
International Organizations and the Frankenstein Problem

Andrew Guzman*

Abstract

In the classic novel, Frankenstein, Doctor Frankenstein creates a living creature in the hope of cheating death. The monster turns against Doctor Frankenstein and kills several people, causing the doctor to regret his decision to make the monster in the first place. When states establish an international organization (IO), they create an institution with a life of its own. In doing so, states risk the institution becoming a monster and acting contrary to their interests. In contrast to Frankenstein, however, states are aware of this risk and are able to guard against it. This article explains that much of the existing landscape of international organizations has been formed by the state response to this 'Frankenstein problem'. The effort by states to avoid creating a monster explains, among other things, why there are so many IOs, why they vary so widely in scope, and the manner in which they are permitted (and not permitted) to affect international law and international relations. The article also identifies the four types of activities that IOs are typically allowed to undertake and explains how states choose which activities to place within which organizations. In addition to providing a new analytical perspective on IOs and how states use them, the article advances the normative argument that states have been too conservative. As if they learned the lessons of Frankenstein too well, states have been reluctant to give IOs the authority necessary to make progress on important global issues. Though there is a trade-off between the preservation of state control over the international system and the creation of effective and productive IOs, states have placed far too much weight on the former and not nearly enough on the latter.

1 Introduction

In Mary Shelley's *Frankenstein*,¹ Dr Victor Frankenstein discovers the secret of life and sets about making a living being. When he animates his creation, however, Frankenstein is aghast at the monster it becomes. Unfortunately for the doctor, the

* Jackson H. Ralston Professor of Law and Associate Dean, Berkeley Law School. Email: aguzman@law.berkeley.edu.

¹ M. Shelley, *Frankenstein* (1818), at 24.

monster is beyond his control and the balance of Shelley's story recounts the interactions between Frankenstein and his monster. Frankenstein set out to defeat death but instead got a monster that killed innocent humans.

States sometimes create their own form of artificial life, the international organization (IO). Dr Frankenstein created his monster in an attempt to improve on a world populated only by humans. States create IOs with the hope of enhancing international cooperation beyond what can be achieved by states alone. Like Frankenstein's monster, IOs created by states may behave differently from the way they are expected to. There is always a risk that an IO will impact the system in ways that harm, rather than help, the interests of states.² An IO can become a monster.

States, then, face what I term the 'Frankenstein problem' when they create IOs. By creating a new entity states hope to address some common problem. Once created, however, the new entity has a life of its own and cannot be fully controlled by individual states.³ Importantly, there is a direct trade-off between the need to give the IO enough authority to be effective and the desire to guard against the risk that it will become a monster.

What separates states from Dr Frankenstein is that the former recognize the Frankenstein problem whereas the latter did not. Frankenstein took no precautions to guard against the risk that his creation would become a monster. States have gone to the opposite extreme – they are overly conservative when they create IOs and have failed to take full advantage of IOs to achieve important cooperative gains. They are too scared of the monster.

As one considers the role IOs play in the international arena, and the role they might play if they were given greater autonomy and authority, it is difficult to escape the sense that more is possible. Like all human institutions, IOs are imperfect and make mistakes. But they also offer the promise of helping to overcome the enormous *status quo* bias that is built into the international community's commitment to consent.⁴ Simply put, states have not been bold enough when assigning authority to these bodies. The Frankenstein problem is real and cannot be eliminated, but greater reliance on IOs would produce benefits that outweigh the risks of creating a monster.

This article identifies and explores the Frankenstein problem as it relates to international organizations. Along the way it not only explains the behaviour we observe; it makes predictions about the kinds of IOs we should or should not expect to exist, including how the power to bind states, the scope of the organization, the ability to comment on international norms, and more interact within IOs. It also identifies the key categories of IO activity and describes why states might choose one set of these

² See, e.g., J.E. Alvarez, *International Organizations as Law-makers* (2005), at 328 ('As IOs, whether prompted by the functionalist needs of their members or the desires of their bureaucrats, expand their original mandates, their normative reaches extend beyond what their creators had anticipated').

³ Collectively, of course, states continue to control the organization.

⁴ For a detailed discussion of consent in international law see Guzman, 'Against Consent', 52 *Virginia J Int'l L* (2012) 747.

activities over another when creating an organization.⁵ Finally, it advances the normative argument that states have failed to give IOs the authority and autonomy necessary to make progress on critical global issues.

There is already a large literature on the subject of international organizations that sheds considerable light on these institutions and their role in the international system.⁶ Of greatest relevance to this project is a corner of this literature that asks questions very similar to those that interest me here. Dunoff and Trachtman, for example, ask, 'Why are these organizations created, and how should they be designed?' and 'why is there not just one big one?'⁷ Abbott and Snidal ask, 'What attributes account for their use, and how do these characteristics set formal organizations apart from alternative arrangements, such as decentralized cooperation, informal consultation, and treaty rules?'⁸

There remains, however, a need for a broader understanding of the role IOs play in the international order. We have good accounts of many of the world's IOs, whether the largest and most conspicuous, such as the United Nations or the World Trade Organization,⁹ the quietly effective such as the Universal Postal Union, or the relatively small and specialized, such as the European Police Force.¹⁰ What we lack is a good sense of why IOs as a category are structured the way they are and how they interact with and impact the international legal system.

⁵ To foreshadow what is to come, IOs undertake 4 broad tasks: they take action in pursuit of well-defined goals in a way that does not require them to make broad policy decisions; they provide a forum for states to exchange information and negotiate; they speak as institutions about international legal matters of concern to states, sometimes affecting international law and politics as a result; and they provide dispute resolution systems.

⁶ See Alvarez, *supra* note 2; N.D. White, *The Law of International Organizations* (2nd edn, 2005); C. Archer, *International Organizations* (3rd edn, 2001); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002); Kennedy, 'The Move To Institutions', 8 *Cardozo L Rev* (1987) 841; Bederman, 'Appraising a Century of Scholarship', 100 *AJIL* (2006) 20; Barnett and Finnemore, 'The Politics, Power, and Pathologies of International Organizations', 53 *Int'l Org* (1999) 707, at 707–727; Barnett and Finnemore, 'The Power of Liberal International Organizations', in M. Barnett and R. Duvall, *Power in Global Governance* (2005) 161, at 163–171; H.K. Jacobson, *Networks of Interdependence: International Organizations and the Global Political System* (2nd edn, 1984); Abbott and Snidal, 'Why States Act through Formal International Organizations', 42 *J Conflict Resolution* (1998) 3; Dunoff and Trachtman, 'Economic Analysis of International Law', 24 *Yale LJ* (1999) 1; Fang, 'The Informational Role of International Institutions and Domestic Politics', 52 *Am J Political Science* (2008) 304; Kingsbury and Casini, 'Global Administrative Law Dimensions of International Organization Law', 6 *Int'l Org L Rev* (2009) 319; Johnstone, 'Law-Making Through the Operational Activities of International Organizations', 40 *George Washington L Rev* (2008) 87; Henkin, 'International Organization and the Rule of Law', 23 *Int'l Org* (1969) 656.

⁷ Dunoff and Trachtman, *supra* note 6.

⁸ Abbott and Snidal, *supra* note 6.

⁹ See P. Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* (2007); T.G. Weiss and S. Daws (eds), *The Oxford Handbook on the United Nations* (2008); B. Simma, D.-E. Khan, G. Nolte, and A. Paulus (eds), *The Charter of the United Nations: A Commentary* (3rd edn, 2011); J. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006); P. van den Bossche, *The Law and Policy of the World Trade Organization* (2nd edn, 2008); A.O. Krueger (ed.), *The WTO as an International Organization* (1998).

¹⁰ Peers, 'Human Rights Ctr., Europol: The Final Step in the Creation of an "Investigative and Operational" European Police Force' (2007), available at: www.statewatch.org/news/2007/jan/europol-analysis.pdf.

The article proceeds as follows: section 2 presents the Frankenstein problem: the need for each state to balance the potential benefits of an IO against the risk that the IO will behave contrary to the interests of the state. This tension and efforts by states to manage it lie at the heart of the process of IO creation and dictate the design of IOs. Section 3 examines how states manage the Frankenstein problem. In particular, it considers four categories of activities carried out by IOs, and discusses how each of them implicates the Frankenstein problem in a different way. Section 4 concludes.

2 The Frankenstein Problem

A States and the Frankenstein Problem

There are hundreds of IOs in the world today and they have become so embedded within the international system that it is all but impossible to imagine contemporary international life without them.¹¹ The precise number of IOs depends on how one defines the category – a question on which there is no consensus.¹² For the purposes of this article I follow the approach taken by Alvarez in his seminal book, *International Organizations as Law-Makers*. Rather than embracing any single definition (‘[e]laborate definitions of IOs raise more problems than they are worth’¹³) he acknowledges three common elements widely viewed as relevant to the identification of an IO: (1) establishment by agreement between states; (2) the existence of at least one organ capable of operating separately from member states; and (3) operation under international law.¹⁴ Alvarez points out that even this list is imperfect as rigid adherence would omit institutions that virtually everybody agrees should qualify as IOs (e.g., at its inception the General Agreement on Tariffs and Trade, ‘GATT’, did not have an organ capable of acting separately from its member states).¹⁵ Like Alvarez, I adopt a pragmatic approach and take the above criteria as indicia of an IO, but do not adhere to a rigid formalism that demands that all three be present in every cited example.

It is helpful first to recognize that there is nothing inevitable about the tasks assigned to IOs, the governance structures within them, or the authority ceded to them. IOs are created by states and could, in principle, be granted virtually any power or authority.¹⁶ If one looks to the IOs that have actually been created, however, it is clear that states have made some consistent choices, and examining these choices helps us to draw conclusions about what states have sought to achieve through these institutions.

¹¹ See H. Schermers and N. Blokker, *International Institutional Law: Unity Within Diversity* (3rd edn, 1995), at 3.

¹² By one count, the number of IOs was at 37 in 1909 and rose to 378 by 1985: see Ku, ‘Global Governance and the Changing Face of International Law’, *ACUNS Rep & Papers* (2001) 26.

¹³ See Alvarez, *supra* note 2, at 4.

¹⁴ *Ibid.*, at 6.

¹⁵ *Ibid.*, at 6–7. Other examples can be found in the international finance area, where less formal international organizations such as the G-20 and the Basel Committee have played important roles in governance. See C. Brummer, *Soft Law and the Global Financial System* (2012).

¹⁶ Some institutions are created by other institutions, but if one traces the ancestry further back the genesis is always a decision by states.

We begin with the somewhat obvious point that states create IOs to serve their collective and individual interests.¹⁷ Every state that supports the creation of an IO must believe itself better off with the institution than without it.¹⁸ Also at work, and tempering state enthusiasm for IOs, is a reluctance to surrender authority. States are the dominant players in the international system, and neither the states themselves nor the individuals in positions of authority within them are eager to surrender this power.

This tension, or trade-off, between effective cooperation and maintenance of state control is key to understanding IOs. Imagine, as a thought experiment, a well-functioning global authority with the power to create and build IOs. When considering an IO, that authority would presumably compare the world-wide benefits of a proposed organization to the world-wide costs. If the institution were expected to have a positive impact on world welfare, it would presumably be created.

Contrary to this hypothetical world, however, decisions about IOs do not emerge from a single global authority. They come instead from a series of state-specific calculations about the impact of a proposed organization. Every participating state decides for itself whether it wishes to support the organization. In other words, an organization is created only if every single state (or at least every single essential state) is made better off. This creates a powerful barrier to the creation and operation of IOs, and biases the processes toward too little cooperation.

B *What the Monster Looks Like*

Frankenstein set out to defeat death, but ended up making a killer. If the creature had simply never come to life, one might conclude that the effort had been a waste of time and energy, but there would have been few other negative consequences (and not much of a book for Shelley). When an IO is created a similar risk of failure exists. This article, however, is more interested in IOs that are harmful in the way that Frankenstein's monster was harmful – IOs that not only fail to generate the benefits sought by their creators, but actually cause harm to one or more of the founding states. Though there are plenty of examples of IOs behaving in ways that attract criticism from some states, it is difficult to identify many that could fairly be described as 'monsters' and that have imposed clear and wide-ranging harms. IOs have simply not been given enough power to impose serious harm on states with any frequency. This, I claim, is a bad thing. The fact that IOs are so rarely monsters is evidence that they are also unable to overcome collective action problems and other problems of cooperation with sufficient frequency. Weak IOs do not become monsters, but they do not solve hard problems either.

¹⁷ There are, of course, methodological debates within international law that implicate the question of what it means to say that a state pursues its interests and the extent to which those interests are stable or in constant flux. It is not necessary to resolve this debate in this article, and so I leave it to one side. It is enough for present purposes to observe that the creation of an IO requires the consent of participating states.

¹⁸ When speaking of the interests of a state, I use that term, as is typical, to refer to the interests as reflected through the domestic political process of the state. For this reason the interests pursued may diverge from what is perceived to be in the broad interests of the population.

At least two features of IOs can be explained by state efforts to protect against the possibility of wayward IOs: (i) there are a lot of them; and (ii) the scope of their influence varies considerably.

All else being equal, creating an organization with narrow scope reduces the risk of creating a monster. The task of a more focused organization can be specified with greater precision in its founding documents and it is easier to observe if it strays from its original mission. Furthermore, an IO with a more limited mission can do less damage when it strays. By creating many IOs, each with a narrow jurisdiction, rather than fewer institutions with broader authority, states can more effectively prescribe the issues that each organization can and cannot address.

If the above is correct, then states believe that small is beautiful when it comes to IOs. If nothing else were going on, every IO would be tiny in scope. In fact, many IOs have a relatively broad scope. There are at least three reasons why states may, at the margin, enlarge rather than shrink the scope of an IO, all of which can be illustrated with the example of the WTO. I refer to these as: effectiveness, linkage, and efficiency.

First, the IO must be given sufficient scope to be effective. Some problems can be addressed successfully only if the IO is able to work on a range of issues simultaneously. Liberalizing trade, for example, requires that the WTO do more than simply limit tariffs. Because a state can achieve the same level of protection with an import quota as it can with a tariff, both issues must be included within the WTO's mandate. In fact, all non-tariff barriers, subsidies, and even 'non-trade' issues such as health and safety, or environmental regulation, must be part of an effective trade agreement to the extent that they can be used as a substitute for tariff barriers. Sure enough, when the General Agreement on Tariffs and Trade (GATT) was created in 1947, each of these issues was included (though admittedly sometimes in an incomplete way).

Secondly, because negotiation takes place within IOs, it is sometimes necessary to expand the scope of the institution's mandate to facilitate bargaining. Specifically, it may be necessary to bring two or more disparate issues within a single IO so there is enough bargaining space to get the consent of all parties.¹⁹ For years, efforts to reach an international agreement that would provide increased protection of intellectual property rights failed to make any progress because developing countries had no reason to consent. It was only when intellectual property issues were brought within the WTO system and linked to trade issues that an agreement was reached in the form of the Agreement on Trade Related Aspects of Intellectual Property (TRIPs).²⁰

Thirdly, expanding the scope of an IO may yield efficiencies in the running of the organization. Rather than including an agreement on trade in services (GATS) within

¹⁹ See Koremenos, Lipson, and Snidal, 'The Rational Design of International Institutions', 55 *Int'l Org* (2001) 761; H. Raiffa, *The Art and Science of Negotiating* (1982).

²⁰ The other, less optimistic interpretation is that by bringing the IP issues into the trade negotiations, developed countries were able to combine their preferred IP rules (reflected in the TRIPs Agreement) and membership of the new WTO. This prevented developing countries from joining the WTO while refusing to accept TRIPs. More pointedly, developing countries were forced to choose between capitulation on the IP issues and exclusion from the international trading system.

the WTO, for example, states could have created a distinct organization devoted to that topic. To do so, however, would require the duplication of many of the features of the WTO, including a distinct dispute settlement process, secretariat, governance rules, and so on. In addition to being wasteful this would have reduced the efficiency of the system by creating jurisdictional battles, conflicting rulings, confusing precedents, and so on.

All of this leads to a prediction about IO size. We should expect any given IO to be of the narrowest possible scope subject to the benefits that greater scope can have for effectiveness, negotiation, and efficiency. Because these forces are not present with the same intensity in all areas, we should expect an IO's scope to vary from one institution to another. When applied, as above, to the WTO, these basic forces offer an explanation for the broad outlines of that organization and the scope of its activities.

The preference for narrow scope need not prevent the international community from getting the most from IOs. As long as states properly weigh the gains from broadening an institution's scope against the potential harms, all should be well. In practice, however, states seem to be so reluctant to increase the scope of IOs that when they do so they find other ways to cripple the institution.

The most obvious strategy to hinder an IO is to impose more demanding voting requirements, thereby prohibiting the IO from making decisions over the objections of member states. One can observe a general pattern of elevated voting requirements in IOs with broad scope. The WTO, for example, does not have limitless scope, but is nevertheless far-reaching and includes (to one degree or another) trade in goods, trade in services, intellectual property, health, agriculture, and more. Important decisions within the organization require unanimity.²¹ The WTO is simply not given the power to become a monster.

Requiring unanimity is not the only way to hobble an organization. An alternative is to grant the power to make decisions over the objection of some members, while simultaneously undermining the impact of those decisions. This is a reasonable description of the UN General Assembly, for example. It is authorized to speak on virtually any matter, and can do so over the objection of some members, but the resulting resolutions have no binding force or formal impact on the international legal system.

The same negative correlation between scope and IO authority exists at the other end of the spectrum – where IOs have the greatest decision-making power and the greatest ability to affect the international legal system, we observe the narrowest and most clearly-defined scope. Examples here include the Codex Alimentarius and the

²¹ Two qualifications are necessary. First, the formal rules of the WTO establish voting rules that do not always require unanimity: see WTO Agreement, Arts IX, X. The practice of the organization, however, has always been based on unanimity. Secondly, the unanimity rule does not apply (obviously) to the dispute settlement system at the WTO. That system can and does do things over the objection of states – most obviously the losing state in a dispute. This article discusses dispute resolution, including the WTO system, in more detail: see sect. 3D for discussion.

Chemical Weapons Convention, bodies with the power to impact the formal legal obligations of states, but only in narrow technical areas.²²

C *Implied Powers*

Up to this point, the discussion has assumed that states are able to define the scope of an IO's authority. This is a fair characterization inasmuch as it is states that determine what is included in the organization's Charter. The formal allocation of authority, however, cannot easily (or perhaps not at all) be done in a way that is entirely without ambiguity. For this reason, once an IO is launched, there is often an ongoing tug of war as the institution seeks to define its role to its liking and states seek to prevent drift away from what they want.²³

Part of this struggle over scope is addressed through the legal doctrine of implied powers. This widely accepted doctrine grants IOs the authority necessary to carry out their essential functions, and perhaps somewhat more than that. '[T]he necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.'²⁴ The best known statement of the implied powers doctrine comes from the *Reparations for Injuries* case: '[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as essential to the performance of its duties'.²⁵

The doctrine of implied powers means that when states assign a certain role to an IO, they must recognize that they are also giving the institution the associated implied powers. Even if the scope of the implied powers doctrine were known with certainty, this would make it somewhat more difficult to limit the authority of an IO. The challenge for states concerned about the Frankenstein problem is even greater, however, because the specific contours of the doctrine are controversial. The most common view is that these powers turn on functional necessity, but the doctrine is sometimes used more expansively to justify powers deemed essential to achieve the 'purposes' of the organization – a considerably more expansive perspective.²⁶

Whatever one's preferred interpretation of implied powers, states must take the doctrine into account when creating an IO. One consequence is to push states further towards conservative strategies that focus more on ensuring that no monster is created, and less on strategies aimed at resolving difficult cooperation problems.

²² See *infra* sect. 3C.

²³ There will also often be disagreements among states about the correct mission for the IO, of course, adding another element to the dynamic.

²⁴ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion [1996] ICJ Rep 226 (July 8), at para. 25.

²⁵ *Reparations for Injury Suffered in the Service of the United Nations* [1949] ICJ Rep 178, at 182.

²⁶ Alvarez, *supra* note 2, at 93.

D *Exit and Voice in an IO*

It is worth noting that even once the IO is established, individual states retain the classic forms of influence identified by Hirschman: exit and voice.²⁷ Though these options give states some protection, they are not enough to overcome state reluctance to cede effective power to international bodies.

First, states can try to influence the IO through their voting rights, the appointment of staff, withdrawal of financial contributions, and normal politicking. Most obviously, if action requires unanimity, the state has considerable protection. If, on the other hand, the IO can act based on a majority vote or even without a vote of member states, the state is less able to exercise control.

At a certain point, after realizing what he has created, Dr Frankenstein enters into a dialogue with his monster and agrees to make him a mate in exchange for a promise from the monster to vanish into the wilderness. This negotiation is an effort by Frankenstein to use 'voice' to influence the monster. A state within an IO may find itself engaged in a similar sort of negotiation and compromise. The need to engage in this way, however, signals that the organization has already acquired its own power – something that states often wish to avoid.

If the organization strays too far from what states intend, the latter can collectively remake or even disband the organization. When doing so requires the unanimous (or nearly so) support of all states, as is often the case, this is a relatively weak mechanism of control.

At one point, Dr Frankenstein flees to the mountains to ease his sorrow. He hopes, perhaps, to escape ('exit') the horror of what he has created, but the effort fails. The monster seeks out the doctor, refusing to leave him in peace, and begs him to create a mate.

If a state concludes that an IO has become a monster and is doing more harm than good, the state can exit. Frankenstein's attempt to flee does not end the monster's existence, or even fully protect the doctor from the monster's actions. The same is true of states that attempt to separate themselves from an IO. For the vast majority of IOs, exit allows the state to escape the formal obligations imposed on members. Nevertheless, exit may not be practical and may not achieve the goal of protecting the state from the organization's actions. First, exit may not even be permitted as a legal matter. A small number of treaties explicitly prohibit exit.²⁸ Though a legal rule of this sort cannot prevent a state from leaving, it makes the course of action a violation, which has implications for the costs of doing so, as discussed below. Secondly, the act of exiting (whether legally or illegally) signals an unwillingness to work within the institution and may carry with it reputational consequences every bit as large as remaining. Thirdly, exit may not fully insulate a state from actions by the IO. To the extent that the IO's influence comes through soft law of one form or another or if the IOs policies affect non-members in important ways, exit may not

²⁷ A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970).

²⁸ Helfer, 'Exiting Treaties', 91 *Virginia L Rev* (2005) 1579, at 1594 n. 31 (citing the treaty memorializing the US lease of Guantanamo Bay as an example).

eliminate the IO's ability to affect the state's interests. Exit from the UN, for example, would not have insulated South Africa from the economic sanctions aimed at ending apartheid.²⁹ A state may also hesitate to exit because doing so would deny it the ability to shape future conduct by the IO. Finally, exit deprives the state of whatever other benefits accrue to members of the IO. Thus, for example, exit from the WTO would be exceptionally costly for any state because it would lose all the market access protections provided by the organization.

In 2005, the US responded to unfavourable ICJ rulings by withdrawing its consent to ICJ jurisdiction under the Vienna Convention on Consular Relations (VCCR), an act that can be described as an exit from ICJ jurisdiction as it relates to the treaty.³⁰ Withdrawal protected the US from ICJ jurisdiction in future cases, but did nothing to protect the US from the *Avena Case* itself – the ICJ retained jurisdiction – so exit obviously did not offer complete protection.³¹

Despite these drawbacks, states sometimes choose to exercise their right to exit, and when this choice is made by enough states or by sufficiently important states, it can significantly undermine the organization and its mission. Famously, between 1924 and 1940, 16 states, including Germany, Italy, and Japan, withdrew from the League of Nations.³² Facing attempts by the League to impose even mild sanctions, these states concluded that the benefits of remaining within the organization were outweighed by the costs. Though one cannot know the counterfactual, the absence of these countries from the League certainly did nothing to promote peace in the lead up to World War II.

The threat of exit, even if only implicit, can have a profound impact on an IO's behaviour. The IO itself and the people who make decisions on its behalf typically prefer to retain a larger, rather than smaller, membership. In making decisions, then, the potential for exit disciplines IO behaviour. In the 1970s and 1980s, for example, the US used exit and threats of exit to influence the International Labour Organization and the UN Educational, Social, and Cultural Organization. In short, the US made credible threats that these organizations would lose support and funding and so was able to change the behaviour of the institutions.³³

When an IO is created, of course, states are free to draft its Charter in any way they wish, and can refrain from including an exit or denunciation clause. The experience of withdrawals from the League of Nations is part of the reason the UN Charter does

²⁹ In the South African case there was discussion of expelling South Africa from the UN, though no expulsion ever took place. See generally www.nationsencyclopedia.com/United-Nations/Membership-SUSPENSION-AND-EXPULSION.html (providing background information on the discussion to expel South Africa).

³⁰ *Case Concerning Avena and Other Mexican Nationals (Mex. v. US)* [2004] ICJ Rep 1.

³¹ The decision to withdraw jurisdiction was also a way to communicate to the ICJ that the US would not tolerate decisions that ran too strongly counter to its interests.

³² S.C. Schlesinger, *Act of Creation: The Founding of the United Nations: A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and Their Quest for a Peaceful World* (2003), at 26–27.

³³ See M.F. Imber, *The USA, ILO, UNESCO and IAEA: Politicization and Withdrawal in the Specialized Agencies* (1989); S.D. Murphy (ed.), 'Contemporary Practice of the United States Relating to International Law', 97 *AJIL* (2003) 962, at 977–979.

not include such a clause.³⁴ One should keep in mind, however, that nothing in a Charter can prevent a state from leaving an organization. The most it can do is determine whether the act of leaving will be labelled a legal withdrawal or an impermissible breach. In 1965, for example, Indonesia notified the UN Secretary General of its intention to withdraw in protest against the election of Malaysia to the Security Council.³⁵ Though the legal right to withdraw from an organization that is silent on the question of exit (like the UN) is the subject of considerable debate,³⁶ it is fairly clear that Indonesia did, in fact, exit the organization. Not only did the country not appear at the UN, but the organization removed its flag and nameplate, and omitted the country name from formal membership lists.³⁷

The key point for present purposes is that a prohibition (or other constraint) on exit serves to raise the cost of exit and, for that reason, reduces the state's ability to avoid actions it opposes. An organization that makes exit costly (whether through legal restrictions or otherwise) is more able to impose costs on member states without their consent. It is more likely to be a monster, but it is also stronger and better able to do its job. The reluctance of states to prohibit exit from IOs is another illustration of their concern about creating a monster.

3 Playing Dr Frankenstein

It is possible to identify four main categories of activities that IOs undertake: they engage in action intended to achieve some specific objective such as the elimination of disease; they provide a forum for negotiation among states and a platform from which states themselves can speak (as distinct from the organization speaking); the organization itself sometimes speaks in ways intended to have influence; and they provide a formal dispute resolution system.³⁸

The first two categories do not trigger the Frankenstein problem in important ways, and we see states enthusiastically creating organizations with these powers. Such organizations can make important contributions to international cooperation, but there are many critical challenges that they cannot address without broader powers. As one turns to the latter two categories one observes states jealously guarding their control and, in so doing, undercutting the ability of IOs to act effectively.

³⁴ N. Feinberg, 'Unilateral Withdrawal from an International Organization', 39 *British Yrbk Int'l L* (1963) 197.

³⁵ *Yrbk UN* (1964), at 189–192.

³⁶ Weiler, 'Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community', 20 *Israel L Rev* (1985) 282, at 282–288; Widdows, 'The Unilateral Denunciation of Treaties Containing No Denunciation Clause', 53 *British Yrbk Int'l L* (1982) 83; White, *supra* note 6, at 116–118.

³⁷ Indonesia's return to the UN in 1966 glossed over the formalities of exit and re-entry. The GA took the dubious position that there had been no withdrawal but instead merely a 'cessation of cooperation': GA 1420th plen. mtg. 1966.

³⁸ The categories are not mutually exclusive, of course, and many institutions have activities that fall into more than one category. Further, the borders of the categories themselves are imprecise and some activities may be difficult to categorize.

A IO Action

Just as a private company planning an event might establish a committee or working group to carry out the day-to-day work of ensuring that it goes well, states sometimes use IOs to carry out relatively specific and well-defined tasks. An international organization can provide collective goods and take advantage of a variety of economies of scale, specialization, and pooling of resources more effectively than states can do on their own. A good example is the WHO's campaign to eradicate smallpox.³⁹ The International Bureau of Weights and Measures (BIPM) offers another example. It seeks to 'ensure the world-wide uniformity of measurements and their traceability to the International System of Units'.⁴⁰ This is largely a task-oriented mandate without major risk of harm to the interests of states.

The World Bank provides a somewhat more controversial example. Though the Bank has a relatively broad mandate that leaves considerable discretion in the hands of the organization, and though it has tremendous influence over many states, its central mission does not involve, for example, the promulgation of hard or soft law rules or the resolution of disputes. It is not, at root, designed to be a player in the arena of international law. It is in the business of making loans to sovereign states in support of government projects or reform efforts.

The existence of the World Bank is explained by the fact that providing financing to developing countries is most effectively done multilaterally rather than bilaterally. It makes sense to centralize the process of evaluating requests for financial support and providing support from a single common fund. The pooling of financial resources, expertise, and administrative effort provides obvious economies of scale that help to achieve the goal of delivering assistance to developing countries. For lenders, the World Bank allows them to participate in lending to a portfolio of borrowers, which serves to reduce the risk they would face if they made bilateral loans to just a few.

IOs of this type are the easiest to understand and impose only very modest sovereignty costs (though the World Bank shows that even these organizations can impose some sovereignty costs). It is true that even the most directed programme must involve some judgement by the organization and some delegation of authority from states, but the scope for the organization to behave in ways that are contrary to the interests of its founding states is limited. These IOs are not typically engaged in a process of changing or directly influencing international legal norms. They are, instead, attempting to generate specific results. For this reason, they are not heavily affected by the Frankenstein problem.

Before moving on, two important caveats must be added. There are at least two ways in which even IOs focused primarily (or exclusively) on performing some task may simultaneously affect the legal obligations of states and fit, to some extent, in one of the other categories identified in this article.

³⁹ See D.A. Henderson, *Smallpox: The Death of a Disease: The Inside Story of Eradicating a Worldwide Killer* (2009), at 12.

⁴⁰ BIPM homepage, International Bureau of Weights and Measures, available at: www.bipm.org/en/home/.

First, there is no bright line between IOs pursuing specific outcomes through concrete action and those seeking to influence the legal obligations of states. UNICEF, for example, can fairly be described as primarily focused on action. It undertakes projects aimed at health and immunization, education, nutrition, safe water supplies, and so on. It is also, however, an advocate for assistance to the poor and especially to children. It is more than willing to promote international legal norms (both hard and soft) that it judges to be consistent with its mission. For example, the organization states that it 'subjects national and international policies to scrutiny against the norms and standards set out in the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women'.⁴¹ In short, an IO focused on action may also be engaged in any or all of the other types of activities discussed in this article.⁴²

Secondly, every IO has a governance structure, and that structure provides an example, or model, of how states can or perhaps should work together to address common problems. Over time and across IOs, certain principles of collective governance have emerged and have come to be seen as desirable or, perhaps, required. The governance of IOs is addressed in a large and growing literature most commonly described as 'Global Administrative Law' (GAL).⁴³ To the extent that an IO contributes to the formation of GAL it might be described as affecting the legal obligations of states by constraining (either *de jure* or *de facto*) the ways in which they cooperate.

B Providing a Forum

IOs are often critical catalysts to the creation of international law because they provide states with a forum in which to learn about one another's concerns, exchange views on policy, and, ultimately, negotiate agreements. Examples of IOs playing this role are so easy to find that I will simply list a few. The WTO and its predecessor, the GATT, have presided over eight successful rounds of negotiation, each of them leading to a formal, binding agreement. The ILO has been instrumental in the creation of many legally binding treaties, including the Forced Labour Convention,⁴⁴ the Worst Forms of Child Labour Convention,⁴⁵ and the Freedom of Association and Protection

⁴¹ Policy Advocacy and Partnerships for Children's Rights, UNICEF, available at: www.unicef.org/policy-analysis/index.html.

⁴² This same point could be made about the World Bank, of course.

⁴³ See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L & Contemp Probs* (2005) 15; Kingsbury, Krisch, Stewart, and Weiner, 'Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law', 68 *L & Contemp Probs* (2005) 1; Kingsbury, 'The Administrative Law Frontier in Global Governance', 99 *Am Soc Int'l L Proc* (2005) 143; Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006) 1; Stewart, 'US Administrative Law: A Model for Global Administrative Law?', 68 *L & Contemp Probs* (2005) 63; Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale LJ* (2006) 490.

⁴⁴ Convention Concerning Forced or Compulsory Labour, 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

⁴⁵ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 2133 UNTS 161 (entered into force 19 Nov. 2000).

of the Right to Organize Convention.⁴⁶ The UN (or, more precisely, UNCITRAL) facilitated the Convention on the International Sale of Goods.⁴⁷

IOs are often said to reduce the transaction costs associated with negotiation.⁴⁸ The basic idea, however, was familiar long before international lawyers began using the term ‘transaction costs’ at all. Writing in 1969, Louis Henkin observed that ‘[IOs] promote, facilitate, expedite, and improve the making of law by bringing nations together and emphasizing their common interests; by identifying problems that might lend themselves to law and developing possible legal ‘solutions’ for them; by providing personnel, machinery, and processes for the various stages of international legislation from conception to enactment’.⁴⁹

Housing discussions within an institution obviously encourages more frequent and more detailed discussions. Increased interaction, in turn, promotes the sharing of information and enhances reputational effects. IOs can also provide a set of default procedures to structure negotiations or other interactions. An IO can also facilitate issue linkage, which can be a critical step in reaching agreement.⁵⁰ The presence of secretariats also assists cooperation because they can often produce information with less bias (or, for the cynical, with a different bias) than that produced by states and reduce the need for duplication of effort by states to gather information.⁵¹

Better communication, including the creation of default procedures for interaction, the generation of unbiased information, and so on, increase the frequency and quality of interaction. A larger number of interactions (both formal and informal) reduces the stakes involved in each exchange and increases the importance of future exchanges to current decisions. In other words, the relationship is more iterative, which makes reputational effects more important. This makes it more costly for states to violate their international law commitments and, so, increases the likelihood of compliance.⁵²

States are enthusiastic about using IOs to improve their communication because the Frankenstein problem is entirely absent. When fulfilling this role, the organization is simply a tool to help states talk to one another. Any agreement still requires the consent of all participating states, so state authority is preserved. Because the organization lacks autonomy, however, it is unable to address problems on its own. States remain firmly in control and the organization’s ability to promote cooperation with respect to the world’s most vexing problems is quite limited.

⁴⁶ Convention Concerning the Freedom of Association and Protection of the Right to Organize, 9 July 1948, 31 ILO Official Bull., Ser. B, No. 1 (1948) (entered into force 7 Apr. 1950).

⁴⁷ United Nations Convention on Contracts for the International Sale of Goods, 1489 UNTS 3 (entered into force 1 Jan. 1988).

⁴⁸ See Abbott and Snidal, *supra* note 6; Aceves, ‘Institutionalist Theory and International Legal Scholarship’, 12 *Am U J Int’l L & Policy* (1997) 227, at 242–256.

⁴⁹ Henkin, *supra* note 6, at 657.

⁵⁰ Recall that linkage is one of the reasons why states may broaden the scope of an IO: see *supra* sect. 2B.

⁵¹ See Alvarez, *supra* note 2, at 346.

⁵² See A.T. Guzman, *How International Law Works* (2008), at 71–117; A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995), at 22–28, 18–123.

C IO Speech

Perhaps the most contentious activity undertaken by IOs is speech. I refer here to virtually any expression or rule created by the organization without the consent of all members and outside formal dispute settlement procedures. Whatever form the speech takes, it interests us whenever it seeks to affect the international system.

The many different forms of IO speech can be separated into two distinct categories. The first includes all speech that imposes a binding legal obligation on at least one state that did not consent to the rule. The most striking feature of this category is that it is so small. It is quite rare for an IO to be given and to exercise the authority to create this type of 'hard' international law.

The second category of speech includes all non-binding rules, statements, proclamations, and other speech by IOs. This is a very large and diverse category and it represents a large share of what IOs do. In this article I refer to rules, norms, and guidelines created by IOs as 'soft law' if they lack binding legal force under international law and as 'hard law' if they have binding force.⁵³ I address these two categories of speech – hard law and soft law – in the next two subsections.

1 Avoiding the Hard Law Monster

It is important at this point to distinguish between the grant of quasi-legislative authority to an IO and the consent-based creation of international law within such an organization. In this article, I describe a rule as having been created by an IO when at least one state is bound by the rule without its consent. If all states consent, even when the consent is given within an institution, there is no meaningful sense in which the institution used some delegated authority to create the rule. For this reason, I describe the rule as having been created by the states.

When an IO can bind members that object to a rule, the institution can fairly be said to be making law. IOs provide a few of the very rare instances in which binding rules can emerge without the consent of all affected states.⁵⁴ One can immediately see the Frankenstein problem at work in these exceptional situations. Exposing oneself to binding international rules created without one's consent, and perhaps even over one's objection, is a risk for a state.

If one looks at the most important problems facing the world, however – global poverty, nuclear proliferation, climate change, terrorism, and more – it is evident that large collective gains could be achieved in many areas if the international system did not demand unanimity for binding legal obligations. One natural way to make progress on these issues would be to give IOs the power to bind states, even over the objections of some. Difficult global problems are necessarily hard to solve if every relevant state must be made better off by the solution. Achieving unanimity in any group context is so difficult that few other areas of serious decision-making adopt it. Virtually any organization one thinks of uses some form of voting instead: national

⁵³ See Guzman and Meyer, 'International Soft Law', 2 *J Legal Analysis* (2010) 171, at 172.

⁵⁴ See Guzman, *supra* note 4.

legislatures, courts, corporate boards of directors, student councils, home associations, and on and on.

When one examines the IOs that states have created, however, this power to bind states against their will is almost entirely absent. States are so fearful of the monster that such an IO might become that they have granted the power to make hard law in only three situations:⁵⁵ the EU, the UN Security Council, and several standard-setting bodies given the power to promulgate binding international rules over certain well-defined and technical areas.⁵⁶ In two of these three cases (the Security Council and standard setting bodies), states have put extreme limits on the institution's ability to act.

Simply put, states have not been willing to grant law-making power to IOs with any frequency, despite the potential for significant collective gains. Fear of creating a monster has generated a strong bias toward less independent, less influential, and less successful IOs; all of which is to the detriment of the international system as it attempts to address the world's largest problems. It is surely the case that the optimal number of instances in which states delegate the power to create binding obligations for states with respect to matters that are more than simply technical issues must be greater than two (EU and Security Council).

The European Union:

The EU is an example of states surrendering considerable autonomy to an institution – including the power to make law. It is, however, the only instance of delegation on this scale. As such, it does not undermine my claim that states have been far too reluctant to surrender power to IOs. In fact, the existence of the EU underscores just how little authority other IOs have. Organizations tasked with advancing cooperation on specific issues (e.g., trade, climate change, arms control, etc.) could make tremendous progress if they were given even a small amount of authority along the lines of what the EU has. Instead, the only feasible strategies to address these critical issues continue to require unanimity.

The Security Council:

If one talks about powerful IOs with the ability to impose obligations on states, international lawyers immediately think of the Security Council. To carry out its mission of maintaining international peace and security, the Council is granted the authority to adopt measures that are legally binding on all UN members.⁵⁷ No other international body has anything approaching the Council's power to impose binding international

⁵⁵ I put aside for the purposes of this article a category of rule-making that deals with the internal rules of an organization. Alvarez points out reasonably that these 'internal' rules can have powerful effects, a point I do not wish to dispute. The effects of those rules, however, are ultimately not felt to be binding rules of international law so much as norms created as a result of their use within institutions.

⁵⁶ See Guzman and Landside, 'The Myth of International Delegation', 96 *California L Rev* (2008) 1693; Alvarez, *supra* note 2, at 10 ('few IOs are accorded explicit law-making powers, except in narrowly defined areas of the law, and relatively few IO organs combine explicitly delegated law-making power with the power to take such action without the specific concurrence of all members'); P. Sands and P. Klein, *Bowett's Law of International Institutions* (2001), at 297–335.

⁵⁷ UN Charter, Art. 48.1.

law on the entire world.⁵⁸ The Council's power is not, however, without limit or constraint.⁵⁹

The first constraint to note is the veto power held by each of the five permanent members. Recognizing that the key victorious powers of World War II ensured that they would not face binding obligations to which they objected goes a long way towards explaining why this particular organization received such unique authority. For these powerful states, the Security Council looks very much like many other IOs – it cannot bind them without their acquiescence.

The Council's ability to act is further hampered by its voting rules. Passage of a resolution requires a super-majority vote of nine of 15 Council Members. There must also be a determination that there exists 'any threat to the peace, breach of the peace, or act of aggression'.⁶⁰ Though the limits of this authority are difficult to pin down with any precision, it is clear that this language restricts the reach of the Council. It would strain credibility, for example, for it to adopt a resolution purporting to govern international banking services, climate change, global poverty, disease control, or anything else that does not implicate global peace and security in a reasonably direct way.

The widely divergent interests among the veto-wielding P5, the willingness of the P5 to exercise their veto to protect the interests of allies, the need for a super-majority vote, and the requirement that there be a threat to the peace create a web of constraints that often paralyzes the Council.

Even with these constraints, the Council is unique, raising the question of why power of this sort has been given to this institution and not to others. Why have states not created a similar body capable of generating binding rules to govern international trade, for example? Or global environmental issues? Or human rights? The answer, I think, is that only the particular circumstances of the Council's creation were sufficient to overcome the states' powerful resistance to this form of delegation. Even when the gains from cooperation are very high, states seem unwilling to create bodies authorized to create non-consensual international law rules. Even when the collective gains are large and the sovereignty costs are low (as would be true with respect to climate change, for example, as well as in many other contexts), states have been unwilling.⁶¹

⁵⁸ Alvarez, *supra* note 2, at 62 ('Putting aside the rarely exercised powers of the Security Council to enforce the peace and the unique supranational authorities conferred on the European Community's Commission, real IO lawmaking . . . is limited to the technocratic law of certain circumscribed UN specialized agencies, such the WHO's ability to issue health regulations or the ICAO Council's ability to adopt binding aviation rules over the high seas').

⁵⁹ There is a significant debate about the precise power the Security Council has been given. Ratner suggests 4 ways in which the Council deploys its authority: declarative, interpretive, promotion, and enforcement: Ratner, 'The Security Council and International Law', in D.M. Malone (ed.), *The UN Security Council* (2004). One can question whether all of these are authorized in the Charter, but all are used. One could relatedly ask whether the Council is engage is 'law making' or enforcement or application of law. For the purposes of this article, however, it is not necessary to resolve these questions. It is enough to note that the Council can adopt resolutions that impose binding obligations on states.

⁶⁰ UN Charter, Art. 39.

⁶¹ In addition to environmental issues, it seems likely that the cooperative gains are worth more than the sovereign costs in many other areas, including trade, finance, drug interdiction, human trafficking, law of the sea, and more.

Standard-setting bodies:

If one looks beyond the Security Council and the EU, examples of binding international law created by IOs are difficult to find. Virtually all such examples can be described as standard setting, by which I mean relatively technical bodies establishing rules over narrow, well-defined areas of law.⁶² These bodies illustrate the point made earlier that when states decide to give an institution the power to create binding rules, they tend to narrow the institution's scope to an absolute minimum.⁶³

Consider the Chemical Weapons Convention (CWC), which came into force in 1997 after a decades-long effort. For the purposes of this article, the most relevant part of the CWC is the Annex on Chemicals in which chemicals are categorized into three schedules based on their potential for legitimate use outside weaponry. The Annex can be amended by an IO: the Organization for the Prohibition of Chemical Weapons (OPCW).⁶⁴ Proposed changes to the Annex can be approved by a two-thirds vote of member states.⁶⁵ The only sure way for a state to escape the binding power of an amendment is to exit the convention altogether. Needless to say this is an extraordinary step as it requires stepping away from not only the amendment but the entire agreement.⁶⁶

It should be noted that most standard-setting bodies are not granted the power to create binding rules, so the power to make hard law is exceptional even within this category of institution. The most important single source for standard setting, for example, the International Standards Organization (ISO), has issued many thousands of standards. These standards do not have any binding force and each country is free to adopt or ignore them.⁶⁷

Even when the case for a binding rule is fairly strong and the risk of misbehaviour is small, states prefer to leave themselves an escape hatch. The Convention on the Facilitation of International Maritime Traffic is intended to facilitate maritime traffic by harmonizing documentary and other similar requirements for ships travelling internationally.⁶⁸ One can easily see the gains to be had by reducing the bureaucratic burden on such activity, and one can similarly see the sense in delegating the specifics to a group of experts with the authority to promulgate mandatory rules. This is a relatively simple coordination problem and the risk to states seems very small.

⁶² See Abbott and Snidal, 'International Standards and International Governance', 8 *J European Public Policy* (2001) 345; Buthe and Mattli, 'International Standards and Standard-Setting Bodies', in D. Coen, G. Wyn, and G. Wilson (eds), *Oxford Handbook of Business and Government* (2010).

⁶³ See *supra* sect. 2B.

⁶⁴ Chemical Weapons Convention, Art. 15(4), (5).

⁶⁵ *Ibid.*, Art. 8 B (18). Consensus is preferred. But failing that, a two-thirds majority is required.

⁶⁶ In fact, the CWC includes explicit language signalling that the parties view exit as a drastic response. 'Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that *extraordinary events*, related to the subject matter of this Convention, have jeopardized the *supreme interests* of its country': *ibid.*, Art. XVI (2).

⁶⁷ Within this category of non-binding standards mention should be made of those that are formally binding on states unless they opt out. Such standards are sometimes referred to as binding, but it is incorrect to think that the standard-setting bodies have the power to impose hard law on states.

⁶⁸ Convention on Facilitation of International Maritime Traffic, adopted 1965, available at: www.admiraltylawguide.com/conven/facilitation1965.html.

Even here, however, states were apparently unwilling to delegate fully. The relevant standards can be amended by a majority of the parties to the Agreement,⁶⁹ but any objecting state can opt out of a standard, preventing this from being an example of non-consensual law-making.⁷⁰

One common feature of all the above standard-setting practices, especially those that impose binding rules, is that the subject matter is limited and technocratic. States appear willing to give certain highly specialized IOs the power and onus to come up with standards as long as the scope of the standards is limited and the benefits of harmonization are sufficiently high. When they do so, however, they are careful to establish severe constraints on the scope of the IO's jurisdiction so as to minimize the risk that it will act contrary to the interests of states.

2 *The Monster's Weaker Cousin – Soft Law*

Not every IO has the authority to 'speak' in a way that creates soft law, but many do.⁷¹ The UNGA and Security Council are obvious examples. A few other bodies with this authority are: the International Atomic Energy Agency (IAEA), the World Health Organization (WHO), the International Labour Organization (ILO), the International Telecommunication Union (ITU), the Universal Postal Union (UPU), and the World Meteorological Organization (WMO).

When IOs speak, they can create rules that, despite their non-binding nature, affect state behaviour. For example, the Nuclear Suppliers Group (NSG) Guidelines set out export control guidelines governing the transfer of nuclear materials between states.⁷² These guidelines are not themselves legally binding on states, but they provide content for the vague but legally binding export control obligations included in the Nuclear Nonproliferation Treaty.⁷³ Another example is provided by Resolutions from the UN General Assembly (UNGA). UNGA resolutions are certainly not binding on states, but they are produced with the objective of nudging the international system in one direction or another. Thus, for example, in the 1960s and 1970s the UNGA issued a series of resolutions relating to sovereignty over natural resources.⁷⁴ These resolutions were aimed at least in part at legitimating the nationalization of foreign-owned property within developing countries and resisting the notion that such nationalizations must be accompanied by full compensation of affected foreign investors. The resolutions did not settle the issue, but they did become part of the conversation. They contributed to

⁶⁹ The amendment process depends on whether or not a Conference of the Contracting Governments is requested by one-third of the governments. If not, a bare majority is sufficient for the amendment to become binding. If a conference is convened, an amendment requires two-thirds of those present and voting to be adopted: Convention on Facilitation of International Maritime Traffic, Arts VII.2, VII.3.

⁷⁰ *Ibid.*, Art. VIII.1.

⁷¹ See, e.g., T. Buergenthal, *Law-Making in the International Civil Aviation Organization* (1969) (arguing that the International Civil Aviation Organization obtains a higher level of participation and better regulation of aviation through the use of non-binding 'Standards and Recommended Practices' than it could achieve through binding approaches).

⁷² Nuclear Suppliers Group Guidelines, available at: www.nuclearsuppliersgroup.org/Leng/02-guide.htm.

⁷³ See Meyer, 'Soft Law as Delegation', 32 *Fordham Intl LJ* (2009) 888.

⁷⁴ See UN GA Res. 1803(XVII); UN GA Res. 3171(XXVIII); UN GA Res. 3281(XXIX).

the political back and forth on the issue and to our understanding of the customary international law rules on expropriation. Though not hard law, it is a mistake simply to dismiss them as irrelevant.⁷⁵

There are at least two different forms of soft law made by IOs. The first provides a kind of support for hard law rules. It fills in gaps, clarifies meaning, and nudges the content of hard law rules. International treaties, like all written legal texts (not to mention CIL), are incomplete and open to interpretation. IOs are among the mechanisms used to clarify the meaning of these agreements. In section 3D, below, I discuss the role that tribunals play in this regard. In this section I am interested in how IOs that do not act as tribunals affect existing legal rules. Among the most obvious places where this happens are the Security Council and the General Assembly. Debates and resolutions from these bodies affect how international law is perceived and, therefore, its meaning.

By way of illustration, consider the rules surrounding the use of force. These have been deeply influenced by both the Security Council and the General Assembly, even though these bodies have no formal authority to interpret the law.⁷⁶ It may seem self-evident to international lawyers that the Security Council is able to influence the *de facto* content of international law with respect to the use of force, but someone unfamiliar with international law would surely find it strange that anyone would pay attention to this body. The Council, after all, consists of just a few countries, each of which is acting in its own interests, as distinct from representing groups of countries or peoples. The Council's reactions are political, rather than legal, and they are highly selective. In short, there is no reason to think that the Council is likely to act in a neutral or principled way to clarify the meaning of international law.

Nor is the Council charged with interpreting, clarifying, or creating international law. It is responsible for 'international peace and security' and, in that function, presumably has to come to some conclusion about when threats to peace and security exist. But it is never required to act, so inaction cannot logically be taken to signal the absence of such a threat, and action in one case is a poor predictor of action in similar future cases. Furthermore, the Council is not required to make law in order to carry out its functions. It is able to act in response to a threat to the peace without stating whether or not there has been a violation of international law.⁷⁷

Despite these features, states pay attention to the soft law that emerges from the Council. This is best explained as a balance struck by states in response to the Frankenstein problem. Having the Security Council speak on the subject is of value to states because there would otherwise be no mechanism to promote a common

⁷⁵ International financial regulation offers an example in which much of the field is regulated internationally through soft law instruments: see Brummer, *supra* note 15, at ch. 5.

⁷⁶ Resolution on the Definition of Aggression, GA Res. 3314 (XXIX) (1974); Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States, GA Res. 2625 (XXV) (1970); Alvarez, *supra* note 2.

⁷⁷ R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963) at 204.

understanding of the rules governing the use of force.⁷⁸ There is no other body able to play this role, and no true international court to resolve these issues. The ICJ is obviously relevant, but its jurisdictional limits and the fact that it can only respond to disputes constrains its ability to clarify the Charter's meaning. Furthermore, as already discussed, the Security Council is designed with a series of constraints to prevent it from becoming a monster.⁷⁹

The second way in which IOs generate soft law is more autonomous. The IO does not interpret or clarify existing treaty law but, rather, creates a soft law rule based on perceptions of CIL or, depending on one's views, from whole cloth. Such pronouncements often assert that they are merely restating or codifying CIL, but to the extent that they provide any independent influence on our understanding of the law, they can fairly be called soft law. When they announce rules of law that do not meet the threshold of CIL (something that is often in the eye of the beholder), they are creating or reinforcing soft law norms that operate separately from hard law.

A conspicuous and well-known example of this sort of soft law is the Draft Articles of State Responsibility produced by the International Law Commission (ILC) in 2001.⁸⁰ The ILC, I must admit, stretches the definition of an international organization, and by most definitions would surely not qualify as such. Nevertheless, the example is useful because IOs regularly make similar pronouncements and those statements engage the international legal system in the same way. The example is also useful to remind us that many of the insights presented in this article apply to entities that are not generally considered IOs but that are nonetheless non-state bodies that influence the system.⁸¹

The Draft Articles do not themselves embrace the label of soft law. Instead they claim to 'formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts'. But any fair reading of the Draft Articles must come to the conclusion that they are more than a list of widely accepted hard law rules. The phrase 'by way of . . . progressive development' in the above quotation makes clear that the Draft Articles seek to nudge the law along. Reading through the Draft Articles themselves confirms that this is more than simply a restatement of CIL and treaty rules.⁸² Though some of the rules in the Draft Articles are widely accepted rules of international law, many do not fit this description.⁸³ Most importantly, the Draft Articles themselves are routinely

⁷⁸ Rulings by the ICJ also serve to clarify the meaning of the Charter, of course, but can only respond to specific disputes, and its establishment is similarly affected by the Frankenstein problem.

⁷⁹ See sect. 3C1

⁸⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁸¹ See *supra* sect. 2A, explaining why it is preferable to avoid a rigid definition of IOs for the purposes of this article.

⁸² It is worth noting that the Draft Articles also illustrate the importance of other soft law sources including international tribunals, the Security Council, the General Assembly, and more. Such sources are often cited in the Commentary to the Draft Articles in support of the stated norm.

⁸³ E.g., Art. 3 states the universally accepted claim that international law (as opposed to domestic law) governs the characterization of an act as internationally wrongful: Draft Articles, *supra* note 80, at 36.

cited as evidence that a particular norm is, indeed, a rule of CIL.⁸⁴ The moment the Draft Articles themselves become evidence of binding law, they have gone beyond a simple restatement of the rules and become a source of the rules. They become a form of non-binding speech that seeks to influence our understanding of international legal rules. They become soft law.

It is fair to ask why states would allow an IO to speak in a way that could influence the legal obligations contained in a treaty. States, after all, place great emphasis on the consent requirement in international law. They (mostly) do not accept legal obligations to which they have not consented. Why, then, would they create a structure in which their existing legal obligations can be influenced by an organization outside their direct control?

One could also reasonably ask the opposite question: If states are willing to create institutions with the power to influence legal obligations, why do they not give these institutions the power to change or create hard law? If delegation makes sense, why do states do it in such a timid fashion?

The Draft Articles are a good example of states striking a balance between an effective institution and preservation of state power. States have shown themselves willing to create institutions charged with making statements about the law, but have not been prepared to grant actual law-making authority to these bodies.

IO speech, then, is well-suited to creating a focal point around which states can coordinate, and can at times impose a modest level of political pressure on states to behave in one way or another. International organizations, however, are denied the authority to make binding statements. Without that ability, the effectiveness of IO speech is undercut and the ability of these organizations to address difficult cooperative problems is greatly diminished. The world's hardest problems require some stronger authority with the ability, in at least some situations, to bind reluctant states to a desirable rule even when those particular states do not benefit. International organizations may be the best hope in this direction, but they cannot serve that role unless states give them greater autonomy and power.

The fact that states so frequently create IOs with the power to speak through soft law, but so rarely allow those same institutions to create hard law, also tells us something about the importance states place on this formal distinction. It indicates that while states retain a powerful preference for control over their hard law obligations, they are willing to surrender control over soft law pronouncements. This may not be surprising to most students of international law, but it flies in the face of claims that the formal status of international legal rules is unimportant. If international law sceptics are to be believed, they will have to explain why states so thoroughly limit their exposure to non-consensual, binding international law but accept non-consensual soft law.

D *Dispute Resolution*

The fourth and final function performed by IOs is dispute resolution. The ICJ is the most obvious example. A similar function is carried out by tribunals nested within

⁸⁴ Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', 96 *AJIL* (2002) 857, at 867–868.

larger IOs, such as the WTO's dispute settlement system or the Inter-American Court of Human Rights, which exists within the Organization of American States.

The international system can at times seem to be overrun with international tribunals. The list of such courts and quasi-courts includes the ICJ, the WTO Appellate Body, the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights, the International Criminal Court, the African Court on Human and People's Rights, the International Centre for Settlement of Investment Disputes and its *ad hoc* tribunals, and on and on.⁸⁵ For present purposes, I consider only inter-state dispute resolution by IOs. Cases involving private parties as litigants are sufficiently different from state-to-state tribunals that I leave a discussion of their impact to another time. When I refer to 'international tribunals', then, I mean to include only tribunals that deal with state-to-state disputes.⁸⁶

Because a tribunal addresses disputes between states, and because a ruling is likely to disappoint one, and perhaps both, parties, there is a sense in which a tribunal will necessarily act contrary to the interests of some states. There is, in addition, a broader risk that the tribunal will adopt interpretations of laws that are out of step with the will of the relevant states. In other words, when states create a tribunal, they risk creating a monster.

At first glance, it can seem as if states have, in fact, given tremendous power to tribunals and, in that sense, surrendered significant control. A more careful look, however, shows that they have refused to grant these courts and quasi-courts either broad mandates or the power to bind states. I focus on two important ways that states have kept international tribunals in check: limiting the jurisdiction of each tribunal and not providing for *stare decisis*.

1. Jurisdiction

Consider first the jurisdiction of international tribunals. By limiting the jurisdiction of a tribunal, states not only reduce the number of disputes subject to the tribunal, they reduce the legal issues on which the tribunal is able to announce its interpretation of the law.

The ICJ, for example, could have been created with jurisdiction over all disputes between UN members regarding international law. Instead, it adopted an opt-in system of jurisdiction.⁸⁷ As it turns out, however, states have been reluctant to submit themselves to the court's general jurisdiction. At present, 66 states have submitted declarations accepting the Court's general jurisdiction.⁸⁸ Of the permanent members of the Security Council,

⁸⁵ One could, of course, add the CJEU and the ECtHR. Though international tribunals appear to be increasing in number and importance, and though they are clearly worth investigating and understanding, we should not lose sight of the fact that it remains the case that most international obligations exist without any mandatory system of adjudication to support them. Consider, e.g., that virtually all obligations in the fields of environmental law, arms control, use of force, humanitarian law (at least with respect to the behaviour of states), diplomatic law, and more lie outside the mandatory jurisdiction of any tribunal.

⁸⁶ I recognize that the term is typically used more broadly, but I use it in this narrower way for convenience.

⁸⁷ ICJ Statute, Art. 36(2).

⁸⁸ Declarations Recognizing the Jurisdiction of the Court as Compulsory, ICJ, available at www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.

only the UK has done so.⁸⁹ Furthermore, the number of declarations overstates the reach of the Court because many of those declarations include significant exceptions.

The ICJ can also acquire jurisdiction through treaty. The parties to a treaty can choose to grant the court mandatory jurisdiction over the disputes that arise from the treaty. Other tribunals, including WTO tribunals and the Law of the Sea Tribunal, acquire jurisdiction through treaty in much the same way. Note that granting jurisdiction in this way gives states tremendous control. States can accept or reject the jurisdiction of a tribunal for the specific obligations in the treaty and nothing else. Indeed, they can even provide for the acceptance of jurisdiction for some, but not all, obligations within the treaty.

The desire to manage jurisdictional questions on an issue-by-issue basis could still be consistent with a single tribunal – perhaps the ICJ. There would be obvious benefits in terms of efficiency, consistency, and legitimacy to having a single tribunal rather than many separate ones. Yet states have chosen to create many unrelated tribunals: the ICJ, the WTO tribunal system, ITLOS, various human rights tribunals, and so on.

I argue above that states have an interest in creating IOs with narrow scope, in part to reduce the harm if the IO pursues objectives different from those of the founding states. The same reasoning explains why states prefer to avoid a single global tribunal. By limiting the subject matter jurisdiction, states reduce the risk that tribunals will become monsters – that they will act in ways contrary to the interests of states. The subject matter jurisdiction of the WTO's Appellate Body (AB), for example, is carefully constrained in the Dispute Settlement Understanding. The WTO's dispute settlement system serves to 'preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements'.⁹⁰ Note that the inquiry is focused squarely on the WTO agreements rather than on international law more broadly.

To be sure, states submit some disputes to tribunals, and in doing so they risk facing rulings they do not like. The system of international tribunals, however, continues to have jurisdiction over only a small fraction of international legal disputes. A greater jurisdictional reach and a move towards more general tribunals would expand the ability of these institutions to speak forcefully about the rules intended to govern the international system. The failure to embrace a more comprehensive use of tribunals has been a conscious one in which states have turned away from a structure that would allow the system of international law to grow and develop through the decisions of tribunals and opted instead for a system in which tribunals still play a relatively small role and disagreements about the content of international law or the conduct of states are often left to be resolved through politics alone.

2. *Stare Decisis*

The second feature of tribunals that I wish to discuss is the absence of *stare decisis*. When an international tribunal issues a ruling, it is typically understood to bind the

⁸⁹ *Ibid.*

⁹⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3(2).

parties to the dispute with respect to their specific dispute – meaning that the losing party is expected to comply with the tribunal’s ruling – but it does not have any formal binding force beyond the particular case. This is a view of court or tribunal decisions that is familiar within civil law systems, of course, but it runs counter to the norm in common law systems.

The *status quo* is easy to understand when viewed in terms of the Frankenstein problem and when compared to the power given to other IOs to create international legal rules. With respect to the specific dispute before the tribunal, a ruling is normally considered binding. Interestingly, even this seemingly obviously rule is not universal. There are various instances in which IOs opine on the merits of a case in a way that is not binding on the parties. One must take care with semantics here as these bodies are not always referred to as ‘tribunals’ in the literature, but they are engaged in fundamentally the same function.

A good example is the UN Human Rights Committee (‘the Committee’). The Committee was established under the authority of the ICCPR to monitor compliance with that agreement.⁹¹ The Committee monitors compliance with the ICCPR in three ways. First, the ICCPR requires parties to report to the Committee on the steps they have taken to implement the obligations created by the ICCPR.⁹² The Committee is authorized to ‘comment’ on the reports and submit those comments to the states for their consideration.⁹³ Secondly, the ICCPR permits states to declare their willingness to have their compliance with the Convention challenged by other member states.⁹⁴ If an amicable solution is not reached between the parties, the Convention authorizes the Committee to request information from the parties and requires it to issue a report on the dispute.⁹⁵ Thirdly, the Optional Protocol to the ICCPR allows states to permit individuals to lodge complaints about their human rights practices with the Committee.⁹⁶ When a complaint is properly made, the Committee is authorized to receive information about the dispute from both the individual and the state concerned, and to formulate and express its ‘views’ on the matter.⁹⁷

The ‘views’ or ‘comments’ issued by the Committee bear some resemblance to the decisions of international tribunals. The Committee’s writings, however, have no independent legal effect and do not even bind the state party involved in the case. Though the Committee is not thought of as a tribunal, it affects our general understanding of the law in much the same way as a tribunal. Like the rulings of a tribunal, the Committee’s decisions add a non-binding gloss on the legal obligations contained in the relevant legal text.

⁹¹ ICCPR and Optional Protocol, adopted 16 Dec. 1966, GA Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, at 52, 59, UN Doc. A/6316 (1966), 999 UNTS (1967) 171, 301 (entered into force 23 Mar. 1976).

⁹² ICCPR, Art. 40.

⁹³ *Ibid.*, Art. 40(4).

⁹⁴ *Ibid.*, Art. 41.

⁹⁵ *Ibid.*, Art. 41(1)(h).

⁹⁶ ICCPR Optional Protocol, *supra* note 92.

⁹⁷ *Ibid.*, Art. 5.

Even when addressing the merits in a particular case, then, states balance the benefits and the risks of exposing themselves to legally binding pronouncements.

Turning to the impact of decisions on international law more broadly and on future cases, the universal rule is that tribunals lack the power to create binding international legal rules. They do, however, have enormous influence on our understanding of the law. One of many possible examples is the famous *Nicaragua* case, in which the ICJ laid out its interpretation of the UN Charter's use of force rules. Though the ICJ ruling is not itself binding law, one could not claim to understand use of force without knowing that case and the ICJ's position.

I have intentionally used the same example (use of force) as I use in section 3C to show that the decisions of tribunals operate in much the same way as the soft law created by other IOs. In both cases the relevant rules affect our understanding of international law but are not binding. In other words, soft law is being generated in both cases.⁹⁸

Once we recognize the relationship between tribunal-generated soft law and soft law generated by IOs in other ways, it seems obvious that tribunal decisions must be non-binding. Recall how reluctant states are to give IOs the power to create binding international law. It would be shocking indeed for states to refuse any grant of formal lawmaking authority to most IOs only to turn around and grant it to tribunals. What one would expect instead is what one actually observes. Tribunals are normally not granted the power to bind states (beyond the states involved in the case with respect to the specifics of the case) but (like other IOs) they are given the power to generate soft law.⁹⁹

4 Conclusion

What should we make of the current use of IOs by states? This article has tried to explain how the Frankenstein problem accounts for a great many of the decisions states have made with respect to IOs, including when IOs are created, what powers they are given, and how the various design elements in IOs are traded off against one another.

Because IOs acquire a life of their own once they are launched, we can learn a good deal about state concerns by examining the charters of these organizations. We can see, for example, that states almost never view the cooperative gains from IOs as being large enough to give these institutions the power to create binding international law. Furthermore, when IOs do get this power, states are careful to make sure that the scope of the organization is extremely narrow. The only exceptions to this practice – the Security Council and the EU – are properly thought of as special cases. In contrast, states are more than willing to give IOs the power to speak to matters of international

⁹⁸ See Alvarez, *supra* note 2, at 329. ('[P]erhaps the largest body of emerging "soft law" today is the ever-increasing numbers of judgments issued by various permanent international courts and tribunals').

⁹⁹ Note that even this soft law role is not necessary. Tribunals could be charge with resolving a dispute without issuing a reasoned decision (or without publishing that decision) and without opining on the law.

law and policy in a wide variety of contexts, even when the statements by the organization may have a significant impact on the general understanding of relevant legal rules and norms. The most obvious example of this can be found in tribunals, which are created to interpret international legal rules, albeit in a non-binding way. Other examples could be pulled from the article, but the common theme is that states seek a balance between the need to give IOs sufficient power to achieve their goals and the desire to avoid having those same IOs act contrary to their interests.

My own view is that the net impact of IO activity is quite clearly positive, notwithstanding the dangers inherent in the Frankenstein problem.¹⁰⁰ It seems to me that states have approached this problem with too much conservatism. Though the problem is real, I believe that there are significant gains to be had by giving IOs more rather than less ability to influence the international system. There would, no doubt, be more instances of individual states regretting the power given to IOs, but these costs would be outweighed by more cooperative outcomes when addressing the world's largest problems. I have made a similar point in other writing where I argue that the international system places too much emphasis on consent.¹⁰¹

¹⁰⁰ There are also significant issues of legitimacy and agency that are well addressed elsewhere and that I have not emphasized: see Ku, 'The Delegation of Federal Power to International Organizations: New Problems with Old Solutions', 85 *Minnesota L Rev* (2000) 71, at 127–129 (2000); Howse, 'The Legitimacy of the World Trade Organization', in J.-M. Corcand and V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001), at 386; Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics & Int'l Aff* (2006) 405.

¹⁰¹ See Guzman, *supra* note 4.