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Global Lawmakers: International Organizations in the Crafting of World Markets: Book Review

Melinda (M.J.) Durkee

Professor Kress persuasively demonstrates that the crime of aggression will not pull the court into unresolvable political disputes, he also underscores the narrow force of the crime. The crime's definition and its constraining jurisdictional regime mean that it is unlikely that we will see an aggression prosecution anytime soon at the ICC. As a result, with regard to some of the most contentious issues surrounding the state use of force today—including humanitarian interventions and self-defense—the crime of aggression will have little relevance.

The material that is packed into this wonderful two-volume commentary shows how much there is to say on this subject, but what it all ultimately means remains uncertain. Is this the beginning, the middle, or the end of the story of the development of the crime of aggression? At Nuremberg, there was another crime born—crimes against humanity—that was similarly narrow in its first instantiation, but which later blossomed to become the central crime prosecuted by the ad hoc international criminal tribunals and the ICC. Will the crime of aggression similarly have an illustrious future after a modest beginning? Only time will tell.

ALEX WHITING
Harvard Law School

Global Lawmakers: International Organizations in the Crafting of World Markets. By Susan Block-Lieb and Terence C. Halliday. Cambridge, United Kingdom: Cambridge University Press, 2017. Pp xix, 456. Index. doi:10.1017/ajil.2019.2

"How law is made affects what law is made," asserts this ambitious and multi-layered new book by Susan Block-Lieb, professor of law and Cooper Family Chair in Urban Legal Issues at Fordham Law School, and Terence C. Halliday, research professor at the American Bar Foundation (p. 7). While the bare claim itself is unlikely to upend settled assumptions or provoke serious debate, the real contributions of the book emerge through the carefully observed case studies with which the authors illustrate the claim. The case studies gradually build up an empirically grounded, meticulously realized argument that individual lawmakers matter. When one allows facts to inform theory rather than the other way around, the authors show, what becomes clear is that individual lawmakers are not just governmental delegates, but a whole variety of professionals, industry association representatives, and others with some stake in the lawmaking process. These actors work not just through formal processes, but also through an array of informal ones. Most importantly, their presence matters to the content of the legal norms that take hold around the world.

The book thus carves a new place among a very small universe of empirically grounded analyses of international lawmaking, and an even smaller universe of accounts that focus on individual actors. It organizes these observations through the lens of social ecology theory, which, though unfamiliar to international legal theory, offers fascinating purchase on the question of how actors develop international legal orders. The book also contributes the first in-depth empirical analysis of the lawmaking work of the little-studied United Nations Commission on International Trade Law (UNCITRAL or Commission). After a brief note on content and method, this essay addresses these contributions in turn.

I. "ETHNOGRAPHY OF THE GLOBAL"

The "law" with which the book is principally concerned is international commercial law, or more specifically, the treaties and model laws that seek to "alter world commerce and domestic markets" by rendering uniform inefficiently patchworked domestic laws (p. 6). The "how" involves UNCITRAL's working methods, with case studies developed from the authors' first-hand observations over more than ten years of the Commission's work on insolvency, secured transactions, and international transport. The authors' methodology is principally qualitative, and their data are drawn from direct observations

of UNCITRAL's working groups and annual meetings, interviews of an array of actors involved in UNCITRAL lawmaking, and analysis of UNCITRAL drafts and final work product. This produces what the authors term an "ethnography of the global" (pp. 16, 19).

The method of this book, and indeed the project itself, arose by accident. Block-Lieb and Halliday describe their serendipitous meeting as they attended assemblies of UNCITRAL's working group on insolvency. Block-Lieb, a specialist in bankruptcy law, attended on behalf of the American Bar Association's International Business Law Section, and Halliday, a sociologist, attended in the name of the American Bar Foundation. The book came about, the authors tell us, because UNCITRAL seats delegates alphabetically by sponsoring organization, and the seating arrangement brought the authors together. The anecdote doubles as framing device: process came to affect substance in the development of this book, just as in the lawmaking the book observes.

Because the book's project arose serendipitously, the authors' research design "evolved as questions came more sharply into focus" (pp. 16–17). This, as the authors acknowledge, led to some asymmetry in the data. They began the project with their observations of the insolvency working group in which they were both "embedded" for five years, keeping detailed notes about all that transpired, including "the sequences or speech-turns of all speakers and the content of their speech," supplemented with analysis of work product and many participant interviews (p. 19). Later, the authors sought to generalize their findings by expanding the project to analyze the working groups on secured transactions and international transport. For these latter two working groups, the authors relied primarily on participant interviews. Block-Lieb and Halliday are confident that these data are sufficiently robust that the authors "have been able to triangulate our findings" and "capture[] both continuities and discontinuities in the decision-making processes and lawmaking practices evinced by these hundreds of global lawmakers" (*id.*). Indeed, the authors were able to develop from their interviews fully realized case studies of the secured transactions and international transport working groups as well.

What emerges from these data is an impressively multifaceted analysis that approaches UNCITRAL lawmaking from an array of different angles. After theoretical, historical, and substantive framing, chapters analyze who is involved in UNCITRAL's lawmaking work—asking not only who is present but how often and in what ways they participate, recognizing that "presence *per se* may not confer influence" (p. 184) (ch. 4); examine debates within UNCITRAL about whether and how non-state actors should participate in the lawmaking process (ch. 8); taxonomize UNCITRAL's informal lawmaking practices (ch. 5); and uncover UNCITRAL's use of distinct legal "technologies"—specifically the choice between treaties and legislative guides (p. 229) (ch. 6). The book homes in to examine how the actors and working methods surveyed led to particular substantive outcomes in each issue area (ch. 7) and scopes out to examine how UNCITRAL has faced competition with other potential lawmakers in each issue area, bargaining over jurisdictional claims and lawmaking territory (ch. 9).

II. The "Invisible" Work of Lawmaking

The ambition of the book is much broader than the very specific universes of insolvency, secured transactions, and transport, though there is much in the book for readers concerned with each of these substantive areas.[1] Rather, as the title suggests, the authors craft a larger argument that the identities and practices of "global lawmakers" matter. By global lawmakers, the authors mean more than governmental delegates.

The authors claim, poetically, that they are making the "invisible visible" (p. 49). In an idiom perhaps more familiar to international lawyers, the authors are continuing the tradition of

[1] Chapters 3, "Issue-Ecologies in Formation," and 7, "Whose Global Norms?," in particular, survey how UNCITRAL came to approach lawmaking in each of these substantive areas, and how particular outcomes in those areas were attained, respectively.

"open[ing] the black box of the state," as well as looking beyond the state to determine exactly who sits at the proverbial lawmaking table.[2] The authors note that they are building on prior work by José Alvarez and others that addresses lawmaking by international organizations[3] and on empirical inquiries on business regulation and private standard-setting.

However, international legal scholarship is populated by many more accounts of law's structure and application than by analyses of the messy complicated process of legislation itself. Even in socio-legal scholarship, which concerns itself with "law in action," the focus tends to be on the practical effects of law and interactions between legal officials and those subject to law's strictures, not on the generation of those legal rules.[4] Other areas of rich description, like global administrative law, focus principally on "administration" rather than "legislation," though work in this area has come to embrace a very broad view of administration.[5]

Not only has international legal scholarship paid little attention to the process of lawmaking, but it especially lacks accounts that take an expansive view of the actors involved in that international legislation. Because focal points are often shaped by theories of law, and the positivist concept of law rooted in state sovereignty still looms large, the nation-state tends to inhabit the central role as lawmaker in scholarly accounts. There is nevertheless a literature in this area, populated most notably by important work by John Braithwaite and Peter Drahos on business regulation;[6] Tim Büthe and Walter Mattli on private standard setting;[7] and Steve Charnovitz on NGOs in global governance.[8] My own work has endeavored to explore the legal mechanisms by which business entities and groups come to have access and influence in international lawmaking,[9] and other accounts consider multi-stakeholder institutions.[10] Yet Block-Lieb and Halliday's analysis demonstrates how much work remains.

Departing from prior accounts, the authors focus on formal lawmaking by international organizations but characterize UNCITRAL not as a lawmaker itself, but as an "arena" in which lawmaking happens by others (p. 13). This allows them the freedom to view the various state delegates, professionals, business representatives, and others as functionally equal participants in the arena, irrespective of the formal status of each actor under international legal doctrine. Moreover, the book does not concern itself with the legal status of the product of the engagements in this arena. Are the treaties and legislative guides UNCITRAL produces law, soft law, or not-law? Setting these questions aside, Block-Lieb and Halliday focus their analysis on how these norms are produced and by whom.

The case studies in the book thus come to serve as a justification of the project itself, as the authors seek to show why the messy collection of expert roundtables, hallway discussions, cocktail parties, and plenary legislative sessions matter to the eventual legal texts; which legal norms govern the formalities and informalities of this process; and which actors come to matter in the production of those legal products. Block-Lieb and Halliday demonstrate the value of this analysis subtly but relentlessly throughout the book by offering missing pieces that disrupt traditional theories.

[2] Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1961 (2002); *see also* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

[3] JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006).

[4] *See, e.g.*, EXPLORING THE "SOCIO" OF SOCIO-LEGAL STUDIES 4–8 (Dermot Freenan ed., 2013).

[5] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005).

[6] JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000).

[7] TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011).

[8] Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AJIL 348 (2006).

[9] Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742 (2018).

[10] *See, e.g.*, Kenneth W. Abbott & David Gartner, *Reimagining Participation in International Institutions*, 8 J. INT'L L. & INT'L REL. 1 (2012).

For example, the authors find, remarkably, that "the actors who craft law for the world are a tiny subset of all the state and non-state delegations and delegates" who attend working group sessions (p. 186)—in fact, "[a]s few as ten (insolvency) and as many as fifty actors (transport) are architects of transnational legal orders" (*id.*). These participants are, unsurprisingly, disproportionately members of the Global North. However, the authors also discover, counterintuitively, that "[m]any states with advanced economies did not send consistently high-attending delegations" (p. 191), and therefore "it is not possible to extrapolate directly from the economic and geopolitical power of a state to its probable impact on lawmaking for global markets" (p. 163). Moreover, contrary to hype, the BRICS are not influential—"[T]he supposed rise of Brazil, Russia, India, China, and South Africa (BRICS) as a new complex of economic power in the world economy does not reveal itself in these arenas of global law- and market-making" (*id.*).

As for non-state actors, many of the tiny set of individuals responsible for lawmaking are professionals, either serving on state delegations, delegations of professional associations or industry groups, or on both public and private delegations by turns. But while larger industry groups have outsized influence, "weak industry or economic actors" like small and medium businesses and workers are almost completely unrepresented (p. 187). Who participates and how is shaped by a mix of formal rules and informal practices that structure UNCITRAL's working methods, which the authors meticulously excavate throughout the book. These processes are important, the authors claim, because the complement of participants at the table affects the ultimate substance of the rules.

III. Lawmaking as Ecology

To explain the connection between process, actors, and the substance of the rules produced, the authors place their work within two theoretical frames: transnational legal ordering and social ecology theory. The authors use transnational legal orders (TLOs)[11] to help explain what legal product the actors in this lawmaking ecology seek to produce: they are working toward the formalization, and ultimately the "settlement," of legal norms at national and transnational levels, which transpires when those norms "come[] to be accepted as legitimate and an acceptable guide to action" (p. 28). As the authors elegantly phrase this, the lawmakers hold the "imaginary" of the entire TLO formation and settlement process in their minds at the moment of lawmaking (p. 30). The project borrows other framings as well from TLO theory, such as a focus on transnational rather than international orders, and an expansive definition of "law."

The theory that does the most significant work in this account, however, is social ecology. The theory provides a mechanism to help the authors map the lawmaking process in terms of patterns of competitive or cooperative interaction between different actors as they make use of particular resources and act within particular constraints. Social ecology theory thus explains actors' behavior in terms of competition and cooperation over resources, and survival within a particular lawmaking space. In this framing, UNCITRAL positions itself as an actor in an ecology of international organizations populated by other lawmaking organisms—like the United Nations Conference on Trade and Development (UNCTAD) and the International Institute for the Unification of Private Law (UNIDROIT). To ensure its own survival in this ecology, UNCITRAL must amass resources. It must cooperate and compete. It must adapt.

Readers trained in law may be struck, as this reader was, by the power of the metaphor this theoretical lens embeds. Legal texts often make use of architectural metaphors, where creating law is a volitional act of design and implementation by autonomous, legally empowered agents.

[11] *See* Transnational Legal Orders 11 (Terence C. Halliday & Gregory Shaffer eds., 2015) (elaborating a theory of transnational legal orders, defined as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions").

Agents *develop*, *construct*, and *build* legal orders. We talk about *foundational* principles and institutional *design*. There is the idea of balancing power—and checks and balances—with this very tangible concept of matter in equilibrium. An architectural metaphor casts the legal actor as a rational actor capable of independent, autonomous, and intentional action. The legal actor uses material to construct edifices according to his or her will. The process is industrial, modern, volitional. Humankind tames nature.

An ecological metaphor, by contrast, subsumes the individual lawmaker within natural processes. Suddenly we are thinking of the raw materials of law in terms of resources, such as legitimacy and expertise, and the development of legal products not as a result of the architect's will, but as an organism's means of survival. We are thinking in terms of adaptation, competition, and cooperation. In this account, the fact that UNCITRAL innovates by expanding its menu of legal technologies is explained by its need to stay relevant, because relevance equals survival. UNCITRAL "maneuvering itself into a space where resources are likely to be abundant" brings to mind evolutionary adaptation (p. 65). UNCITRAL cooperates with UNIDROIT, the Hague Conference, and other organizations to avoid destructive competition, and to gather resources necessary to its development.

This is a different way of thinking about law than the architectural metaphors suggest. It is relational, dynamic. It submerges the individual deciders within an entire ecosystem which constrains or demands those decisions. The lens offers a set of answers to why lawmaking processes developed as they did, and why the content of law and the particular legal structure in which those norms were embedded emerged as they did. The architectural metaphors do not help with this. They embed legal decisions within the intention of the architects. This framing does not offer many ways to approach the question of why law took the form it did. We can investigate intentions expressed in the record, or try to understand the larger structure or function of the law. To a large extent, however, this metaphor buries the story of lawmaking within the minds of the makers just as the old international relations theories buried state intention within the billiard ball model of action and reaction.

IV. Whose Law Is It?

The empirically grounded narratives the authors offer through these theoretical lenses demonstrate the connection between the identities of the lawmakers and the substance of the laws made. For instance, in chapter 7, the authors offer case studies that reveal the "principal faultlines that implicitly or manifestly divided the actors in the lawmaking space" (p. 265), uncovering the processes by which those rifts were resolved and tracing "which actors disproportionately placed strong imprints on UNCITRAL's global norms" (p. 266). The result is a textured narrative in which we learn, for example, how the principal industry association for shipping, the International Maritime Confederation (CMI), assumed a role as one of the core players in the negotiation of the Rotterdam Rules. CMI prepared the initial draft of the Convention and played key roles throughout the negotiation of the agreement. To do this effectively, CMI had to resolve within its own organization the fundamental issue that would play out within the larger UNCITRAL working group: divergent interests between carriers and shippers. CMI spent years on this problem, conducting its own version of a notice and comment process and ultimately offering a draft agreement that "prefigured a balance between carrier and shipper interests" (p. 277). CMI's method of resolving the problem would eventually make its way into the final agreement. The story upsets the standard notion that governmental negotiators are responsible for treaty texts, or are the principal representatives of the interests of regulated groups. It has much to offer those interested in elaborating theories of legitimacy or process in international governance, or tradeoffs between legitimacy and effectiveness.

Legitimacy and process issues also emerge in chapter 5, where the authors examine informal working practices that offer a "back door to the Secretariat through expert working groups and

other informal meeting places" (p. 269), and come to a head in chapter 8, "lawmaking of lawmaking," which recounts France's concern that private actors were participating so substantially in UNCITRAL working groups. As the anecdote about CMI suggests, private experts—industry and trade association representatives and others—have an unfettered right to speak and circulate documents in UNCITRAL working groups and elsewhere. In fact, UNCITRAL's non-member observers share the access rights of member-state participants on equal terms. UNCITRAL's openness to non-state actors matters in particular because the organization has developed unusual consensus voting rules in both the working groups and plenary Commission itself, where consensus does not mean unanimity, but rather often involves the moderator proposing a compromise. Because industry experts have speaking rights equal to those of governmental representatives, those industry players can affect the "center of gravity," of the compromise (p. 326).

France's principal complaint was that non-state actors "participating on a 'de facto equal basis with Member States,'" vitiated the rightful authority of those state actors over the process (p. 325). "[P]rivate associations had wheedled their way into UNCITRAL's working group sessions and, more importantly, the ear and pen of the Secretariat," as the authors characterize France's complaint, and thus these associations "held importunate authority within UNCITRAL" (p. 328). France wished to substitute the more formal United Nations Economic and Social Council (ECOSOC) procedure in which non-governmental organizations apply for accreditation before receiving very specific participatory rights in various fora. In France's view, substituting that formal application process for UNCITRAL's informal working methods would carry the benefit of reasserting state control over the process and giving states the opportunity to close off access to non-state outsiders. As the authors note, however, the informality of the working procedures, the openness of UNCITRAL to outsiders, and the unique "center of gravity" decision-making procedure were all adaptations UNCITRAL made to enhance its own survival and effectiveness (p. 326).

The anecdote locates the fault lines of an important debate about whether private actors should be at the table for the making of critical international decisions. Should the relationship between state and non-state entities be hierarchical or equal? And how should it be regulated? The debate is transpiring not just in the academic literature but in the halls of international organizations as well. For example, the World Health Organization (WHO) recently adopted a new "Framework of Engagement," which established separate rules for WHO's interaction with non-governmental organizations on the one hand, and private sector and international business entities, on the other.[12] Neither group has participatory rights that equal those of state delegates.

These diverse responses to non-state actors arise from the fundamental tension between the specialized knowledge industry representatives, professionals, and other experts can bring and legitimacy concerns connected with non-governmental actor participation in lawmaking or governance processes. Interest representation, quality of information, and buy-in by regulated entities stand on the side of opening lawmaking access to all. But the potential for conflicts of interest, legitimacy deficits, and asymmetry of representation can pull toward closing off access, especially when big business or other influential actors participate. France's complaints went unresolved in Block-Lieb and Halliday's anecdote, mirroring the larger unresolved story about the place of private actors, and in particular business actors, in international lawmaking.

V. Scoping Out

The particular challenge of this project is to contain the "endless particularities," of an enormously complex lawmaking process within UNCITRAL's arena, and marshal these particularities sufficiently for productive use (p. 420). In offering an epidemiological study based on a

[12] World Health Organization [WHO], Framework of Engagement with Non-State Actors, WHA69/2016/ REC/1 (May 28, 2016).

diverse data set including first-hand observations and interviews, the authors risk saying everything and thus nothing, and thereby failing to offer significant interventions in the diverse scholarly conversations to which the book seeks to connect. The authors seem to appreciate the weight of this challenge. They bookend the project with many varieties of conceptual framing on the one hand, and an extensive set of potential implications on the other, the latter gathered under the rubric of "inventive global governance" (p. 389). In doing so, the authors avoid tying up the particularities too neatly into a new theoretical or conceptual apparatus beyond the high-level claim that the actors involved in lawmaking matter. But in so doing, they also cannot entirely avoid the weight of conceptual jargon common to one or another intersecting discipline. The framing that most substantially lifts the particularities into a cohesive whole is social ecology theory, which the authors use nimbly to taxonomize factors like time, money, expertise, legitimacy, and infrastructure as resources; to explain UNCITRAL's changing missions over time as evolutionary adaptations (or failures to adapt); and to posit an array of useful generalizations. Indeed, the author's use of social ecology theory in this context would seem to offer a productive exemplar for investigation in other arenas of global lawmaking.

In the end, UNCITRAL constitutes just one of many models of interaction between state and non-state entities, and its particular style of lawmaking is built on one of many sets of working practices, lawmaking procedures, and distinct historical accidents. Nevertheless, by giving us a tremendously fact-driven and multifaceted account of lawmaking in this very particular context, the book demonstrates how, through painstaking data collection, to disrupt the "plausible folk theories" on which legal scholarship is sometimes built (p. 441). It challenges broader assumptions about the roles state and private actors *actually* take in global lawmaking and the contribution of legal norms to facilitating or constraining the lawmaking process. And it helps frame important questions for later work about both the is and the ought of global governance.

MELISSA J. DURKEE
University of Georgia School of Law

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