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# International Organizations and Human Rights – the Need for Substance

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I would like to talk today about the relationship between international organizations (IOs) and human rights. I will discuss these issues as an academic, not as a human rights advocate. By “international organization,” I mean an organization established by a treaty or similar international instrument, and possessing its own international legal personality. There are hundreds of IOs varying in size and in the range of their functions, from huge IOs like the UN and the World Bank to bilateral commissions on boundary waters and the European University Institute. In my view this is a large and complex subject, especially given the variety of IOs; and I approach it with humility. Today I would like to stress the difficulty, and explain why I am uncomfortable with simple formal answers to the questions involved.

At the outset, I would emphasize the distinction between “human rights” as moral principles and “human rights” as norms of international law. Some human rights norms may have universal moral validity, and some requirements have been embodied by states in positive international law, as provisions of treaties or as norms of customary international law (or general principles). Some of the moral principles are so widely recognized that their content is directly stated as positive legal rules. But positive human rights rules may vary in their content from the moral principles that motivate them, for several reasons. Sometimes states disagree about the proper content of a moral principle, and they adopt a legal rule that embodies a compromise among their understandings. Sometimes a human rights provision guarantees a structure or a procedure that serves instrumentally to protect a moral norm, rather than being intrinsically valued. Sometimes the content of a human rights norm is modified to operate more effectively within the institutional realities of the system where it is enforced.

Thus, even if one believes that all positive human rights norms reflect universal moral values, their articulation as rules of positive law will also reflect the political choices of states in drafting the rules, and the institutional context that the drafters contemplated.

As further complication, the international regime for protecting human rights, taken together, exhibits fragmentation. There are multiple systems, multiple overlapping treaties within systems, and multiple institutions and actors offering interpretations of the content of human rights provisions within these treaties.

For these and other reasons, it is a fallacy to make the easy inference that because human rights are meant to be universal, therefore they should all directly bind all public authorities, including all IOs. This is the main problem I want to address today.

(A)

IOs, like many other wielders of power, are double-edged from the human rights perspective. Some IOs provide assistance to the protection of human rights, but they may also adversely affect human rights. IOs support human rights tribunals, such as regional courts and treaty bodies, that help to clarify the legal obligations resulting from the positive law of human rights.

The international system of human rights protection generally places primary reliance on states to ensure the protection of human rights. States implement their human rights obligations through their constitutions, criminal laws, civil codes, courts, administrative agencies, and public services. International organizations facilitate that protection in a variety of ways – by providing guidance, assistance, monitoring, and back-up. The United Nations was responsible for drafting and adopting the Universal Declaration of Human Rights and the two Covenants that translated it into binding treaty obligations, as well as various other human rights treaties. The Security Council has – on occasion – responded to severe human rights violations by imposing economic sanctions, authorizing criminal jurisdiction, and even approving armed intervention. As is well known, the coercive actions of the Security Council may pose risks to human rights as well as defend them.

In the regional human rights systems, multipurpose international organizations – the Council of Europe, the Organization of American States, the African Union – also perform human rights functions, and support specialized independent bodies, such as regional human rights courts and commissions, that are dedicated to human rights promotion and protection. At the global level, the so-called “core” human rights treaties create independent treaty bodies, supported by the United Nations, to monitor compliance with states’ obligations. These independent courts and treaty bodies are not considered international organizations, but they are connected with international organizations, and I will say a bit about them as well.

Of course, not all international organizations have explicit human rights functions. Some international organizations serve goals closely allied to the goals of human rights treaties, but without employing a human rights framework. Some international organizations serve narrow economic purposes at best loosely correlated with human rights. International organizations can also be employed in conscious opposition to human rights.

The three regions I mentioned – Europe, the Americas, and Africa – have empowered their human rights courts to issue judgments that are binding on the states that accept their jurisdiction. In contrast, the decisions of global treaty bodies are not strictly binding. Their interpretations have been characterized as “authoritative” or entitled to great weight, but they are not as determinative even within their own regime as the interpretations of a regional court.

Moreover, the global treaty bodies issue a variety of texts with differing levels of formality and intended legal significance. Some involve carefully considered findings of violation of a treaty, and some involve merely recommended good practices. To illustrate from the treaty body I know best, the Human Rights Committee (*of course I do not speak for them*), the findings of violation of the Covenant on Civil and Political Rights in “Views” on communications are meant as legal rulings. Statements in “General Comments” about what state parties “must” do, or what the Covenant obliges states parties to do, are meant as descriptions of the states’ hard law obligations under the treaty. However, remedial recommendations in Views on communications are more ambiguous; statements in General Comments about what a state party “should” do may be ambiguous, depending on context; other statements in General Comments are clearly recommendations of good practices – in other words, intentionally “soft law” – and the recommendations in Concluding Observations on state reports are usually just recommendations. The findings of Views and the more definite passages in General Comments provide the HRC’s clearest effort to guide states authoritatively on the meaning of the Covenant.

Even human rights treaty bodies, which wield the pen and not the sword, can have negative impacts on human rights. The example I would like to mention here concerns their crucial function of interpretation. A treaty body may interpret its treaty as obliging a state to perform an action that violates another human right – especially a right that is protected by a different treaty. Specialized treaty bodies sometimes pay insufficient attention to the rights of others that come into conflict with the rights within their specialized mandate. This may happen, for instance, when antidiscrimination policies come into conflict with freedom of expression or fair trial rights. The result may be explicit contradiction between two treaty bodies, asserting inconsistent obligations on states. Of course, when two treaty bodies disagree, it may not be clear which treaty body has misjudged the rights. In my opinion, contradictions of this kind should not be settled by forcing agreement or by automatically prioritizing one interpretation. The two bodies each need to deliberate on the merits of the opposing interpretation, by means that may include actual dialogue between the bodies.

(B)

As a general matter, do IOs have obligations under international human rights law? Surely they do, but the question of which obligations they have is highly debated. Some authors make very broad assertions that IOs are legally bound by all the human rights obligations of all their members, and others argue that IOs have only narrow human rights obligations, perhaps limited to *jus cogens* norms. I would like to suggest some caution about sweeping assertions on this point, both theoretically and practically.

First, from a moral perspective, one could say that IOs must have some human rights obligations, as everyone else does. States have human rights obligations, individuals have human rights obligations, and corporations have human rights obligations – so should IOs. But these are not all the same obligations. Some authors are quick to analogize IOs to states and assume that IOs have the same obligations as states.

But that does not follow so easily. IOs in general have different powers than states and different capabilities, and as a result their obligations may be different. One might think that IOs should have at least the human rights obligations that private individuals have to their fellows, but even that assertion may require a few exceptions; public authorities may have the privilege to perform some acts that private individuals should not.

Also it is essential to bear in mind the different kinds of obligations that human rights discourse contemplates – negative obligations and positive obligations, obligations to respect and to protect and to fulfill. IOs might have some of these obligations with regard to a particular right, but not others. Let me add that those labels – positive and negative; respect/protect/fulfill – are useful reminders of the range of content, but they don't divide obligations cleanly into distinct pigeonholes. In my view, this complexity requires much greater care in figuring out which IOs have which human rights obligations, either morally or legally.

From the legal perspective, we begin with the fact that international organizations are rarely formal parties to human rights treaties, which usually address states and are drafted with the characteristics of states in mind. Nonetheless, I will discuss three formal arguments that have been offered as strategies to extend the human rights treaty obligations of states to international organizations. First, some argue that IOs are directly bound in their activities by the Human rights obligations of their member states. Second, others argue that IOs have obligations under general international law not to be involved in Human rights violations by their member states. Third, some argue that IOs are indirectly bound, because their member states have obligations under Human rights treaties to control the IO's actions and ensure their compliance with the treaty. These arguments do not convince me that all IOs have human rights obligations that are as extensive as their proponents suggest. Finally, I will turn to a subset of IOs, those with their own human rights mandates, where the argument for extending Human rights obligations has more of a contextual anchor.

(1)

So, first, it is sometimes argued that IOs are agents of their members, and therefore must be bound by the obligations of their members. I see several problems in this argument. First, it is far too general – it seems to apply not only to human rights obligations, but to all obligations under international law. To say that IOs are bound by whatever treaty obligations a member undertakes would impose insurmountable complexity on IOs, and would enable states to evade their duties to the IO by adopting inconsistent obligations elsewhere. Indeed, if IOs were bound by all human rights treaty obligations that bind any member, then small groups of states could create idiosyncratic human rights obligations that redirect the activity of IOs. This problem is not hypothetical, given the rise of subregional human rights treaties, some of which are designed to launch alternative frameworks in competition with global human rights law. Remember that we are talking about positive law Human rights obligations, not universal moral principles.

Second, it should be emphasized that agents of a state are not actually bound by all of the state's human rights obligations. Human rights treaties require states to provide courts and

schools and election procedures, but they do not require each state agent or agency to provide these things. As a general matter, IOs should not be bound to provide courts and schools and elections, either.

The example of elections illustrates another problem with the argument— some human rights treaties (though not the European Convention on Human Rights) describe in broad terms the human right to political participation and active and passive voting rights. Individuals usually have no voting rights vis-à-vis IOs [*though the European Union is a counterexample*], and the fact that the member states are all parties to the ICCPR has not been thought to override that structure. In other words, some human rights obligations are not suitable for direct application to IOs.

On the other hand, some human rights obligations are entirely suitable for direct application to IOs: IOs should be as strictly forbidden to torture people as states, individuals, and corporations are. But that does not mean that all the obligations under the Convention against Torture apply directly to IOs. For example, the Convention against Torture requires states to exercise criminal jurisdiction against people who commit torture. Most IOs have no criminal jurisdiction to exercise.

Now, it could be said that IOs' obligation not to torture arises from a *jus cogens* norm of customary international law, rather than from treaties. And it has been argued that all *jus cogens* norms are binding on IOs. I would suggest a little caution before deducing consequences from even that proposition – it is one thing to say that a *jus cogens* norm binds an IO, and something more to say that it binds an IO as if it were a state. I agree that IOs should be legally obliged, as their employees are, not to engage in torture or genocide, but it is possible that other *jus cogens* norms could exist that apply differently to IOs, or to some IOs. If, as the Inter-American Court of Human Rights believes, states have a *jus cogens* obligation to prevent private actors from engaging in direct or indirect discrimination on a broad array of grounds, I do not think that all IOs would have that same obligation.

The question also arises whether IOs have the obligation to use their budgets to contribute to the expense of fulfilling economic and social rights in states with fewer resources. Such spending may indeed be part of the mission assigned by states to particular IOs, but does the principle follow generally? If all IOs are bound by the human rights obligations of their members, then every IO, no matter how specialized its mandate, may be obligated to divert funds for that purpose as needed. Two different rationales might be thought to support that conclusion: either that the IO is bound by the human rights treaty obligations of the less resourced members; or that the IO is bound by a human rights treaty obligation of its wealthier members to contribute to the realization of rights in less resourced states that are parties to the same human rights treaty.

The first rationale is similar to an argument I have already criticized: saying that every IO a less developed state joins has an obligation to contribute to economic and social rights for its people is just a monetized version of the claim that the IO has the obligation to provide courts

and schools and elections.

The second rationale is somewhat different, because it focuses on human rights treaty obligations of states to contribute affirmatively to the realization of economic and social rights in other states that have fewer resources. The Committee on ESC Rights, which monitors the ICESCR, has long interpreted that treaty as imposing such obligations on states parties for the benefit of people in other states parties with less resources. And it is a familiar argument of distributive justice that when many dutyholders owe a generalized obligation of assistance to many rightholders, the situation may produce a duty to establish an institution that can coordinate the provision of assistance. In the international context, it is true that IOs can function as coordination mechanisms that make feasible the allocation of specific positive obligations to wealthier states to assist less wealthy states in realizing the human rights of their people. But even if states have an obligation to create such mechanisms, that does not imply that each existing IO – the Universal Postal Union, or the EUI, or the European Space Agency -- is legally obliged to operate as such a mechanism.

In light of these problems, I do not think that the first strategy, equating human rights obligations of IOs with the obligations of their member states, is persuasive as a general matter.

(2)

Let me turn then more briefly to the second strategy, relying on general international law notions of international legal responsibility to constrain IOs from involvement in human rights violations by their member states. I will borrow for this purpose the International Law Commission's phrasing of the rules in its 2011 Articles on the Responsibility of International Organizations. I should mention that those 2011 Articles were not the most successful product of the ILC, and that they have been criticized as too much based in abstract reasoning without sufficient support in actual practice. The result is that the legal argument for binding IOs may be even weaker than the ILC Articles make them appear.

The Articles identify four ways that an IO may become responsible in connection with a wrongful act committed by a state (*articles 14-17 respectively*). An IO may aid or assist the state in committing a wrongful act; it may direct and control the state in committing a wrongful act; it may coerce the state to commit a wrongful act; or it may circumvent one of its own obligations by binding or authorizing a state to commit the act. The key point here is that for three of these four types of involvement, the Articles make the IO responsible only if the act in question would be wrongful if committed by the IO itself – in other words, only if the IO is already bound by the rule that the state is violating. Thus, arguing on the basis of these three articles cannot demonstrate that the IO is bound by the human rights obligation – it presupposes that the IO is bound.

The exception is article 16, coercion. If the IO coerces the state to violate one of the state's own obligations, then the IO is internationally responsible, even if it would not have been wrongful for the IO to commit the act itself. The commentary explains that even a binding

decision by an IO amounts to coercion only in “exceptional circumstances,” when the IO’s conduct “forces the will of the coerced State ..., giving it no effective choice but to comply.” Thus the Articles give only very limited support for extending to an IO a human rights obligation of a member state that is not already binding on the IO itself.

(3)

The third strategy is to bind IOs indirectly, by imposing on their member states the obligation to cause the IO to act consistently with the states’ own human rights obligations. Some regional court judgments and treaty body texts endorse versions of this argument. The regional courts and treaty bodies usually do not have jurisdiction over the international organizations themselves, which are non-parties to the treaties.<sup>1</sup> But they can try to reach the IOs through the participation of their member states in making decisions or establishing policies.

General Comments of several treaty bodies (but not the HRC) have included this argument in various phrasings. Sometimes the General Comments use the ambiguous verb “should” rather than “must,” and sometimes they describe the goal as making the IO take the rights into account, rather than as making the IO act consistently with the right. (I am not aware of a good explanation for these variations.) It might be added that when a treaty body urges a state to act consistently with the treaty when participating in an IO, it appears to mean act consistently with the treaty as interpreted by the treaty body.

The position of the Committee on ESC Rights reflects that Committee’s strong interpretation of states’ extraterritorial duties of international cooperation and assistance in support of economic and social rights worldwide, individually and through international organizations. This position resembles the unofficial Maastricht Guidelines on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, which the Committee sometimes cites. The Maastricht Guidelines insist that “A State that ... participate[s] in an international organisation must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State” (*art. 15*), and then defines the extraterritorial obligations of states expansively.

The ILC’s 2011 Articles include an arguably relevant provision, article 61, referring to a state’s circumvention of its own obligation by causing an IO to commit an act that would be a violation if the state had performed it directly. There is no requirement in this provision that the obligation should also be binding on the IO. If the requirement that a state be intentionally using the IO to circumvent its own obligation is taken seriously, then the scope of this provision would not support a broad obligation of states to align the policies of the IO with a human rights treaty; but the Article does not provide a clear enough definition of circumvention to supply predictable limits.

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<sup>1</sup> [but the EU is a party to the *Convention on the Rights of Persons with Disabilities*, which permits “regional integration organizations” to join; and may become party to the *ECHR*]



Let me distinguish the preceding strategy from a narrower one. Treaty bodies commonly hold that states have treaty obligations to protect people in their territory from certain kinds of abuses committed by private actors. Often those obligations should apply as well to similar abuses committed within the territory by employees of international organizations. To the extent that organizational immunity undermines the incentives of the employees to comply with local law, the best plan of prevention may include steps to influence the international organization's policies. This argument aims at compliance by international organizations with a subset of human rights obligations that also restrict private actors. It does not broadly attribute to international organizations the obligations of states.

In my opinion, the notion that member states must use their control over an IO to ensure that it complies with all their human rights obligations goes much too far, for reasons already mentioned. States have too many positive and negative obligations under human rights treaties for all of them to be appropriately imposed on all of the IOs they join, and these arguments supply no criteria for evaluating which obligations are appropriate.

(C)

If the diversity of IOs and human rights obligations resists simple formulation, then perhaps a more segmented approach would be helpful. Not all IOs have human rights mandates, but some, perhaps many, do. IOs with human rights mandates can also pose threats to human rights, either in carrying out their other, non-human-rights functions, or when they are protecting certain human rights, but in a manner that puts other rights at risk. Several of the motivating examples for the literature on human rights obligations of IOs concern the operations of the United Nations – peacekeeping operations, Security Council sanctions, and staff relations. The UN is not a party to the major global human rights treaties, but the UN Charter itself gives the UN human rights responsibilities. The UN's human rights obligations do not have to be deduced solely from the obligations of the member states, but rather the treaties interact with the Charter. They supply inputs into the interpretation of the UN's Charter obligations, taken together with other provisions of the Charter and other rules of international law.

One aspect of this interpretative enterprise would involve evaluation of what human rights obligations are suitable for direct application to the UN as an international organization and what human rights obligations presuppose that the dutyholder is a state. It is also possible that state-like obligations apply to the UN organs locally and temporarily in specific situations where they are performing state-like functions of territorial administration.

The treaty being interpreted in this inquiry is the UN Charter, with attention to the human rights treaties as background. A treaty body's own interpretation of its treaty has only mediated influence here, first because that interpretation is not ipso facto binding as to the meaning of its treaty, and second because the treaty body is not authoritative as an interpreter of the Charter. The treaty body's understanding may be highly persuasive on the merits, but that will depend on its reasoning and on the reaction of others.

The United Nations is a special case for a variety of reasons, including its generative role in the human rights system as a whole. But I believe similar arguments can be made for other international organizations with human rights mandates, with consequences that will depend in part on the scopes of their mandates and on other provisions of their charters. I do not mean to say that an IO with a selective human rights mandate has no other human rights obligations – no IO is free to torture or enslave, among other obligations. Still, the obligations that should be attributed to them will be affected by their functions and their powers. I do not think it is possible to escape from substance and context when making these judgments, in the current condition of international law.

I would include, for example, the World Bank as an IO with a human rights mandate. I agree that its role in development needs to be understood against the background of the modern reconciliation between human rights and development. Nonetheless, the details of the World Bank's human rights obligations need to be worked out through dialogue and deliberation, just as the disagreements between the HRC and the CERD Committee do, respecting the independence of each body. The Committee on ESC Rights does not have final decisional authority on the World Bank's lending policies, through its monitoring of member states.

(D)

I realize that I am coming to the end of my time without having said much affirmatively about the human rights obligations of IOs that have no human rights mandate at all. Let me repeat that there must be such obligations, direct and indirect, and that at least some of them reflect sources such as *jus cogens* and the duties that apply to other non-state actors. I have suggested that easy generalizations may not provide persuasive answers, and that formal arguments may not avoid the need to consider the substance of the rights at issue.

All of this is in recognition of the importance of the issues. I find them difficult, and if the answers are going to succeed, they need to persuade people who are not human rights specialists. I think the subject needs more work, and I look forward to the perspectives of others.