

INTERNATIONAL LAW:
50 WAYS
IT HARMS OUR LIVES¹

IN DAILY LIFE

- 1 Failing to make international air travel safer.**
As a result of the weak, lowest-common-denominator Standards and Recommended Practices adopted in the International Civil Aviation Organization, both airplanes and airports are not subject to state-of-the-art enforceable regulations that reflect the highest safety standards.

- 2 Imposing double taxation on your estate, unless you live in certain countries.**
Because avoidance of double taxation is premised on the existence on a bilateral tax treaty between the relevant states, many estates and inheritances still may face double taxation.

- 3 Having to call home a nation that has no relation to your history or ethnic identity.**
Converting a 1964 statement of policy by African government elites into a questionable norm of customary international law, the principle of *uti posseditis* has led to constant ethnic and frontier disputes and blessed an unjust and arbitrary colonial legacy.

- 4 Making it harder to migrate to seek a better life.**
The legal definition of refugee and the sanctity of borders work against those fleeing poverty. International law, and its continued emphasis on the rights of "sovereigns" over the rights of individuals, does not provide long-time residents and guest workers of a country any legally

¹ A draft by José E. Alvarez and David Lachman.

enforceable right to continue their lives in that country.

5 Undermining your government's efforts to protect your rights as a worker.

The weak enforcement of the lowest common denominator labor rights contained in ILO Conventions makes the prospect of an "international labor code" risible. The ILO cannot enforce states' reporting obligations in any case and many states are behind in their reports and the various dispute mechanisms in the ILO, even when triggered, can only give non-binding views. Under the circumstances, critics assert that ratification of such treaties may only deflect attention from governments' continuing failures to implement effective labor protections. Moreover, the once progressive tripartite division of interests within the ILO (of governments, employers and unions) is now seen as impeding the consideration of myriad relevant groups and interests.

6 Undermining your government's efforts to regulate to promote economic development in ways not approved by the "Washington consensus."

Bretton Woods institutions, such as the IMF, have expanded their ability to impose one-size-fits-all approaches to governance, as through structural adjustment conditionality. Their actions severely constrict the policy options of governments that are hosts to foreign investment. Investment treaties complement the regulatory impacts of the IMF; they ban or discourage requirements that foreign enterprises operate only as joint ventures, or mandates that they transfer technology, hire locally, or export more than they import -- even though such requirements were widely used by many states that have experienced significant economic growth, such as the Asian tigers and China. On the other hand, international law and international institutions encourage privatization, deregulation, and the free movement of capital, and discourage government policies that would intervene in the market, even to correct market failures. See, for example, the works of the 2007 Grotius Speaker, Joseph Stiglitz.

AT LEISURE AND IN THE WORLD

- 7 Encouraging global warming.**
International lawyers' emphasis on the Kyoto Protocol encourages the planet to rely on a single ineffectual treaty, not ratified by some of the major states contributing to the problem, and promotes the view that further global warming would be halted if that single step were taken.
- 8 Exposing U.S. citizens to the perils of unlimited off-shore internet gambling services.**
According to a recent WTO decision, global trade rules mandate open access to off-shore internet gambling, even when these take advantage of peoples' predilection for wagering and are supplied from the Caribbean island nations of Antigua and Barbuda.
- 9 Making it less likely that you will see many endangered species on your vacation.**
Relevant treaties, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity (CBD), do not adequately address the causes of species extinction. By assuming that most species loss occurs through poaching and trafficking in endangered species, CITES fails to curtail the main threat to endangered species: habitat loss. While the CBD addresses habitat loss, its inclusion of loopholes for developing nations, where most habitat loss occurs and where endangered species are most vulnerable, severely limits its efficacy.
- 10 Allowing whaling to continue through loopholes in the relevant regime.**
The International Whaling Commission (IWC) includes chief whaling nations, some of which continue to violate the whaling moratorium under the scientific research provision. The whaling regime bribes developing countries to join the IWC for the sole purpose of voting against the moratorium.

- 11 Keeping Winnie the Pooh out of the public domain.**
European-influenced international copyright treaties and other intellectual property protections, as under the TRIPs agreement of the WTO, erect no barriers to lengthening the term of copyright protection (unless one counts the Preamble to the WIPO Copyright Treaty, which pays lip service to balancing the rights of authors and the public interest). Taken to an extreme, overprotection of authors' rights reduces public access to information, deprives future authors of the raw materials for new creative works, and encourages private censorship.

AWAY FROM HOME

- 12 Leaving you unprotected when unjustly arrested abroad.**
Treaties such as the Vienna Convention on Consular Relations only afford rights to consular notification to aliens abroad; even assuming such notice is given, it is then left up to the notified state alone to decide whether to concern itself with its citizen's plight. And the weak enforcement provisions of the International Court of Justice mean that even in those rare instances in which that Court affirms that a state has failed to respect consular rights, you may still end up facing the death penalty abroad without ever having the aid of your consulate. See also items 14, 15, and 19.
- 13 Turning a blind eye to confinement in secret detention camps.**
Although "arbitrary" detention without due process of law is officially condemned by international law and regional human rights courts have affirmed such rights, there are meager legal mechanisms at the global level, apart from the actions of the International Red Cross (whose officials may not be informed of your whereabouts) to prevent individuals from being "disappeared."

LIBERTY

- 14 Failing to protect anyone from torture who does not live in a country subject to an effective regional system for the protection of human rights.**

Treaties such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) or the International Covenant on Civil and Political Rights (ICCPR) only deal with state-sanctioned torture. Further, such treaties fail to include effective measures for enforcement or prevention, such as damages for victims or authorization to apply sanctions against culpable governments. Indeed, according to human rights NGOs, as many as half the world's governments continue to practice torture.

- 15 Failing to protect anyone from cruel, inhuman, or degrading treatment who does not live in a country subject to an effective regional system for the protection of human rights.**

Treaties such as the CAT and ICCPR fail to clearly define or to criminalize cruel, inhuman, or degrading treatment and, as with torture, provide only rhetorical protections against such abuses.

- 16 Depriving you of your financial assets or your right to travel at the whim of the Security Council.**

UN Sanctions Committees, under Security Council Resolution 1267 and subsequent resolutions, are authorized to subject individuals or organizations to numerous sanctions without benefit of individualized due process.

- 17 Giving freer rein to military occupiers.**

As affirmed by Security Council Resolution 1483 and relevant subsequent resolutions dealing with Iraq, the Security Council has gone beyond existing humanitarian law in the Hague Regulations to permit the United States and the United Kingdom to impose democracy on Iraq, even if this means permanent changes to Iraqi law and institutions. Whether this will be treated as a general license for future military occupiers remains to be seen.

- 18 Enabling secretive international dispute settlement, even when such disputes involve major public policy issues and not merely private commercial disputes.**
Investment agreements, at the bilateral and regional level, enable investors to sue their host states, as with respect to issues contesting environmental regulations or the privatization of basic natural resources or utilities. But not all complaints, underlying pleadings, or subsequent rulings are made public. Individuals or groups concerned may not always be permitted to intervene to give testimony or to observe the proceedings.
- 19 Licensing harmful extra-territorial action, by both state and non-state actors, even in violation of human rights.**
Global human rights conventions, such as the ICCPR, are, by their terms, apparently territorial in their reach. Further, for the most part, they do not reach the actions of non-state actors, from multinational corporations to terrorists, unless these are connected to state action.
- 20 Over-legalizing transitional justice.**
International lawyers' emphasis on formal international human rights and international criminal justice tends to "occupy the field" with respect to policy options in the wake of mass atrocity. The focus on, for example, international criminal courts, has sometimes crowded out (or denied resources to) other ways of dealing with the myriad challenges of "transitional justice," such as local trials, truth commissions, and amnesties. It has also eclipsed other ways of pursuing social justice, such as religious vocabularies or the use of legal tools to promote economic justice.
- 21 Reifying the second class status of half of the world's population.**
One of the most widely ratified treaties (but also the one with the most number of reservations), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), has, in the views of many, merely served as an enabler to male-dominated governments' resistance to advancing in fact, and not merely in rhetoric, the equal rights of women. (Of course, CEDAW is only

the poster child for the flaws of international law's treatment of treaty reservations. Under the Vienna Convention on the Law of Treaties, international law permits reservations to treaties subject to other states' objecting should these violate the treaties' "object and purpose." But this scheme breaks down, particularly in the context of human rights treaties where states have little incentive to file such objections.) Further, neither CEDAW nor traditional international criminal law has recognized the serious dimensions of violence against women, particularly in the home; indeed, even with respect to violence against women undertaken by state agents, it took international lawyers more than half a century to recognize and prosecute rape as a war crime, as genocide, or as a crime against humanity.

- 22 Not providing victims with an adequate legal remedy against environmental destruction.** International human rights law, environmental law, and economic law do not generally provide an avenue of legal redress for victims of environmental destruction, especially when this results from the acts of non-state actors. Environmental harm to individuals is not a cause of action under current international law; such harm must be connected to another substantive right and this requirement leads courts and commissions into an undefined area of law. *But see* Security Council Res. 687 where Iraq was declared liable for environmental damage after its invasion of Kuwait.
- 23 Allowing states to circumvent their non-refoulement obligations through "diplomatic assurances."** Although international law prohibits states from transferring persons to places where they might be persecuted, state practice suggests that this prohibition is overcome if the receiving state merely gives "diplomatic assurances" that the person will not be persecuted.
- 24 Leaving liberty rights up to law professors.** As is suggested by Article 38 of the Statute of the International Court of Justice, the writings of scholars can help define the content of the law, both in treaties and custom. This means that the interpretation of human rights may be subject to the varied views of often self-designated experts,

thereby failing to ensure predictable rights for individuals and exacerbating the legitimacy deficits of international law.

25 Enabling international organizations to bypass democratic processes.

Much of modern international law results from the actions of international organizations, including the Security Council, human rights treaty experts, the IMF, the World Bank, and the World Trade Organization. While the charters of most such institutions were approved a half century ago, through democratic processes in ratifying states, their contemporary normative output is not usually subject to the parliamentary approval and political give and take of national law, and yet in some cases, as with respect to Security Council decisions, the law made within such organizations purports to bind states no less than domestic legislation.

26 Enabling NGOs to bypass democracy.

International organizations have sought to remedy the problems suggested by the previous item by, for example, granting NGOs, as "representatives of international civil society," access to documents, observer status, or in some cases the right to file amicus briefs in institutionalized international dispute settlement. However, international law fails to require NGOs to establish that they "represent" anyone at all. For critics, international legal processes exacerbate their democratic deficits when they permit such groups, which have failed to convince the governments in which they are located to adopt a policy, to have a "second bite" at the same issue at the international level.

27 Empowering the powerful through treaties, custom, and general principles.

International law does not impose any rules on how multilateral or bilateral treaty negotiations are conducted. It provides no assurance that in fact, states will be able to exercise an equal voice in such negotiations. "Unequal" treaties only marginally different from those that were imposed on the "uncivilized" in the 19th century are one result. The products of multilateral treaty negotiations, such as the Uruguay Round's inclusion of TRIPs on the mere promise that the

next trade round would address developing countries' needs, are often said to reflect the priorities of the North over the South, a fact that may only be enhanced if the North's NGOs are given a voice in subsequent treaty interpretation. (See the previous item.) Critics charge that some bilateral treaties, such as investment agreements, essentially force developing countries, on a piecemeal basis, to give consent to arrangements that "hurt" them and their citizens. Although in theory the practices of all states "count" for purposes of determining rules of custom and general principles, in fact rich and powerful states, whose laws and digests of practice are more readily available, often determine such rules. Other international law principles, such as the principle that states emerging from colonial rule must be deemed to have "accepted" the rules of custom that preceded their achievement of independent statehood and the deference accorded to "specially affected" states also reify power through law.

28 Empowering the powerful through international organizations.

The weighted voting schemes of the most powerful international organizations, such as the Security Council or the IMF, legalize rule by the powerful. Other organizations, such as ICAO, privilege power more subtly, as by ensuring representation on their most powerful bodies to states that are important to civil aviation.

29 Empowering the powerful through institutionalized dispute settlement.

Critics charge that those ostensible "levelers" of the playing field, international courts and tribunals, in fact launder rule by the powerful, and not only because powerful states such as the United States are assured a permanent judge on bodies such as the ICJ or the WTO Appellate Body. It is argued that, absent greater technical assistance, host states sued by investors in ICSID are at a severe disadvantage given the expertise and resources not always available to them. Similarly, poor states with little trade leverage may not be willing to bring a meritorious WTO dispute and be unable to enforce a ruling in their favor should they win.

- 30 Empowering the executive branches of governments, even at the expense of democratic checks and balances or the principle of separation of powers.**
International legal processes privilege the executive branches of governments. This is suggested by, for example, the turn to sole executive agreements within the United States, even though these treaties are not mentioned in the U.S. Constitution. It is also the executive who usually initiates and leads treaty negotiations, engages in diplomacy or warfare, makes custom, and appoints individuals to serve in international organizations. U.S. courts have generally deferred to the executive on such matters as the interpretation of treaties and the conduct of "foreign affairs."

PUBLIC HEALTH AND THE ENVIRONMENT

- 31 Delaying access to life-saving medicines.**
Such medicines may not be available at affordable prices without violating the WTO's or WIPO's intellectual property protections, at least where no waiver has been granted (as was belatedly done with respect to some AIDS drugs at the WTO).
- 32 Encouraging the privatization of and limiting access to such basic natural resources as water.**
Rules found in international trade accords such as the WTO and NAFTA, and the advice given by international financial institutions encourage the privatization of public utilities, while promoting other policies that critics charge are at odds with states' obligations to respect the economic, social and cultural rights of their citizens. For example, as a condition of loans from the World Bank, Bolivia was required to privatize its water services. This resulted in substantial increases in water rates, with some people being asked to pay 30% of their monthly income merely to have fresh water for daily use. When public protests succeeded in turning back the privatization plan, the investor sought

millions from the government of Bolivia in damages and future lost profits.

- 33 Ignoring food security.**
International law does little to protect against food crop contamination, including measures to strengthen bio-pharm crop regulation. While in theory international law respects sovereigns' efforts to adhere to the precautionary principle, it provides few means of clarifying its meaning or enforcing it. Attempts to follow the precautionary principle, such as the European Union's efforts to ban the import of beef from countries employing certain growth hormones, encounter resistance from the WTO.
- 34 Denigrating the human right to a healthy environment.**
Although a number of treaties recognize their signatories' ability to protect particular aspects of their environment and to protect aspects of the global commons, other treaties, such as investment agreements, do not defer to such environmental accords. International law has been slow to recognize, and certainly to provide effective means to enforce as a global right, the proposition that all persons should have the right to a secure, healthy and ecologically sound environment.
- 35 Reducing the prospect that future generations will see certain furry animals in Europe.**
International law's reliance on state consent, both with respect to entry into treaties and with respect to compliance with their terms, severely limits its regulatory capacity. This may be true even with respect to a relatively effective international legal regime with binding dispute settlement, such as the WTO. The European Union, for example, has refused to comply fully with the requirements of WTO rulings in two cases involving animals. In one case, the European Union refused to withdraw a regulation barring the import of fur from animals trapped through leg-hold traps.

PUBLIC SAFETY

36 Failing to prevent genocide.

The only global entity legally authorized to intervene in cases of mass atrocity, the Security Council, is paralyzed by the veto and the need to secure the concurrence of nine of its members. Nothing in the UN Charter requires it to act to save lives, even in cases of genocide. Moreover, the Genocide Convention only rhetorically urges states to prevent on-going genocides but fails to say how, does not clarify whether states (and not merely individuals) can commit genocide, and only requires states to prosecute genocidaires after the fact. To make things worse, the ICJ has recently found, in the case brought by Bosnia against Serbia and Montenegro, that even when a state violates the duty to prevent genocide and fails to cooperate in the prosecution of perpetrators, it does not owe damages to the victims or their state.

37 Failing to abolish nuclear weapons, and perhaps encouraging their deployment.

Neither the ICJ, in its notoriously fractured advisory opinion on nuclear weapons given to the General Assembly, nor the relevant arms control agreements endorse the abolition of nuclear weapons. Such weapons are not in all circumstances illegal under international law. On the contrary, international law has tended to suggest that the deployment of such weapons, especially by the current nuclear powers, is acceptable and that even their use, in some cases, might be legal, irrespective of the devastating consequences, including to global health. According to most experts, the proliferation of nuclear weapons and international law's failure to establish ways to patrol components and weaponry means that the world is today at greater risk that such weapons will be used, especially by a non-state actor, than at any period during the Cold War – when mutual deterrence, and not international law, appeared to provide the real constraint against nuclear annihilation.

38 Enabling, not preventing, the militarization of the world.

For all the rhetoric in the UN Charter about the need to maintain peace and security, nothing in it precludes states from arming themselves or their citizens. The recent collapse of UN negotiations on a small arms treaty highlights how international legal processes have been "captured" by states and non-state corporate interests with a stake in arming the world.

39 Hampering criminal law efforts directed at combating terrorism.

There is no definition of terrorism under international law. Fifteen different conventions deal with terrorism, but these conventions have different signatory states, the language of these conventions is archaic and frequently ambiguous, and diplomats are forced to adapt an inadequate "prosecute or extradite" regime to modern realities. Extradition agreements, even when these exist, may not cover certain terrorist acts, particularly if these are deemed "political crimes." Further, even if terrorists are caught, international criminal courts do not recognize the specific crime of terrorism, and victims have no global forms of redress, even when such acts have international dimensions as grave as those posed by crimes against humanity or war crimes.

40 Restricting the use of force to combat terrorism.

Article 2(4) and 51 of the UN Charter were drafted in light of inter-state conflict, not international terrorism. By its terms, the UN Charter appears to preclude the use of force except when an armed attack has already occurred, and the Security Council has been notified and authorizes a response. Customary international law may also enable a state to respond with proportionate force to an imminent attack as inherent self defense. But neither the Charter nor custom appears to anticipate the prospect of potential devastating attacks by non-deterrable non-state actors armed with deadly weapons -- from commercial aircraft to a nuclear device. For critics, if international law precludes military action intended to forestall such attacks before they occur or as directed against states that fail to prevent such attacks, it fails to

meet the legitimate expectations of the world's peoples, and especially of those living in democracies who expect their governments to protect them from such attacks.

41 Failing to confront contemporary realities with respect to state responsibility.

As is suggested by the rigid test for imputing state responsibility repeatedly applied by the ICJ, as in the recent Bosnia case, the ICJ's (if not the ICTY's) judges believe states can only be culpable of violations of international law if they effectively control the acts of non-state actors who otherwise do their bidding. This is as unsatisfactory to many critics today as it was when the Court first declared this test, in connection with notorious U.S. actions vis-à-vis the Contras in Nicaragua. At a minimum, the disagreement between international judges on this point promotes uncertainty on a crucial matter and suggests that international law may be fragmenting with the proliferation of international courts.

42 Otherwise hampering counter-terrorism efforts.

International legal standards respecting "territorial integrity" severely limit terrorist-hunting states from following their quarry across borders or, in the absence of express agreement, securing the cooperation of another state's police or intelligence services. In the absence of agreement, international law defers to national bank secrecy laws that make it difficult to "follow the money trail." Moreover, international law does not assist the monitoring of those who come into your country. No international framework governs access to passenger name record data, the basic information that you get when you buy a plane ticket. This information would enable states to identify whether people seeking to come into the country have connections to terrorists. Further, the proliferation of and bureaucratization of international organizations, encouraged by international lawyers, means that a welter of distinct bodies (estimated at over 60) are charged with distinct duties with respect to counter-terrorism. Even a single organ such as the Security Council has a number of subsidiary organs involved in this effort. The resulting duplication of effort and lack of coordination, not unlike that believed to have been the case within U.S. agencies at least prior to 9/11,

undermines the prospects for an effective global response.

43 Imposing inappropriate rules when terrorists are captured.

The 1949 Geneva Conventions, which presume situations of conflict with definable territorial and temporal borders, seem ill-suited to a "war" on terror subject to no such geographic or temporal limits. Neither the rules governing the treatment of POWs nor the rule that those captured in the course of conflict can be held until the end of hostilities appear suited to current realities. Further, neither international humanitarian law nor international human rights law provide clear guidance on how states are supposed to deal with individuals whose past behavior or current statements suggest they pose, if released, a clear risk of future dangerousness.

IN COMMERCIAL LIFE

44 Privileging globalization over human rights.

Poor governments are faced with a Hobson's choice between honoring the demands of the International Covenant on Economic, Social and Cultural Rights (ICESCR) or complying with the commands of international economic institutions. If they violate human rights, governments may face complaints or international investigation. By contrast, the World Bank and IMF can cut off aid, reducing the resources that governments have available to fulfill the economic human rights of their people.

45 Extending property rights, especially in the context of "regulatory takings," beyond that generally recognized in national law.

As is suggested by the Metalclad decision under the NAFTA's Chapter Eleven, certain investment agreements may recognize investors' rights to compensation even in contexts that would not lead to compensation under national law, including under the takings clause of the U.S. Constitution. In that decision, the international arbitrators stated that since investors are entitled to prompt,

adequate and effect compensation for any measure that is "tantamount to expropriation," any measure, even if taken for environmental reasons, that diminishes the expected stream of profits of a foreign investor requires compensation. Taken literally, this would require governments to pay foreign investors for any general regulatory measure, even if it is not discriminatory, such as changes in zoning laws.

46 Promoting free trade at the expense of fair trade.

The relative effectiveness of the WTO regime over the ineffectiveness of the weak regimes to enforce labor rights under the ILO has resulted in privileging the former over the latter. Further there are built-in blind spots in the trade regime. WTO lawyers and panelists do not ask whether Mexico's failure to implement a minimum wage scheme is an unfair subsidy and is therefore WTO-illegal; nor do they ask whether Chinese manufacturers who benefit from the non-enforcement of local law are engaged in illegal dumping when they export. On the contrary, trade economists tend to see such matters as the exercise of particular countries' "comparative advantage." Comparable inequalities appear in other legal contexts, as in the relative weakness of the NAFTA's side agreements on labor and the environment.

47 Failing to regulate flags of convenience.

With fish stocks collapsing worldwide, regional fisheries management organizations are struggling to conserve marine species. Yet they have no power to sanction vessels that violate conservation measures, because international law vests exclusive jurisdiction in the flag state that registers a vessel. Flag states with no genuine link to the state itself are known to issue "flags of convenience."

48 Relying on experts unfamiliar with commercial needs to make commercial law.

As is suggested by Paul Stephan's many critiques of multilateral treaty making projects, as in UNCITRAL, international legal processes often permit legal academics or others not directly involved in the business transactions being regulated to control relevant treaty-making

processes, to the detriment of clearly articulated or practicable legal standards. The resulting lowest-denominator-solutions may require those engaged in international transactions to negotiate around existing treaties rather than use them as intended.²

49 Failing to provide foreign investors with stable, predictable rules.

Because of the ad hoc nature of investor-state arbitration resulting from some 2500 investment agreements (see item 18 above), the unclear nature of many of the underlying legal rights (e.g., the right to "fair and equitable treatment"), and the absence of an appellate mechanism to reconcile disparate decisions, foreign investors are left at risk and uncertain with respect to whether they will be protected when they invest abroad. These flaws, along with others within the emerging foreign investment regime, make it unclear whether this regime has actually promoted increasing levels of incoming investment to countries that need it the most.

50 Forcing multinational enterprises to deal with unpredictable "soft law."

International lawyers' increasing reliance on various forms of so-called "soft law," such as non-binding codes for the conduct of multinational enterprises, fails the most basic test for a viable rule of law. As recognized by H.L.A. Hart, the rule of law presupposes a clear statement of primary and secondary rules for the benefit of those trying to follow it. As a result, multilateral enterprises, such as Nestlé in the wake of the consumer and NGO boycott of its products, was compelled to sign a "contract" with NGOs containing guidelines on the marketing of breast milk products blessed by the WHO, merely to be able to conduct business with some predictability.

² See, e.g., Robert E. Scott and Clayton P. Gillette, "The Political Economy of International Sales Law," 25 Int'l Rev. L. & Econ. 446 (2005).

