

Anne-Marie Slaughter

Everyday global governance

With the creation of a new International Criminal Court and the sudden proliferation of international, regional, and hybrid criminal tribunals for Rwanda, the former Yugoslavia, Kosovo, East Timor, and – potentially – Cambodia and Sierra Leone, it is possible to discern the outlines of a new global system of criminal justice. However flawed, these are real achievements – almost unimaginable even a decade ago. But the tribunals and courts are only a part – and arguably only a small part – of the institutions of global governance that already exist, laying an inconspicuous foundation for future progress and reform.

I define global governance here as the collective capacity to identify and solve

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problems on a global scale. We must develop this capacity without risking what Immanuel Kant called the “soulless despotism” of world government. And we must develop it in a way that is genuinely global. That does not necessarily mean including all states in the world, but rather all the government institutions that regulate the lives of the world’s peoples.

In this essay I will describe the quiet emergence of an informal global system of governance comprising networks of regulators around the world – regulators responsible for everything from environmental protection to competition policy to securities regulation. Similar networks are beginning to link judges and even legislators in different countries.

Transgovernmental networks are not one-shot deals. While the activities of a given network may focus on a particular issue, such as environmental enforcement, they occur within a broader framework of sometimes formal, sometimes informal, interaction. And as they come together over time, the parties develop relationships that allow them in turn to understand the context in which their counterparts operate.

It is hardly surprising that such relationships help defuse major conflicts. They enable regulators to keep an issue

from becoming the source of conflict in another issue-area. Indeed, cooperation on one issue can be a means of keeping the lines of communication open when states are unable to agree on anything else, as with China and the United States's cooperation on environmental protection. Equally important is the transgovernmental network's role as a transmitter or 'bearer' of reputation – as a forum in which behavior has consequences, for good or ill. In other words, members of a government network are likely to try to meet agreed standards of professional behavior and substantive commitments to one another because they know everyone else is watching.

In the context of the larger drama of global justice – capturing terrorists, trying war criminals, creating new international courts – the activities I will describe may seem humdrum indeed. But justice requires order, and order requires at least a measure of regulation – or, in the global sphere, some form of governance, short of the Leviathan that Kant feared creating. The emergent global system of government networks performs precisely this function. Within this system, national and supranational officials must cooperate, coordinate, and regulate, but without coercive power.

Each member of a transgovernmental network – a national securities regulator, say, or a utilities commissioner – may exercise a measure of coercive power at home. But within the network, regulators cannot compel one another to take certain measures, either by vote or the binding force of international law. They do not have the power to conclude treaties or to establish by themselves new international rules. In effect, the new transgovernmental networks exercise a kind of "soft power" (as Joseph Nye calls it); what power they have flows from an ability to convince others that they want

what you want, rather than from an ability to compel them to forego what they want by using threats or rewards.¹

The new networks thus coexist alongside a much more traditional world order, structured by both the threat and use of 'hard' power. In that old world order, states still jealously guard their sovereignty and undertake commitments to one another with considerable caution. Still, it is possible to glimpse the outlines of a very different kind of world order in the growing system of government networks. In this system, political power will remain primarily in the hands of national government officials, but will be supplemented by a select group of supranational institutions far more effective than those we know today. And in it, global justice could become more than a dream.

The logs of embassies around the world are perhaps the best evidence for the growing importance of the networks of national regulators. U.S. embassies, for instance, host far more officials from various regulatory agencies than from the State Department, and foreign affairs budgets for regulatory agencies across the board have increased dramatically, even as the State Department's budget has shrunk. Regulators, at both the ministerial and bureaucratic level, are becoming a new generation of diplomats.

Where are these networks of national regulators? In some familiar places, and in some surprising ones. Briefly I will outline the genesis of several such networks.

Transgovernmental regulatory networks have long existed within the tradi-

1 Robert O. Keohane and Joseph S. Nye, Jr., "Power and Interdependence in the Information Age," *Foreign Affairs* 77 (5) (September/October 1998): 81, 86.

tional framework of international organizations. Robert Keohane and Joseph Nye have described these networks of government ministers as emblematic of the “‘club model’ of international institutions. [C]abinet ministers or the equivalent, working in the same issue-area, initially from a relatively small number of relatively rich countries, got together to make rules. Trade ministers dominated GATT; finance ministers ran the IMF; defense and foreign ministers met at NATO; central bankers at the Bank for International Settlements (BIS).”²

More recently, transgovernmental networks have arisen through executive agreement. Between 1990 and 2000, the U.S. president and the president of the European Union (EU) Commission concluded a series of agreements to foster increased cooperation, including the Transatlantic Declaration of 1990, the New Transatlantic Agenda of 1995 (with a joint U.S.-EU action plan attached), and the Transatlantic Economic Partnership agreement of 1998. Each of these agreements spurred ad hoc meetings between lower-level officials, as well as among business enterprises and environmental and consumer activist groups, on issues of common concern. Many of these networks of lower-level officials were emerging anyway, for functional reasons, but they undoubtedly received a boost from agreements at the top.

Or consider the web of transgovernmental networks among financial offi-

cial that has emerged as the pragmatic answer to calls for a new financial architecture for the twenty-first century in the wake of the Russian and East Asian financial crises of 1997 and 1998. Notwithstanding a wide range of proposals from academics and policymakers – including one for a global central bank – what actually emerged was a set of financial reform proposals from the G-22 that were subsequently endorsed by the G-7 (now the G-8). The United States pushed for the formation of the G-22 in 1997 to create a transgovernmental network of officials from both developed and developing countries, largely to counter the Eurocentric bias of the G-7, the Basle Committee, and the IMF’s Interim Committee, which is itself a group of finance ministers.

Even more striking are the transgovernmental networks that have emerged more or less spontaneously. These have been formed in two main ways. Some networks have institutionalized themselves as transgovernmental regulatory organizations. The Basle Committee on Banking Supervision was created in 1974 and is now composed of the representatives of thirteen central banks that regulate the world’s largest banking markets. The International Organization of Securities Commissioners (IOSCO) emerged in 1984, followed in the 1990s by the creation of the International Association of Insurance Supervisors and of a network of all three of these organizations and other national and international officials responsible for financial stability around the world called the Financial Stability Forum. These networks do not fit the model of an organization held either by international lawyers or political scientists – they are not composed of states and constituted by treaty; they do not have a legal personality; they have no headquarters or stationery.

2 Robert O. Keohane and Joseph S. Nye, Jr., “The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy,” paper prepared for the American Political Science Convention, Washington, D.C., 31 August – 3 September 2000, available at <<http://www.ksg.harvard.edu/cbg/trade/keohane.htm>> (last visited 28 March 2000), p. 3.

The second category of spontaneous transgovernmental networks has grown out of agreements between the domestic regulatory agencies of different nations. The last few decades have witnessed the emergence of a vast network of such agreements effectively institutionalizing channels of regulatory cooperation between specific countries. These agreements embrace principles that can be implemented by the regulators themselves; they do not need further approval from national legislators. Widespread use of Memoranda of Understanding and of even less formal initiatives has sped the growth of transgovernmental interaction exponentially, in contrast to the lethargic pace at which traditional treaty negotiations proceed.

The most highly developed and innovative transgovernmental regulatory system is of course the EU. Legal scholar Renaud Dehousse describes a basic paradox in EU governance: "increased uniformity is certainly needed; [but] greater centralization is politically inconceivable, and probably undesirable."³ The response is "regulation by networks" – networks of national officials.⁴ The question now confronting a growing number of legal scholars and political theorists is how decision-making by these networks fits with varying national models of European democracy.

The EU itself sits within a broader network of regulatory networks among Organization for Economic Cooperation and Development (OECD) countries. The primary function of the OECD has been to convene government officials in specific issue-areas for the purpose of addressing a common problem and making

recommendations or promulgating a model code for its solution. But more broadly, OECD officials see all OECD member states – including all EU members, the United States, Japan, South Korea, and Mexico – as participating in a "multilayered regulatory system"⁵ whose infrastructure is government networks.

It is worth bearing in mind that the governing committees of the 'global' organizations I have just described are mainly comprised of ministers from the most powerful economies. The Basle Committee, for example, is explicitly limited to the central bankers of the world's most powerful economies, although it has outreach efforts to the bankers of many developing countries. The all-important Technical Committee of IOSCO looks much more like the OECD than the world. And the G-7 remains more powerful than the G-22.

I have just described a world of concentric circles of government networks, most dense among the world's most highly developed countries. The relative density of these circles reflects the relative willingness of national governments to delegate government functions beyond their borders to networks of national officials rather than to a supranational bureaucracy. Thus the EU is pioneering a way for states to govern themselves collectively without giving up their identity as separate and still largely sovereign states. The challenge, however, is to make such networks truly global.

So what exactly do the new transgovernmental networks do?

Above all, their members talk a lot. So much, in fact, that it is easy and com-

3 Renaud Dehousse, "Regulation by networks in the European Community: The role of European agencies," *Journal of European Public Policy* 4 (2) (June 1997): 259.

4 Ibid.

5 Scott H. Jacobs, "Regulatory Co-Operation for an Interdependent World: Issues for Government," in *Organisation for Economic Co-operation and Development, Regulatory Co-operation for an Interdependent World* (Paris: OECD, 1994), 18.

mon to write them off as mere talking shops. But talk is the first prerequisite of information exchange; in the process, trust is fostered, along with an awareness of a common enterprise. This experience reinforces norms of professionalism that in turn strengthen the socializing functions of these networks, through which regulatory agencies reproduce themselves in other countries.

Indeed, what sometimes starts as haphazard communication may lead officials to recognize the need and opportunity for coordination, across the range of domestic governmental concerns – from enforcement efforts to codes of best practices. For example, U.S., Canadian, and Mexican environmental officials now coordinate the release of information to the public as one means of enhancing effective environmental enforcement. Similarly, U.S. and Mexican environmental officials now coordinate training sessions for the private sector.

As transnational corporations have become genuinely global in scope, international cooperation has become crucial for the effective enforcement of domestic laws. In the case of drug enforcement efforts at the U.S.-Mexican border, cooperation allows the U.S. Drug Enforcement Agency, with its large budget, many agents, sophisticated equipment, and extensive files, to compensate for Mexico's limited resources to battle drug production and trafficking. Such cooperation involves more than coordination, but something less than policy harmonization. Cooperation to combat international crime takes place both through formal organized bodies, such as Interpol (International Criminal Police Organization) and Europol, and on a more regional and bilateral level through national agencies. For instance, Interpol has a general secretariat that provides information exchange through an auto-

mated search facility operating twenty-four hours a day in four languages; issues international wanted notices; distributes international publications and updates; convenes international conferences and symposia on policing matters; offers forensic services; and makes specialists available for support of local police efforts. With a membership of 179 police agencies from different countries, making it the second largest international organization after the UN, it is striking that Interpol was not founded by a treaty and does not belong within any other international political body.

Other agencies around the world cooperate on enforcement activities within the framework both of informal understandings and more formal mutual recognition agreements, such as that concluded between the United States and Europe specifically concerning enforcement cooperation in a wide range of subject areas in 1998. Regardless of the surrounding framework, participants in enforcement networks call on the following tools: strategic priority-setting and -targeting, cooperative compliance promotion, cooperative compliance monitoring, cooperation on specific enforcement cases, sharing experiences to build enforcement capacity, including consultation on laws and policies, and training and technical assistance.

Groups of ministers and regulators are increasingly involved in the collection of information about regulatory activities from countries around the world. They process and distill this information, frequently in the form of codes of best practices. The Basle Committee of Central Bankers, the International Organization of Securities Commissioners, and financial regulators around the world have all issued codes of best practices, on everything from how to regulate the securities market to how to prevent

money laundering. The impact of these codes points to a complex interaction between the private and public sectors.

For lack of other criteria by which to judge a country's economic or regulatory performance, private-sector investors may increasingly rely on codes of best practices developed by public-sector officials. Regulators of states are generally the initial source of such codes, processed through officials meeting within networks and then disseminated to become the standard by which national regulators will judge domestic and transnational activities within their competence.

Best practices can also be disseminated in a less formal manner. Since 1997, the Public Utility Research Center at the University of Florida has hosted eleven International Training Programs on Utility Regulation and Strategy in cooperation with the World Bank. The program brings together senior public utility regulators to address the "principal areas of concern" faced by utility regulators worldwide. Reports from the organizers, such as from British water regulators and Russian electricity regulators, attest to the nature of the international best practice transfer that prevails.

Information exchange, as discussed above, may be an end in itself or a means to future cooperation. And – whether an ulterior motive or an unintended effect – the replication of a particular form of regulation, or of a particular type of regulatory institution, might accompany it. The U.S. Securities and Exchange Commission, for instance, enters into bilateral agreements with securities regulators all over the world with the explicit aim of replicating itself and its relationship with Congress.

Treatises on globalization speak glibly of 'convergence,' as if impersonal forces were at work homogenizing national cultures and institutions. A closer exam-

ination of the world of transgovernmental cooperation reveals a much more deliberate and checkered pattern of replication and resistance. To understand replication fully we must delve further into the motives driving it. Often a domestic agency seeking to replicate its style or structure is trying to strengthen its autonomy on its home turf, or to enhance the effectiveness of its regulatory activity by creating a more uniform transgovernmental system. But as legal scholar and political scientist Kal Raustiala documents, replication, regardless of motives, is a clear and measurable effect of transgovernmental interaction.⁶

In addition to providing part of the critical infrastructure for any hope of global justice, transgovernmental networks teach us several lessons that are vital for future efforts to achieve anything on a global scale.

First is the value of soft power, not as a substitute but as a complement, for hard power. Second is the value and strength of pluralism, based on a concept of legitimate difference. Third is the need for active cooperation and collaboration, an ethos of positive engagement rather than of respectful noninterference. Finally, governance networks are a direct outgrowth of the disaggregation of the state – that is, of the ability of different political institutions to interact with their national and supranational counterparts on a quasi-autonomous basis. That disaggregation permits the creation of a wide range of new forms of governance, including relationships between national and international courts, that will be the backbone of a genuinely global justice system.

6 Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law," *Virginia Journal of International Law* 43 (2002).

Overall, the most important lesson that transgovernmental networks can teach is the appreciation of the simple fact of their existence and the preconditions for it. Networks of national regulators can only exist as a form of global governance if the purported architects of world order – whether scholars, policy-makers, pundits, or the members of innumerable task forces and commissions – think of the state not as a unitary entity but as an aggregate of its component official parts.

Individuals in domestic and transnational society do not interact with states; they interact with specific branches of government. Thus, in imagining the projection of domestic institutions onto a global screen, we should be thinking less of replicating domestic institutions – courts, regulatory agencies, even legislatures – at the global level, than of connecting the national institutions we already have in global networks. These government institutions exercise an indispensable measure of coercive power, combined with an as yet unmatched measure of public legitimacy.

Further, once we have got used to thinking about domestic government institutions linking up with their foreign counterparts, it is also easier to start thinking about how they might link up with supranational equivalents.

Here the judicial possibilities are by far the richest. As has been demonstrated in the EU, it is possible for a supranational court such as the European Court of Justice to forge a dynamic and highly effective relationship with different national courts for the interpretation and application of EU law. The International Criminal Tribunals for Rwanda and the former Yugoslavia also have structured relationships with national courts built into their charters; they can ask a national court to cede jurisdiction over a

particular defendant. In the International Criminal Court (ICC) the relationship will work the other way: national courts will be primarily responsible for trying perpetrators of war crimes, genocide, and crimes against humanity, while the ICC will serve as a backup if a national court proved unable or unwilling to do the job.

At the same time, national courts are networking with one another in a variety of interesting ways. National constitutional judges are exchanging ideas and decisions on thorny issues that they all must face, such as the constitutionality of the death penalty, the balance between privacy and liberty, the limits of free speech, and the enforceability and scope of economic, social, and cultural rights. Ordinary courts involved in transnational litigation are openly communicating with one another to try to figure out where and how a particular case should be tried. And bankruptcy judges are negotiating mini-treaties to ensure the orderly management of defunct multinational corporations' finances. All of these developments open new institutional horizons for the possibility of global justice.

The new world order has thus far promoted a healthy amount of transgovernmental comity. "Neither a matter of obligation on the one hand, nor of mere courtesy and good will on the other ... comity," in the words of the U.S. Supreme Court in 1895, "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation ..."⁷ 'Recognition' is generally a passive affair, signaling deference to another nation's action, as regulators participating in government networks must often choose

7 *Hilton v Guyot*, 159 US 113, 163 – 164 (1895).

between passive recognition and active application of their national law extra-territorially.

The EU competition authorities and the U.S. antitrust regulators, however, have developed a more robust notion of 'positive comity,' a principle of affirmative cooperation between government agencies of different nations. As a principle of governance for transgovernmental regulatory cooperation, positive comity requires regulatory agencies to substitute consultation and active assistance for the seesaw of noninterference and unilateral action. More generally, as a principle of global governance, positive comity mandates a move from deference to dialogue, from 'I-thinking' to 'we-thinking.'

This shift hardly means the end of conflict – far from it. Regulators in regu-

lar interaction with each other will bump heads just as they would in a domestic system, as demonstrated by the regulators of the different states of the United States. And just because action is requested does not mean it is achieved. But the point of departure in a world of positive comity is a presumption of assistance rather than distance, of transgovernmental cooperation based on coordinated national action. In a world in which crime depends on global networks as much as corporations do, that is a positive step. Global justice is a noble but sadly distant ideal. Global disorder is more evident than order. But in the everyday rhythms of regulators around the world, new forms of global governance are being born.