

EVENT: “Do International Organizations Really Advance the ‘Rule of Law?’”
— a dialogue with Prof. José Enrique Alvarez (Professor of International Law, New York University School of Law) and UNU Rector Dr. David Malone

DATE: 10 September 2013, 6:30–7:30 PM

VENUE: 2F Reception Hall, United Nations University Headquarters, Tokyo

ORGANIZER: United Nations University

“Why do we have so many courts and so many organizations? Because Western states want it that way — they have the power and resources to keep it that way.”

On 10 September 2013, the United Nations University in Tokyo hosted a conversation between Professor Jose Alvarez, a prominent scholar in the field of international law, and UNU Rector David M. Malone, on the role of international organizations in advancing the rule of law. The conversation covered a variety of topics including the discrepancies between the rule of law within states and between states; the accountability of international organizations; the differences between practice and law, and; the democratic legitimacy of international law.

The one-hour event’s dialogue format offered a chance for the audience of over 140 people to ask questions. The event also was followed by a buffet, where students, scholars, and other guests had the opportunity to engage with the speakers.

International organizations and the rule of law

The conversation commenced with Dr. Malone asking two general questions: what is meant by the rule of law in the context of international law and how is the rule of law related to international organizations?

Alvarez began by arguing that international organizations often function as lawmakers, but that the laws they create, like the bulk of international rules, are usually not accompanied by formal enforcement bodies (such as courts) that ensure that actors abide by the law. He explained that, for example, the standards and recommended practices produced by the International Civil Aviation Organization (ICAO) effectively govern the rules that apply to air traffic controllers.

Professor Alvarez claimed that these and other guidelines (not limited to the ICAO) are no less a part of international law than more traditional sources such as treaties or international customary law. While the ICAO has no enforcement mechanism to ensure that states, airlines or municipalities that operate international airports, abide by its regulations, market forces tend to ensure that all of these actors comply — since lack of compliance would entail exclusion from international aviation and grave economic consequences.

Professor Alvarez then explained that international law, no matter from what source, has few formal enforcement mechanisms, and that similarly there are few mechanisms in place to

apply the rule of law to the international organizations themselves. There are also difficulties in determining how the rule of law applies to organizations like the UN. The rule of law as it applies inside states cannot be just exported to the international level. The rule of law might not be violated when the UN Security Council (UNSC), for example, passes selective resolutions or when it takes decisions on a case-by-case basis.

That was anticipated by the Charter, which requires nine votes (including those of the five permanent members of the UN Security Council) for taking SC decisions. To illustrate this, Prof. Alvarez used the example of International Criminal Court (ICC) referrals that have been issued by the UNSC. Thanks to the Council's referral, the ICC was able to issue an arrest warrant for Omar al-Bashir, the president of Sudan, but not for Bashar al-Assad, the president of Syria, even though Assad is allegedly guilty of crimes within the jurisdiction of the ICC. Alvarez emphasized that the Council is not bound under the law of the Charter to act consistently in such cases, even though international courts like the ICC would be obligated to act consistently once someone has been indicted. Like all courts, the Council is likely to treat its prior rulings as precedent.

Making law versus creating practice — the politics of international law

Dr. Malone then focused the conversation on how the practices of international organizations influence the law, and the politics involved in this process. Professor Alvarez noted that in traditional terms, organizations are not themselves "sources" of international law, and that they, like judges, can only "interpret" or "apply" the law. He argued that in both cases, when "law meets fact", new law emerges. He contended that International Organizations' (IO) interpretations of the treaties that they operate under constitute subsequent practice of those treaties and change the meaning of, for example, the UN Charter, over time. They also turn the treaties and standards that they promulgate into dynamic instruments that evolve as needs change.

They also use new tools to enforce law on states and even individuals. Professor Alvarez cited the International Monetary Fund (IMF) as an example. In many countries, including Argentina, the IMF has imposed conditionality through loans, forcing states to change their domestic laws or to compel them to privatize state-owned enterprises. Alvarez argued that in such instances the IMF is enacting law — national and international — that is forced upon states, which agree to IMF conditions "with an economic gun to their heads".

For these reasons, Professor Alvarez pointed out that the formal definition of international law no longer explains the process of international law-making or how it is actually made. He emphasized that, "We better get over this fixation that everything must fit into treaties, customs and general principles. If you are a lawyer working anywhere and you give a response relying on only those formal sources to your client, you would be guilty of malpractice. In the practical world, decisions taken by the UN General Assembly and UNSC and by many other IOs have a legal impact on people, states, multinational corporations, and even individuals. Organizational soft law often becomes hard law more than do treaties, as the latter are often ignored by states."

Rule of law within, versus among, countries

Professor Alvarez contended that many international organizations, including the UN, attempt to promote the "rule of law" within states. They undertake a number of "good

governance” activities, including through UN peace operations, intended to improve the laws inside states. At the same time, since they are engaged in exporting the rule of law to others, many now expect these organizations to adhere to the rule of law themselves. There is considerable doubt, Alvarez contended, that IOs do well at either task — promoting the rule of law abroad or adhering to it themselves. He also argued that while the instinct to apply the rule of law to lawmakers such as IOs is a good one, we need to accept the possibility that the adherence to the rule of law might mean different things in states as opposed to among states.

Professor Alvarez pointed out that the concept of the rule of law, when “exported” by international organizations to states through good governance, is very different than the rule of law that exists among states and international organizations. In fact, Professor Alvarez claimed that even though the UN asserts that it applies the rule of law to its own activities, “there are few concrete examples of how this works”. Specifically, Alvarez used the example of transparency that should exist within states but does not necessarily exist within international organizations or among other international actors (like diplomats or NGOs).

Accountability of the UN and non-state actors

On the question of accountability, Professor Alvarez noted that the UN is better at accepting its legal responsibilities when this involves small-scale, one-time breaches of tort law (such as car accidents involving UN peacekeepers), however “when it’s a big deal and you pose questions that involve serious questions of UN policies, the UN response is not that we will question the facts but rather that we won’t even look at it”.

An example of this can be found in the cholera outbreak in Haiti that began in late 2010, allegedly caused by Nepalese peacekeepers. In that instance the UN’s response to date has been to ignore the petition of those Haitians harmed by arguing that their claims involved consideration of matters of “policy” and were therefore not sufficiently “private”.

Because of privileges and immunities extended to organizations, it may be easier to “pierce the veil of the organization” to blame the member states doing their bidding — as happened with respect to Dutch peacekeepers in Srebrenica. Recently, the Dutch Supreme Court ruled that the Netherlands was liable for the deaths of three Bosnian Muslim men killed in the 1995 Srebrenica massacre. In instances like the Haiti cholera case, Alvarez asserted that we need “more effective remedies since those that now exist require the cooperation of the Haitian government and ignore the needs of the Haitian nationals who have been directly affected”.

Professor Alvarez also made a point regarding the role of other international organizations in the law-making process. In his view, the UN empowers non-state actors such as NGOs by giving them observer/consultative status within the organization. Professor Alvarez noted that this has been very important in transforming the very nature of “inter”-“national” law, as non-state actors are now influencing the making and enforcement of international law.

International law no longer comprises the rules that states and only states decide and interpret for themselves. This is yet another way that the traditional state-centric sources of international law need updating. Nevertheless, Professor Alvarez did note that NGOs, as new actors in the field of international law, face few formal mechanisms for accountability or transparency.

Democratic legitimacy in international law

The final point in the conversation focused on the issue of democratic legitimacy in international law-making. Alvarez noted that for many critics of international law, even traditional sources such as treaties have never been particularly democratic since executive branches are usually far more active in their negotiation and conclusion than legislatures. This perception of a “democratic deficit” has only been exacerbated in the age of IOs as it is increasingly evident that laws are being made within international forums that are democratic by virtually any metric. The leading example that Professor Alvarez used was the UNSC, which passes or refuses to pass resolutions with only nine votes including those of its five veto-wielding members.

Alvarez noted that states might turn to IOs like the UNSC or the IMF precisely to bypass the arduous (and more democratic) processes required by the negotiation and ratification of treaties. Professor Alvarez demonstrated his point using UNSC Resolution 1373, a counter-terrorism resolution that was passed in the UNSC shortly after the terrorist acts of September 11, 2001 in the USA. The resolution appeared to redefine the use of force and the definition of self-defence. It also compelled all states to undertake serious counter-terrorism laws. After successfully passing the resolution, US government officials suggested that Resolution 1373 was a useful and expeditious tool to export US counter-terrorism laws to the rest of the world, without the need to negotiate a multilateral treaty.