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# HUMAN RIGHTS AND THE LEGITIMACY OF GLOBAL GOVERNANCE INSTITUTIONS

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# HUMAN RIGHTS AND THE LEGITIMACY OF GLOBAL GOVERNANCE INSTITUTIONS[1]

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**RESUMEN**

En un reciente artículo Allan Buchanan y Robert Keohane defienden la tesis de que una de las condiciones necesarias para la legitimidad de instituciones de gobernanza global como la WTO o el FMI consiste en que respeten los derechos humanos básicos. Estoy plenamente de acuerdo en que fijar el umbral mínimo de aceptabilidad moral por debajo de esto sería completamente irrazonable. Pero, desgraciadamente, la tesis de que las instituciones de gobernanza global tienen obligaciones de derechos humanos es controvertida. De hecho, estas instituciones hacen grandes esfuerzos para rebatirla. Su postura oficial encuentra un fuerte apoyo normativo en la concepción de los derechos humanos centrada en el estado que domina tanto los debates normativos como la práctica actual de los derechos humanos. En este artículo desafío algunos de los supuestos normativos que subyacen a la concepción estado-céntrica para defender una concepción pluralista que asigna obligaciones de derechos humanos no solamente a los estados sino también a actores no estatales como las instituciones de gobernanza global. Después de analizar brevemente algunas de las propuestas actualmente en discusión sobre cómo anclar la obligación legal de respetar los derechos humanos en

1. I presented an earlier version of this essay at a conference on "Global Justice and the Authority of International Institutions" at Pompeu Fabra University in Barcelona in June 2012 and at a workshop on "Human Rights and Democracy in a Globalized World" at Torcuato di Tella University in Buenos Aires in November 2012.

estas instituciones, defenderé la plausibilidad de tales propuestas contra la objeción de que su implementación es incompatible con el actual sistema de estados y que requeriría, por consiguiente, la creación de un estado global.

***Palabras clave:*** Derechos humanos, Instituciones de gobernanza global, Concepción de los derechos humanos centrada en el estado, Diligencia debida, Legitimidad.

**ABSTRACT**

In a recent article Allan Buchanan and Robert Keohane defend the view that one of the necessary conditions for the legitimacy of global governance institutions such as the WTO and the IMF is that they respect basic human rights. I certainly agree that setting the minimal threshold of moral acceptability any lower would be entirely unreasonable. But, unfortunately, the view that global governance institutions have human rights obligations is far from uncontroversial. These institutions themselves go to great lengths to deny such a claim. Their official stance finds strong normative support in the state-centric conception of human rights that dominates both normative debates about human rights and current human rights practice. In this article I challenge some of the normative assumptions behind the state-centric conception in order to defend a pluralist conception that ascribes human rights obligations not only to states but also to non-state actors such as global governance institutions. After briefly analyzing some of the proposals currently under discussion about how to legally entrench the obligation to respect human rights in those institutions, I will defend the feasibility of those proposals against the objection that their implementation is incompatible with the current state-system and thus it would require the creation of a world state.

***Key words:*** Global governance institutions, Human rights, Human rights due diligence, Legitimacy, State-centric conception of human rights



In a recent article on the legitimacy of global governance institutions Allan Buchanan and Robert Keohane (Buchanan and Keohane 2006) defend the view that one of the necessary conditions for the legitimacy of global governance institutions such as the WTO and the IMF is that they respect basic human rights[2]. According to their view, "global governance institutions … are legitimate only if they do not persist in violations of the least controversial human rights… For many global governance institutions, it is proper to expect that they should *respect* human rights, but not that they should play a major role in *promoting* human rights." (p. 420)[3] They admit that this is quite a minimal moral requirement and that often what is at issue in disputes over the legitimacy of these institutions is whether they are worthy of support if they do not actively promote human rights[4]. But they argue that the environment of moral disagreement and uncertainty in which current global institutions have to operate "limits the demands

2. By "global governance institutions" they understand "a diversity of multilateral entities, including the WTO, the IMF, various environmental institutions, such as the climate change regime built around the Kyoto Protocol, judges' and regulators' networks, the UN Security Council, and the new International Criminal Court (ICC)." (p. 106) This is also how I use the expression in what follows, but my analysis will focus on the International Financial Institutions in particular (the WTO, the IMF and the World Bank).

3. The other two substantive criteria that they identify as necessary conditions for the legitimacy of global governance institutions are *comparative benefit* (i.e. these institutions must be able to provide benefits that cannot otherwise be obtained) and *institutional integrity* (i.e. their practices and procedures should not predictably undermine the pursuit of the very goals in terms of which these institutions justify their existence). These two conditions are relatively straightforward and I won't focus on them here.

4. On the distinction between the obligation to respect and the obligation to promote human rights see note 23 below. For an analysis of the differences between these two obligations in the context of proposals for integrating human rights enforcement with international trade law in particular see Green 2005 and Pauwelyn 2005.

we can reasonably place on them to respect or protect particular human rights." (ibid.) Nonetheless, they hasten to add that accepting this minimal requirement does not rule out the possibility that higher standards may be appropriate in the future: "The standard of legitimacy should require minimal moral acceptability, but should also accommodate and even encourage the possibility of developing more determinate and demanding requirements of justice for at least some of these institutions, as a principled basis for an institutional division of labor regarding justice emerges." (p. 421-22)

Given their awareness of "the exceptional moral disagreement and uncertainty" that surrounds debates on global justice, it is not surprising that they hesitate to make the quite demanding obligation to promote human rights a necessary condition for the legitimacy of global institutions. However, what is surprising is that they don't see any need to justify the appropriateness of the less demanding standard that they propose. In presenting their proposal they acknowledge that there is disagreement about "what the list of human rights includes and how the content of particular rights is to be filled out." (p. 420) Indeed, it is precisely because of this disagreement that the minimal standard they propose only requires respect for the most "basic" rights, since they are also "the least controversial." (ibid.) But they never pause to consider whether their claim that global governance institutions have an obligation to respect human rights could itself be controversial, even against the backdrop of the current environment of moral disagreement and uncertainty. Instead, they seem to regard this claim as so obvious that it does not require an explicit defense or justification.[5]

5. Perhaps more surprising is that they do not address the question of implementation at all. They do not identify any mechanisms that global governance institutions would need to put in place in order to discharge their obligation to respect human rights. Given the complexity of the activities of these institutions, it would be hardly possible to know whether any of their specific policies, regulations or projects is likely to have a negative impact on human rights in the absence of any specific control mechanisms. I address the issue of implementation in section 2 below.



I find this tacit optimism refreshing and encouraging. I certainly agree that setting the minimal threshold of moral acceptability any lower would be entirely unreasonable. But, unfortunately, the view that global governance institutions such as the WTO, the IMF or the World Bank have human rights obligations is far from uncontroversial. These institutions themselves go to great lengths to deny such a claim[6]. Their official stance is that engagement with human rights is beyond the scope of their legal mandate and, as a consequence, they in fact do not possess any legal tools or institutional mechanisms to discharge any human rights obligations. Even more relevant to our context, their official stance finds strong normative support in the state-centric conception of human rights that dominates both normative debates about human rights and current human rights practice. Thus, a successful defense of the view that global governance institutions have human rights obligations is not simply a matter of reminding those institutions that they need to live up to generally accepted normative standards. Instead, defending such a view is first and foremost a matter of challenging some of the generally accepted standards themselves –standards that lend normative support to the status quo. In what follows I challenge some of the normative assumptions behind the state-centric conception of human rights in order to defend a pluralist conception that ascribes human rights obligations not only to states but also to non-state actors such as global governance institutions (I). After briefly analyzing some of the proposals currently under discussion about how to legally entrench the obligation to respect human rights in those institutions (II),

6. For an overview and critical assessment of the main reasons advanced by the IMF and the World Bank for disclaiming human rights responsibility see Darrow 2003, chap. 4.

I will defend the feasibility of those proposals against the objection that their implementation is incompatible with the current state-system and thus it would require the creation of a world state (III).

## I. Challenging the state-centric conception of human rights

For all the disagreement that surrounds normative debates on human rights, there is one claim about human rights that finds almost universal acceptance, namely, the claim that human rights are norms that regulate the behavior of states towards their own people.[7] This state-centric view of human rights is so ingrained in current practice that most scholars simply mention it as a trivial assertion before they move on to defend or criticize other supposedly more substantive or contested claims about human rights. Indeed, any search for a detailed explanation of this claim, let alone an explicit justification of some of its salient implications, would be in vain. The state-centric definition of human rights is rarely used, at least not in academic debates, to explicitly defend the view that states lack human rights obligations towards foreigners (and may therefore treat them in any way they like) or the

7. This wording is from Beitz 2009, 13. For additional examples see Cohen 2004: 195; Donnelly 2003: 34ff.; Martin 2005: 45ff.; Nickel 2007: 7; Rawls 1999: 79-80; Raz 2010: 328; Talbott 2005: 3; Talbott 2010: 10. Most authors interpret this claim as including foreign nationals who are under the state's jurisdiction. For example Donnelly explains: "states have international human rights obligations only to *their own* nationals (and foreign nationals in their territory or otherwise subject to their jurisdiction or control)." (Donnelly 2003: 34) Unsurprisingly, an exception to the state-centric trend can be found among authors interested in the extraterritorial human rights obligations of states or the human rights obligations of non-state actors. For some examples see Alston 2005, Buchanan 2011, Clapham 2006, Cottier, Pauwelyn and Bürgi 2005, Darrow 2003, Herstermeyer 2007, Marceau 2002, Salomon 2007, Skogly 2001, Zagel 2005.



view that non-state actors such as global governance institutions lack any obligations whatsoever to respect even the most basic human rights of those subject to their decisions. However, precisely because the state-centric view enjoys the status of a truism, the plausibility of these implications remains all the more effectively shielded from critical scrutiny and the practice that reflects such implications remains unchallenged. Thus, in order to question the plausibility of such implications we must take a closer look at the normative credentials of the state-centric view.

In his recent book *The Idea of Human Rights* (2009), Charles Beitz offers a paradigmatic statement of the state-centric conception of human rights that he defends. As he explains, "the central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community or those acting as its agents." (p. 13) Consequently, human rights practice "consists of *a set of norms for the regulation of the conduct of governments* and *a range of actions open to various agents for which a government's failure to abide by these norms supplies reasons*." (p. 44; my italics) Thus, according to the state-centric conception, there is a *conceptual connection between human rights norms and states*, since the function of the former is to regulate the behavior of the latter. This in turn entails that states are "the bearers of the primary responsibilities to respect and protect human rights" (p. 108)[8]. The interna-

8. The claim that states are the bearers of the *primary responsibility to respect* human rights seems highly implausible. Certainly, a clear and legitimate purpose is served when the primary responsibility to *protect* against human rights violations perpetrated by third parties is ascribed to some specific agent. Yet the same does not follow for the ascription of the responsibility to *respect* human rights. If the primary responsibility to *respect* human rights is ascribed only to a specific agent then this seems

tional community bears some responsibility in the protection of human rights, but, in contradistinction to states, this responsibility is secondary (or residual[9]), and this is in two senses. First, the international community's responsibility is secondary in that it is activated only if and when states are unwilling or unable to protect the rights of their own citizens. Second, the responsibility of the international community is secondary in that it is not supposed to replace the protective function of states. Through the different institutions that act as its agents the international community may provide (temporary) assistance to states, but none of these institutions are supposed to directly provide the kinds of protections, entitlements and services that states provide to their own citizens. In sum, the protective function of the international community is exhausted in holding states accountable for the treatment of their own citizens. This function is exercised by a variety of international and transnational agents and through a variety of measures. These range from monitoring states' compliance with international standards of human rights to offering economic and other incentives for compliance (e.g. conditional aid or preferential treatment in economic relations) to using coercive measures such as threats of economic or diplomatic sanctions and, in cases of gross human rights violations, even military intervention.

There are several striking features in the state-centric allocation of human rights obligations. First, this allocation leaves a clear gap with respect to any responsibility that states might have in their treatment of citizens in and from other states either through direct action (e.g. through their foreign policy) or indirectly through their actions as participants in

to merely serve the (illegitimate) purpose of releasing all other agents from their obligations to respect human rights, thereby potentially licensing human rights violations. See footnote 14 below.

9. See Goodin 2003, 76f.



global governance institutions. It suggests that states must protect the human rights of their own citizens and residents, but are off the hook with regard to their treatment of those who are outside their jurisdiction.

This is a direct implication of the state-centric account of the distinctive aim of human rights practice. According to Beitz, "human rights are the constitutive norms of a global practice whose aim is to protect individuals against threats to their most important interests *arising from the acts and omissions of their governments*" (Beitz 2009: 197, my italics)[10]. This account suggests that if the exact same threats originate from the governments of other states or from non-state actors then they are not a matter of human rights and thus not a matter of concern to the international community. However, no indication is given for the sort of normative reasons that could possibly justify this restriction from the perspective of those participating in current human rights practice.

There are several reasons to question the plausibility of this account of the overall aim of human rights practice. First, the claim that the distinctive function of human rights is to regulate the behavior of states towards its own people seems implausible if for no other reason than the fact that this is already the distinctive function of the constitutional rights of citizens that are embedded in each state's legal system. If human rights served the exact same function as domestic constitutional rights then they would be redundant.[11]

10. Beitz 2009, 197; my italics. This claim seems to rule out any extraterritorial human rights obligations of states. On this issue see Gibney and Skogly (2010); also Maastricht Principles on Extraterritorial Obligations of States (2011).

11. This claim has no direct bearing on the question of whether human rights and domestic constitutional rights coincide or differ in content. Instead it is simply a claim about their different functions. I follow here the practical conception of human rights, according to which in order to understand what international human rights are we need to understand their

Moreover, the constitutional rights of many modern states are the result of a long-standing practice of regulating the power of government. Citizens engaged in this practice well before anything like contemporary human rights practice emerged in history. Thus, if we are to understand the *point* of contemporary human rights practice, it seems clear that we need to bring some other element into the picture beyond states and their citizens.[12]

Second, the most salient distinction between citizens' civil rights and human rights is that the former are territorial whereas the latter are supposed to be universal. In light of this, it is hard to see why a territorial understanding of human rights norms should be essential to the very concept of human rights. In fact, limiting the obligation of states to respect the human rights of those persons within their jurisdiction runs counter the principle of universal respect for the human rights of all persons to which all signatories of the UN Charter are bound.[13]

Another striking feature of the state-centric allocation of human rights obligations is its silence regarding any obligations on the part of non-state actors (ranging from individuals[14] to multinational corporations[15] or international financial institutions like the WTO, IMF or the World Bank). If states bear primary responsibility in respecting and protecting the human rights of their own citizens and the secondary responsibility of the international community is exhausted in holding states accountable for the treatment of their own citizens, then it seems that non-state actors do not have any human rights obligations and, consequently, that the international community has no responsibility to hold such actors accountable for the impact that their actions or decisions have on the protection of human rights. However, under the current conditions of globalization, it is becoming increasingly clear that decisions on global economic regulations by non-state actors such as the WTO, the IMF or the World Bank can have a tremendous impact on the protection of human rights worldwide. Now, if this is the case, isn't it implausible to claim that these institutions simply lack any human rights obligations whatsoever? Even worse, how can the international community hold states accountable for the consequences of global regulations that are (either partly or wholly) outside their control? Shouldn't the international community seek to hold those actors accountable whose decisions and actions hamper the protection of human rights, regardless of whether they happen to be states? If what is hampering the protection of human rights of citizens within a country, let's assume,

specific function "in a normative practice to be grasped *sui generis*." (Beitz 2009: 12) However, different conceptions of their function may lead to different views of their proper scope. Rawls, for example, defends the view that human rights are a proper subset of the constitutional rights of citizens in liberal democracies (see Rawls 1999: 81). But his notoriously narrow conception of the scope of human rights follows from his narrow conception of the specific function of human rights and not from his endorsement of the practical approach per se. For my own account of the specific function of international human rights see Lafont 2012: 20-29.

12. I offer an in-depth analysis and criticism of Beitz's account of the specific function of contemporary human rights practice in Lafont 2012: 15-20.

13. In light of this principle, Beitz's claim that *states* have the primary responsibility to *respect* the human rights of their own citizens seems incorrect as well. According to the UN Charter and all human rights documents, the responsibility to *respect* the human rights of all persons is universal and thus binds everyone and not only states.

14. The possibility of prosecuting guerrilla leaders for human rights violations such as ethnic cleansing or genocide irrespective of any recognition of official status as agents of a state is just one example of the disconnect between the state-centric conception of human rights and current human rights practice. On this issue see Clapham 2006: 271-316.

15. The possibility of prosecuting multinational corporations in US Courts for violations of international human rights law under the Alien Tort Claims Act is another example of current human rights practice that seems hard to account for within the limits of the state-centric conception. For a good overview of the existing international regimes that cover the human rights obligations of corporations see Clapham 2006: 195-270. See also Alston 2005.

is some policy imposed by the IMF, some project funded by the World Bank, or some trade regulation of the WTO, then it seems that the only appropriate action to be taken by members of the international community would be to change those policies or regulations. The usual interventions that seek to regulate the behavior of states won't solve the problem at all.

Beitz defends his state-centric interpretation of the practical approach to human rights by claiming that the "two-level model of human rights" he proposes should be descriptively accurate of current practice and thus should not be changed unless the practice itself changes. This may seem to undermine any action-guiding function of the model vis-à-vis current practice and thus to open his practical conception to the objection of giving too much authority to the status quo by taking an existing practice as given – an objection that Beitz himself would like to avoid.[16] However, from the standpoint of descriptive accuracy, the exclusion of non-state actors from Beitz's allocation of human rights obligations does indeed reflect actual practice, since so far neither the WTO, nor the IMF nor the World Bank recognize any human rights obligations as part of their legal mandate. But his account of the secondary responsibility of the international community seems clearly weaker than what is currently recognized. According to Beitz, the actual or anticipated violation of human rights provides merely *pro tanto* reasons for outside agents to act, but this falls short of strict obligations to protect from violations by third parties of the same kind that states have towards their own citizens. As Beitz puts it, "a human rights failure in one society will not *require* action by outside agents." (p. 117)

Unfortunately, this is true for many violations of human rights. Nevertheless, in signing the 2005 World Summit document[17], all members of the UN General Assembly have explicitly recognized their responsibility to protect all persons from violations committed by third parties (notably, states) in a manner that is analogous to the responsibility to protect that states have with regard to their own citizens – even though the scope is so far limited to just four specific cases of international criminal law (genocide, war crimes, ethnic cleansing and crimes against humanity). I cannot address here the interesting issue of how far the responsibility to protect human rights of the international community may need to be expanded in light of the UN's official doctrine of the indivisibility and interdependence of all human rights (civil, political, social, economic, etc.)[18] But setting aside the *secondary* responsibility of the international community for now, let's focus on the aforementioned difficulties of the state-centered conception's exclusive allocation of *primary* responsibility for human rights protections to states.[19]

As already hinted at, the claim that states hold the primary responsibility for protecting the interests and rights of their own citizens seems to lead to the view that each state must give priority to their own citizens over citizens of other countries. Now, this would not be a problem per se if states were also simply minding their own business. But it does generate obvious problems once representatives of states participate in global governance institutions such as the WTO, the IMF or the World Bank. For in that context they are accountable to their own citizens for giving priority to their interests and rights while also making decisions about global regulations to which the citizens of other countries are equally subjected but to whom they are in no way accountable. This generates a very special kind of accountability deficit. The problem here is not simply that whenever citizens have no effective means of control over their representatives the latter can easily avoid

16. See Beitz 2009: 105.
17. See http://www.un.org/summit2005/documents.html.
18. I explore this issue in Lafont 2012: 39-43.
19. In what follows I draw from Lafont 2010.

accountability. The specific problem here is that they are not even supposed to be accountable to all those who are subject to their decisions in the first place. Powerful countries can impose global economic regulations that may have devastating consequences for many of those subjected to them and this occurs not so much because the delegates of these countries in global governance institutions avoid accountability but rather precisely because they make their decisions in the name of such accountability. Since delegates are supposed to be accountable to the citizens of their own countries regardless of whether the decision-making is at the domestic or transnational level, they often see themselves as under an obligation to protect and promote the interests and rights of their own citizens and not those of all who are subject to their decisions. Thus, strengthening the accountability of state delegates *to their own citizens* can only exacerbate the problem rather than solve it.

However, rejecting the state-centric allocation of human rights obligations in favor of a pluralist allocation that ascribes primary responsibility to respect human rights not only to states but also to non-state actors such as global governance institutions may seem incompatible with maintaining the current division of political space into states. If state representatives participating in global governance institutions are not supposed to give priority to the interests and rights of their own citizens but are instead supposed to equally protect the rights of all persons, then in what sense are they still representatives of a specific state and its citizens? Doesn't the cosmopolitan ideal of equal concern for all persons inevitably lead to a cosmopolitan ideal of a world state in which political officials would represent all world citizens and therefore be accountable to them all? If so, a pluralistic conception of human rights obligations cannot be meaningfully implemented before the current state system has been dismantled and institutions with global political authority are created in its place. The purported connection between the cosmopolitan moral ideal and such a political consequence is open to the



usual *modus ponens* / *modus tollens* argumentative alternative: whereas some authors offer the connection as a reason in support of the need for a world state,[20] others use this purported connection against cosmopolitan claims to global justice on the grounds that such claims appear to ignore the normative significance of states in our current geopolitical situation. Nagel's article "The Problem of Global Justice" offers a clear example of the latter strategy. He sharply characterizes the structural difficulty at issue here as follows:

> "I believe that the newer forms of international governance share with the old a markedly indirect relation to individual citizens and this is morally significant. All these networks bring together representatives not of individuals, but of state functions and institutions. Those institutions are *responsible to their own citizens* and may have a significant role to play in the support of social justice for those citizens. But a global or regional network does not have a similar responsibility of social justice *for the combined citizenry of all the states involved*, a responsibility that *if it existed would have to be exercised collectively by the representatives of the member states*" (Nagel 2005: 139-140).[21]

Nagel's counterfactual claim highlights the normative dilemma: either states and their representatives have the pri-

20. For an example of this line of argument see Schmalz-Bruns 2007.

21. Nagel's argument in this passage tackles two questions at once. One is the question of "inclusion", that is, the question of whether global institutions have responsibilities towards all citizens throughout the world even though their members only have primary responsibilities towards the citizens of the countries they represent. The other is the question of the "content" of those responsibilities, that is, the question of whether or not the responsibilities of global institutions towards citizens throughout the world are as strong as the responsibilities of social justice that national institutions have towards their own citizens. The focus of this paper is on the first question only, but in section III I briefly indicate how the proposal I defend bears on some of Nagel's claims regarding the second question.

mary responsibility of protecting the interests and rights of their own citizens or a world state would be needed whose representatives would have the collective responsibility of protecting the interests and rights of all world citizens equally. On such a formulation of the issue it is simply not possible to continue to ascribe primary responsibilities to states while simultaneously expecting inclusive accountability of global institutions whose members represent states rather than world citizens. The problem here is not the usual discrepancy between normative expectations and the realities of power politics, but a direct conflict between normative expectations themselves. The objection is not empirical, but conceptual.

Now, since global governance institutions are currently organized by state membership, in order to argue that a pluralist conception of human rights obligations can be meaningfully implemented under current conditions, it is crucial to show that the state system itself does not need to be dismantled in order to render these institutions accountable to all those subject to their decisions. Indeed, as I will try to show in what follows, the pluralist conception of human rights obligations that I defend is perfectly compatible with allowing members of these institutions, as representatives of states, to remain accountable to the citizens of their own countries for the special responsibilities they have towards them.

In order to make this case, it is important to pay attention to the ambiguity within the notion of "protecting" human rights. If, following what has become standard terminology, we distinguish between the duties to *respect*, *protect* and *fulfill* human rights,[22] it is clear that speaking of the obligation to "protect" human rights can have different meanings. These different

22. This particular terminology was introduced by Eide 1987. The conceptualization of the multiple obligations structure applicable to all human rights expressed in this tripartite division was originally proposed with a different wording by Shue 1980.



meanings depend on whether obligations are interpreted in the narrower sense of (merely) *respecting* human rights or in the more expansive sense of (actively) *fulfilling* human rights. Whereas in the second, more expansive sense it is indeed very plausible to claim that states bear the primary responsibility in providing the protections, entitlements and services necessary for *fulfilling* (i.e., promoting and enforcing) the human rights of their citizens, it does not seem plausible at all to claim that states are the only actors that bear primary responsibility in *respecting* the human rights of their citizens. The obligation to respect human rights in the sense of not contributing to their violation seems to be a universal obligation and thus one that binds states just as much as non-state actors.

In this context, it is important to resist assimilating the distinction between these two senses of "protecting" human rights to the distinction between "acts" and "omissions", according to which the "fulfillment" of human rights requires positive action whereas "respect" requires only *self-restraint*. There may be contexts in which this distinction is useful but our present context is not one of them. Inaction may be an appropriate way to discharge the obligation of respecting human rights in some contexts by some non-state actors, but surely not by all of them. A multinational corporation may decide to cease involvement in a country with a high record of human rights violations in order to discharge its obligation of respecting human rights. However, this is not a live option for international financial institutions that are in charge of regulating different sectors of the global economic order (such as the WTO, the IMF and the World Bank). So long as their mission is to implement global economic regulations and policies, they have no option but to *actively* choose among alternatives and implement some regulation or other. As far as these institutions are concerned, the relevant difference between promoting and respecting human rights is not the difference between action and omission. Instead the relevant difference is that between either *taking the protection and enforcement*

*of human rights worldwide as their own goal* (i.e., becoming a human rights organization) or *accepting the obligation to ensure that the regulations they implement in the pursuit of their respective goals* (e.g., trade liberalization, financial stability, economic growth, etc.) *do not hamper the protection of human rights worldwide*. In light of this distinction, it seems clear that the question of whether or not these institutions ought to make the goal of actively promoting and enforcing human rights part of their legal mandate or whether this function ought to be left to states and human rights institutions, has no bearing on the quite different question of whether they are bound by international human rights law to *respect* human rights by making sure that the regulations they implement (in pursuit of their own specific goals) do not have a negative impact on the enjoyment of human rights worldwide. As Buchanan and Keohane rightly point out, whereas the former question is complex and its appropriate answer is therefore highly contested, the positive answer to the latter question hardly seems questionable from a normative point of view.

## II. Entrenching the obligation to respect human rights in global governance institutions: The Due Diligence Standard

However, the abstract obligation to respect human rights remains vague and ineffective as long as it is not translated into clearly specified and legally entrenched responsibilities.[23] As a first step in that direction, global governance institutions such as the WTO, the IMF or the World Bank could make their obligation to *respect* human rights effective by legally entrenching a duty to exercise human rights *due diligence* so as to ensure that their policies and regulations do not hamper the

23. I offer a more detailed analysis of the different institutional possibilities in Lafont 2012: 36-43.



protection of human rights. The due diligence standard has recently been recognized by the UN Human Rights Council as appropriate standard by transnational corporations to use in order to discharge their responsibility to respect human rights. In June 2008, the Council explicitly reaffirmed the responsibility of transnational corporations to respect human rights and requested the Special Representative of the Secretary-General on this issue, John Ruggie, to further elaborate the scope and content of that responsibility.[24] In his Report to the Council in April of 2009 this responsibility is interpreted as requiring "an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts."[25] This process should include four elements: adopting a human rights policy, undertaking – and acting upon – a human rights impact assessment, integrating the human rights policy throughout the company, across all functions, and tracking human rights performance by monitoring and auditing processes to ensure continuous improvement. These four ways of operationalizing the standard of due diligence within the activities of MNCs also seem to be easily applicable within international financial institutions. In order to become aware of and prevent adverse human rights effects, these institutions could engage in human rights impact assessments of their proposed policies and regulations before implementing them.[26] In

24. See paragraph 4(b) of Resolution 8/7, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf).

25. Report available at http://www2.ohchr.org/english/issues/globalization/business/docs/A.HRC.8.5.pdf.)

26. The Office of the High Commisioner for Human Rights in all of its reports on the impact of trade law rules on human rights stresses the need to carry out human rights impact assessments of trade agreements (e.g. OHCHR, *Human Rights, Trade and Investment, Report of the High Commissioner,* E/CN.4/Sub.2/2003/9, at para 12; OHCHR, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights Report of the Commissioner,*E/CN.4/Sub.2/2001/13, *at para 61; OHCHR, Globalisation and its Impact on the Full Enjoyment of Human*

addition, as a way to mitigate or redress any adverse effects, institutional mechanisms for processing human rights complaints could be established. For example, the WTO's Dispute Settlement institutions could review human rights complaints from member countries with the help of the different legal tools at their disposal (these tools could range from the relatively minor concession of exceptions to specific countries to the more consequential demand that the trade regulation at issue be revised by the crafters to avoid conflict with international human rights law)[27]. The IMF and the World Bank could implement similar measures. In fact, some features of the Bank's current structure and practices provide an institutional basis for entrenching obligations to respect human rights. In contrast with the WTO, the Bank already engages in "social impact analyses" which are designed to calibrate the social impacts of its own policies and programs at the country level as they affect "the well-being or welfare of different stakeholder groups, with particular focus on the poor and vulnerable."[28] Although the track record for implementing this type of analy-

*Rights* (E/CN.4/2002/54), *at para 46 and 49;* OHCHR, *Liberalisation of Trade and Services and Human Rights,* E/CN.4/Sub.2/2002/9, at para *12, 67 and 72)*. This view is not limited to the specific context of trade. In its 2004 report on the principle of participation and its application in the context of globalization, the OHCHR recommends that "states and other actors including the private sector and international institutions" undertake "human rights impact assessments of globalization's rules, policies and projects", which "should be public and participatory and focused in particular on disadvantaged and vulnerable groups." For in depth analyses of the possibilities and difficulties in institutionalizing human rights impact assessments of trade agreements in the WTO see Walker 2009 and Zagel 2007; also, Harrison and Goller 2008 and Braunschweig et al 2010. For an analogous analysis regarding the IMF and the World Bank see Darrow 2003.

27. For a good overview of the main proposals currently under discussion by legal scholars see Herstermeyer 2007: 209-29.

28. World Bank, 'A User's Guide to Poverty and Social Impact Analysis' (draft prepared by the Poverty Reduction Group and Social Development Department), 19 April 2002, at 2.



sis within most of the programs supported by the Bank is poor, to say the least, the mere existence of such a mechanism points to the feasibility of incorporating human rights-based impact assessments within the Bank's operational policies[29]. These assessments would be sensitive to the wider range of factors in different countries that are relevant for human rights protections and could thus provide guidance as to whether and how a specific operation or program can proceed. This same sort of practice is also present in the IMF, although to a lesser extent. The Inspection Panel that was established in 1993 is yet another institution within the Bank that holds some promise for further entrenching human rights obligations. The mandate of the panel is to review complaints from any group of private persons alleging that they are suffering or expect to suffer adverse material effects as a consequence of the Bank's failure to follow its own operational policies and procedures. Although no explicit reference is made to human rights in characterizing its legal mandate the Panel is the closest thing one can find within current global financial institutions to an institutionalized mechanism for individuals to complain about human rights violations. In our context the main normative significance of the Panel's establishment is that it constitutes the first formal acknowledgement that international organizations are accountable not just to their member states, but also to individuals or private parties who are affected by their operations, independently of the relationship that either the organization or the private actor has to a member state.[30]

29. An interesting development in this direction within the World Bank Group are the "Performance Standards" adopted by the IFC which do make explicit reference to several UN Conventions on human rights. The full document can be found at the IFC's official website www.ifc.org

30. See Bradlow 1994: 554; Woods and Narlikar 2001: 576-77. For additional examples of accountability mechanisms adopted by other international institutions in response to the increased demands for 'good governance' see Reinisch 2005: 50f.

## III. Pluralist Human Rights Obligations in a World of States

This brings us back to the aforementioned question of whether it is conceptually sound to expect members of global institutions who are representatives of states to be accountable to all those subject to their decisions while at the same time remaining accountable to the citizens of their own countries for their special responsibilities they have towards them. It seems to me that, once the question is framed in terms of the human rights obligations of global institutions, the conceptual dilemma loses much of its plausibility. Acknowledging the legal obligation to respect human rights in this strict sense falls well short of the obligation that states have to actively *protect* and *promote* the rights of their own citizens. To the extent that this is so, it is not obvious why legally entrenching the standard of human rights due diligence within global governance institutions should be incompatible with maintaining the special obligations that states currently have with respect to their own citizens. It seems perfectly coherent to claim that members of global institutions have, as representatives of states, the special responsibility of advancing the interests and rights of their own citizens as strongly as possible, so long as they *respect the limits imposed by the general obligation they have as agents of global institutions to make sure that their collective decisions do not negatively impact the protection of human rights.* An analogy with national level politics makes this view of plural obligations appear all the more normatively plausible. In a country with a federal political structure representatives of different regions may have a special responsibility to promote the interests and rights of their constituents as strongly as possible. However, as participants in national institutions, they must also respect the limits imposed by their obligation to make sure that their collective decisions do not negatively impact the possibility of protecting the constitutional rights of all citizens.



I do not mean to suggest that the analogy between national and global levels is perfect nor that the institutional solutions established at the national level (such as a supreme court with the final authority to interpret the constitution) would be appropriate or desirable at the global level. One important difference between national and international levels is that all citizens typically have the same constitutional rights at the national level, whereas at the international level the constitutional rights of citizens in some nation-states can be much more extensive and demanding than the human rights which are recognized as being applicable to all world citizens. For this reason, the proposal I am defending here is *compatible* with Nagel's claim that the obligations of social justice among the citizens of a particular nation-state are qualitatively different from and greater than the obligations these compatriots have towards citizens of other countries.[31] However, in ascribing human rights obligations to global institutions, my proposal is directly incompatible with Nagel's additional claim that the actions and decisions of global institutions do not

> raise to the level of collective action needed to trigger demands for justice, even in diluted form. The relation remains essentially one of *bargaining*, *until a leap has been made to the creation of collectively authorized sovereign authority*. On the 'discontinuous' political conception I am defending, international treaties or conventions, such as those that set up the rules of trade... are 'pure' contracts, and nothing guarantees the justice of their results (Nagel 2005: 141, my italics).[32]

31. In pointing out the compatibility of my proposal with Nagel's statist view of social justice my intention is not to endorse this view but rather to show that, even if one endorses it, it provides no convincing reasons for rejecting the ascription of human rights obligations to global institutions.

32. For a forceful criticism of this claim see Cohen and Sabel 2006: 171.

Nagel's interpretation of international institutional regulations as 'pure contracts' that, as such, are exempt from any constraints of justice seems motivated by a false dilemma. As we saw at the beginning, Nagel's argument seems to assume that we have only two conceptual choices: either the representatives of various states have a responsibility to advance the interests and rights of their own citizens or, once "a leap has been made to the creation of collectively authorized sovereign authority", they have the collective responsibility of equally advancing the interests and rights of the combined citizenry of all states involved. The assumption that these are the only possible conceptual choices is quite widespread, not just among statists like Nagel, but even among authors who aim to defend the claim that members of global institutions and regional networks ought to be subject to both global and domestic accountability.

Anne-Marie Slaughter offers an example in "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks". On the one hand she claims, very plausibly in my view, that the members of government networks "first, must be accountable to their domestic constituents for their transgovernmental activities to the same extent that they are accountable for their domestic activities. Second, as participants in structures of global governance, they must have a basic operating code that *takes account of the rights and interests of all peoples*"(Salughter 2005: 39, my italics). However, her account of the latter responsibility seems too strong to avoid the criticism that it leaves no space for a meaningful exercise of the former responsibility. She explains: "Even if *participants in government networks around the world were satisfactorily accountable to their domestic constituents*, what duty do they owe to other nations? It may seem an odd question, but if these networks were in fact primary structures of global governance... then they would have to be subject to global as well as national norms. They would be responsible for *collectively formulating and implementing policies in the global public interest*." (ibid.: 51; my italics) Unfortunately, Slaughter does not explain how these two responsibilities can be simultaneously exercised in the absence of a world state. To the extent that her proposal is based on the same conceptual choices as Nagel's, it opens itself up to the criticism that inclusive accountability is conceptually incompatible with domestic accountability. For it seems that exercising the collective responsibility of equally advancing the interests of all world citizens would leave no space to exercise the responsibility to advance the specific interests of domestic constituents. In the absence of a world state, representatives trying to meet the demands of inclusive accountability would be subject to the reproach that they are systematically neglecting the legitimate expectations of their own constituents.



However, once the question of the proper accountability of global institutions is framed in terms of the obligation of respecting human rights, a way out of Nagel's dilemma opens up. For we can see how the global and domestic responsibilities that representatives of member states have towards different populations *are significantly different* and can thus be discharged simultaneously. To the extent that this is so, it is hard to see how citizens of any country could legitimately expect or demand anything more from their own representatives. Let's take the WTO as an example and, for the sake of the argument, let's accept the (quite widespread) view suggested by Nagel that this institution was merely designed to facilitate bargaining among mutually self-interested parties seeking their own advantage.[33] On such an understanding, WTO

33. In spite of WTO's official commitment to the goals of raising the standard of living and of sustainable development, many critics maintain that the design of the WTO as a voluntary association to facilitate trade among its members makes it simply a marketplace for bargaining in which its members are not trying to collectively agree on the best trade policies for everyone, but rather trying to negotiate the best deal for themselves. In his book *The Bottom Billion*, Collier offers a colorful characterization of

members are not trying to collectively agree upon the best trade policies for the global public interest. Instead, they are trying to negotiate the best deal for themselves. Now, even in such a strategic setting, it is one thing to expect your representatives to advance your interests and rights as strongly as possible and quite another to expect them to advance your interests and rights as strongly as possible at the cost of egregiously (and predictably) violating the basic human rights of others. Since avoiding these costs does not require giving equal weight to the interests of all world citizens beyond a relevant threshold, an obligation to respect human rights that

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the WTO along these lines: "It [the WTO] is not a purposive organization but rather a marketplace. The WTO secretariat is there merely to set up the stalls each day, sweep the floor each evening, and regulate the opening hours. What happens is determined by the bargaining... The present round of trade negotiations was termed a 'development round', but such labels really have no possibility of content in an organization designed for bargaining. You might as well label tomorrow's trading on eBay a 'development round'. Trade negotiations are there to get the best deal for their own country, defined in terms of the least opening of the home market for the maximum opening of others." (pp. 170-71) The legal development of the WTO and its internal institutions suggests that this narrow assessment of its functioning is likely to become less and less accurate over time, but even if one accepts it as an accurate description of how its members and the citizens they represent understand the role of this institution, as I do in the text for the sake of argument, it would still seem entirely unjustified to claim that this institution has no obligation to respect human rights. It should be noted that, in spite of his cynical assessment of the current design of the WTO, Collier does not see any impediment to his ambitious proposal for reform, which involves "adding a transfer role to its bargaining role" with the explicit aim of helping the poorest countries at the expense of the strongest economic interests of the richer ones. As he explains, "by a transfer I mean an *unreciprocrated* reduction in trade barriers against the bottom billion: a gift, not a deal... The secretariat of the WTO should be charged with negotiating such a gift as the first phase of each round." (p. 171) As a former director of the World Bank, Collier takes the Bank's own development as a model for the WTO: "The Bank evolved by adding a transfer role targeted on low-income countries to what was originally a mutual assistance role for richer countries. That is what should happen to the WTO." (ibid.)



is collectively shared by all the members of a global institution seems perfectly compatible with pursuing the strategic aim of advancing the interests of those that one represents as strongly as possible. To achieve this compatibility all one has to do is stay within the (very broad) normative limits established by the prior obligation that one shares with all members of the relevant global institution. To the extent that this plural view of obligations seems both plausible and normatively compelling, it seems that the burden of proof lies on defenders of the state-centric view to provide a normative justification for denying that human rights obligations can and should be legally entrenched in global institutions even in the absence of a world state.

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