwilling rule-takers rather than avid participants in a "pooling of sovereignty" for the benefit of all.

Second thoughts about the value of institutionalization may explain a number of contemporary developments. Fears about establishing yet another international bureaucracy explains why the pace of institutionalization appears to be slowing down or why some regions of the world, such as Asia, have not shared the general post-WWII enthusiasm for them, while others, such as African countries, may be turning to more regional alternatives. It may also explain the appeal of **formal but non-legally binding institutions** such as the Financial Action Task Force (FATF) to combat money laundering and terrorist financing or the United States' Proliferation Security Initiative to control the spread of WMDs; **public/private consortia** such as the Global Fund AIDs, Tuberculosis and Malaria; **recourse to private ordering** such as the International Organization for Standardization (ISO) which sets global safety standards or the Fair Labor Association setting standards in the apparel industry; **transnational networks of**

government regulators such as the Basle Committee of central bankers at the heart of Slaughter's "New World Order;" or **regularized meetings of treaty parties** without permanency such as environmental treaties' COPs or MOPs; or **hybrid, not-quite-international models for international adjudication** (such as the Tribunal for Sierra Leone).

The move from institutions is also suggested by decidedly un-Grotian doubts about the wisdom of multilateral rules and advocacy instead of unilateral assertions of extraterritorial jurisdiction, bilateral treaties, recourse to regional coalitions of the willing, or even avoidance of law and lawyers altogether. There are also an increasing number of policymakers and scholars who urge limitations on IOs' legislative, regulatory, or adjudicative powers through new restraints on their implied powers, on the scope of delegated authority, or on adjudicators' interpretative gap-filling. Proposals for greater or more creative recourse to deferential and sovereignty-protective concepts, particularly for adjudicators, abound. These include a return to the "passive virtues" such as

greater use permitting dismissal of troublesome claims on procedural grounds or ripeness, reliance on the principles of subsidiarity or non-liquet, or even a return to the Lotus presumption. Some have suggested more simply that IOs learn the lessons of "government failures" elsewhere and engage in less law-making by turning to the market or deregulation -- as have many states. Many of these proposals appear inspired, directly or indirectly, by Eric Posner and Jack Goldsmith's recognition, in their notorious recent book, that there are "limits to international law."

Conclusion

The present state of IOs and IO scholarship lies in the eye of the beholder. For some the deepening skepticism about the value of formal institutions across the political spectrum and around the world suggests an "existential crisis" for public international lawyers -- a loss of the turn-of-the-century idealism that has characterized the invisible college. I disagree. When you look more closely at virtually all the examples of alternatives to formal

old-fashioned IOs that I listed, it seems that virtually all supplement but do not supplant the role of existing IOs, which for the most part continue to thrive and to produce ever greater offshoots, as through sub-bodies. But while the age of IOs is not over, I look forward to this afternoon's skeptical look at how they continue to make the rules. To me, these concerns suggest not buyers' remorse but healthy, if belated, recognition that the study of IOs should never be confused with their celebration.

Thank you.