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Global Governance and Human Rights

Cristina Lafont

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For Adrian and Axel

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LECTURE I

Can a practical conception of human rights offer any guidance to the human rights project?

I Introduction: universal human rights without universal obligations?

Globalization has brought to the fore a peculiar mismatch between the concept of human rights and the allocation of human rights obligations that has been taken for granted throughout the 20th century. On the one hand, human rights are supposed to be universal. It is often said that human rights are possessed by all human beings simply in virtue of their humanity. The universality inherent in the concept of human rights expresses a cosmopolitan ideal of equal moral concern for all human beings. On the other hand, according to the standard interpretation of human rights obligations, states bear the primary responsibility for protecting the human rights of their own members.¹ This state-centric interpretation of responsibilities for human rights protections leaves a gap with respect to any responsibility that states might have in their treatment of members of other states either through direct action (e.g. through their foreign policy) or indirectly through their actions as participants in global governance institutions. It suggests that states must protect the human rights of their own people, but are off the hook with regard to their treatment of those who are outside their jurisdiction. The current situation of the prisoners at Guantanamo is perhaps an obvious example of how a state can exploit the existence of this gap in the state-centric interpretation of human rights obligations for its own (often questionable) goals. But perhaps a better illustration of the morally unacceptable consequences of the state-centric distribution of responsibilities is former President Clinton's recent apology for pushing for dramatic tariff cuts on U.S. rice imports to Haiti at the expense of Haitian farmers during his time in office.² Testifying to the Senate Foreign Relations Committee on March of 2010 Clinton declared that 'It may have been good for some of my farmers in Arkansas, but it has not worked. It was a

¹ This criterion includes not only the nationals of a state but also any territorially present, jurisdictionally bound persons regardless of their citizenship status, whereas it is supposed to exclude everyone outside a state's jurisdiction. As Donnelly puts it, 'states have international human obligations only to *their own* nationals (and foreign nationals in their territory or otherwise subject to their jurisdiction or control).' (Donnelly 2003, 34)

² For some general information about this issue see <http://www1.american.edu/TED/haitirice.htm>

mistake... I had to live everyday with the consequences of the loss of capacity to produce a rice crop in Haiti to feed those people because of what I did; nobody else.'

As is made crystal clear by this example, in defending the economic interests of farmers in Arkansas, President Clinton took himself to be discharging his obligation to protect and promote the rights of citizens in his own country. But in light of the humanitarian catastrophe following the collapse of rice production in Haiti, he came to recognize his direct responsibility in hampering the human right to food of Haitian citizens. However, according to the current distribution of human rights obligations, it is hard to accommodate Clinton's claim of responsibility which is at the core of his apology. From the perspective of international human rights law, there is no specific legal obligation that Clinton failed to discharge. Since he is not a representative of Haitian citizens, he is not responsible for protecting their interests and rights. From a political perspective, his apology is even more puzzling, since Clinton certainly discharged his obligation to defend the interests and rights of those to whom he is politically accountable, namely, the citizens of his own country. Had he failed to do so in international negotiations, he would have faced adverse political consequences at home. Moreover, he was exercising this obligation within the legal parameters of the principles of free trade established by the WTO – principles which call for the elimination of tariffs on imports and other similar trade barriers. With his apology, Clinton is clearly suggesting that he did something wrong and that he is the one responsible for it, but neither of these claims make sense within the standard state-centric ascription of responsibilities for human rights protections currently recognized by the international community. According to this state-centric interpretation neither the US government nor the WTO have a legal obligation to protect the human rights of Haitian citizens. Officials from Haiti are the only ones responsible for their protection. But wait! If this is the case, then there is actually no gap in the distribution of human rights obligations after all. Shouldn't Haitian officials be held accountable by the international community for their failure to discharge their obligation to protect their citizens' human right to food? Didn't they fail to protect and promote the human rights of their own citizens in allowing such a humanitarian catastrophe to happen? Actually, it is hard to argue that they did. For if they had refused to bring Haiti's trade policies in line with the WTO agreements and accept the recommendations of the IMF and the World Bank then the economic consequences would have been even more devastating for Haitian citi-

zens. It does not take a former head of State like Clinton to see what is wrong with this picture. Precisely the fact that none of the actors involved failed to discharge their respective obligations indicates that, for cases like this one, the current distribution of human rights obligations impairs the effective protection of human rights. For the actors who have the legal obligation to protect the human rights of their citizens – individual states – may not have the effective capacity to do so and the actors who do have the effective capacity – the WTO, IMF or the World Bank – do not have the obligation.

This points to a serious structural incoherence in current human rights practice. By using various UN human rights agencies the international community is supposed to monitor states and to hold them accountable for any failure to protect the human rights of their members. However, at the same time, the international community may also use other UN agencies like the World Bank or the IMF to impose structural adjustment programs without any obligation to check whether these programs undermine the ability of recipient states to protect the most basic human rights of their members.³ The devastating consequences of this structural incoherence make it clear that an alternative to the state-centric ascription of human rights obligations is urgently needed to move the human rights project forward in a globalized world. Can a philosophical conception of human rights be of any help here? I think that the answer is yes, but only after the state-centric assumptions that pervade philosophical debates on human rights are questioned.

II **Traditional vs practical approaches to human rights in philosophical debates**

In current philosophical debates there are two main ways of looking at human rights. One is the so-called traditional or orthodox approach that is mostly concerned with core philosophical questions regarding the nature, grounds and substantive content of the concept of human rights. Following this approach, different

³ See Freeman (2002), p.153. For an in depth analysis on the negative impact of the IMF and the World Bank structural adjustment programs on human rights see Abouhard and Cingranelli (2007).

authors articulate different conceptions of what human rights are on the basis of some independently grounded account of human nature or human freedom.⁴ Despite its philosophical importance a weakness of this approach is that it tends to work in disconnect from actual human rights practice. The main task is to answer abstract questions related to the nature and grounds of human rights, whereas more practically oriented questions such as the proper allocation of human rights obligations tend to be regarded as subsidiary. The so-called political or practical approach starts from the opposite side. It takes contemporary human rights practice as a guide in order to figure out what human rights actually are.⁵ This orientation towards contemporary practice makes the practical approach seem more promising in terms of its ability to offer fruitful answers to the difficult questions that arise within that practice. However, a weakness of this approach is that precisely because it takes current practice as a guide it also tends to take the state-centric view of human rights obligations for granted, as this view pervades current practice. In so doing, it seems unable to offer fruitful guidance to the crucial challenges this practice currently faces. My contention, however, is that there is no intrinsic connection between adopting the practical approach and accepting a state-centric conception of human rights obligations. In what follows I would like to substantiate this claim through a detailed analysis of the core assumptions of the practical approach (III). On the basis of this analysis, I will offer an alternative account of the practical approach that is compatible with a pluralist conception of human rights obligations (IV). Although I cannot provide here a fully articulated account of such a conception, I hope that even the brief sketch I will offer suffices to show that the practical approach to human rights contains valuable resources that are worth exploring.

4 For some examples see Craston (1973), Gewirth (1982), Donnelly (1982), Sen (2004), Griffin (2008), Talbott (2010).

5 The main representatives of the practical approach are J. Rawls, J. Raz, J. Cohen, T. Pogge and C. Beitz. Beitz (2009) offers the most extensive and in depth account of the practical approach available to date. For this reason, I focus mostly on this work.

III The practical approach to human rights

As already mentioned, whereas the traditional approach attempts to ground human rights on some authoritative account of human nature or human freedom, the ‘political’ or ‘practical’ approach takes contemporary human rights practice as being authoritative for an understanding of what human rights are. The guiding thought is that by understanding the aim and purposes of contemporary practice one can grasp the concept of human rights that is actually operative in it. Thus, its main claim against traditional approaches is that the *content* of human rights cannot be determined solely by moral reasoning divorced of any reference to the distinctive functions that human rights play in contemporary practice. The traditional approach may lead to a successful conceptual analysis of some morally significant rights while simultaneously failing to identify the concept of human rights that is actually operative in contemporary human rights practice. If so, discrepancies between the philosophical reconstruction of the traditional approach and the realities of current practice may lead to prescriptions for revision of the latter that seriously undermine its goals by undermining its ability to perform the functions that are necessary to reach them. The failure to properly appreciate the distinctive functions that international human rights are supposed to play in contemporary practice will likely lead to proposals for revisions of that practice that may be at best useless and at worst harmful. In contradistinction, discrepancies between current practice and a critical reconstruction that is based on an accurate understanding of its distinctive functions are likely to issue proposals for revision that aim to improve the practice’s ability to reach its own goals. In fact, one of the main attractions of the practical approach is the promise of fruitful guidance in helping the human rights project to achieve its goals.

In light of this brief characterization of the practical approach, it should be obvious that the identification of the overall aim or purpose that guides contemporary human rights practice is one of its most essential features. By grasping the aims of the practice and understanding its significance we obtain the central interpretative clue that allows us to answer the question of what human rights actually are through the indirect path of figuring out what distinctive functions they play in practice. Given this general methodological strategy characteristic of the practical approach, it is hard to overestimate the impact that the initial theoretical move of identifying the practice’s overall aim has on the answer of what human rights are, as well as on the subsequent answer of what human rights there

are. Since the theoretical strategy consists in determining what human rights are through the indirect method of figuring out what they are *for* within a given practice, nothing can have a deeper impact on the answer to that question than the specific answer given to the prior question of what the overall practice itself is for. As I said before, it is by understanding the *point* of the practice of human rights that we understand what human rights actually are.⁶

This can be easily illustrated by Rawls's *Law of Peoples*, which is generally identified as the first account of human rights that follows the practical rather than the traditional approach. According to Rawls, the main goal of human rights practice is to determine the limits of toleration between peoples. In light of this goal, the distinctive function of human rights is to 'specify limits to a regime's internal autonomy', such that the regime's fulfillment of the rights of its citizens 'is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions or... by military force.' (Rawls 1999, 79-80) It is not coincidental that an interpretation of the function of human rights as (defeasible) triggers for coercive intervention against states⁷ yields a notoriously truncated list of rights that bears little resemblance to the list of rights actually contained in the major human rights conventions and treaties, which have been signed by a majority of states.⁸ Rawls's list of human rights proper is limited to the 'right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural

6 This also gives us a relatively independent standard to judge the plausibility of different accounts of human rights. In examining any proposed conception of human rights, if it turns out that the purported human rights are such that they could not play the key roles that the current practice of human rights requires them to play, we can safely conclude that it is an account of something other than human rights. It may be an account of moral or natural rights, but not of international human rights as they are understood in the contemporary legal and institutional practice.

7 See Tassioulas (2009).

8 The major human rights conventions are the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social, and Cultural Rights*, the *Convention on Eliminating All Forms of Discrimination Against Women*, and the *Genocide Convention*. For a complete collection of these and other human rights documents see Brownlie and Goodwin-Gill (2010).

justice (that is, that similar cases be treated similarly).' (Rawls, p. 65) Rights to political participation, to an education or to full equality and non-discrimination are conspicuously absent. However, as some have argued, if Rawls is right and the distinctive function of human rights is to trigger coercive intervention against states, his list may actually be too expansive. In light of the highly problematic nature of this kind of international action, hardly anything beyond genocide or massive violations of the right to life may safely qualify for inclusion among the list of human rights proper.⁹ I don't want to assess here the plausibility of Rawls's highly revisionary account of human rights. Instead, I just wish to highlight the crucial importance that the initial identification of the goals of contemporary human rights practice has for the resulting account of human rights as well as for the practical guidance that it can be expected to provide.¹⁰

Now, in light of these observations, it seems advisable to keep a crucial distinction in mind. The *methodological* assumption that is constitutive of the practical approach, that an understanding of the political function of human rights in contemporary practice is essential for a proper understanding of what human rights are, must not bleed over into specific *substantive* accounts that different authors may provide of what that political function in particular consists in. Although the distinction may seem straightforward, it is actually quite remarkable that proponents and critics alike seem to take it for granted that adopting the practical approach is tantamount to accepting that the political function of human rights is to specify constraints against state sovereignty.¹¹ There is space for variation in how this function is interpreted by different proponents: human rights can be seen as triggers for external intervention or as benchmarks of a state's political legitimacy. But regardless of the details, everyone seems to agree that commitment to the practical approach implies commitment to a state-centric con-

9 See Buchanan (2010), p. 47.

10 For a criticism of Rawls's narrow understanding of the distinctive function of human rights as triggers for coercive intervention see Nickel (2006). He offers a list of 14 functions that human rights norms play in contemporary practice of which providing standards for coercive intervention is just but one of them (see p. 270).

11 Since Rawls's approach refers to 'peoples' rather than 'states', his own wording is slightly different. His own description of the function of human rights is to 'specify limits to a regime's internal autonomy.' But this terminological difference is insignificant in our context.

ception of human rights, according to which the main function of human rights is to regulate the behavior of states towards their own people. Now, it is true that most defenders of the practical approach happen to endorse a state-centric conception of human rights.¹² Moreover, the state-centric conception finds quite

¹² See Rawls (1999), p. 79-80, Cohen (2004), p. 195, Beitz (2009), p. 13, Raz (2010), p. 328. Raz's views on the issue are unclear. On the one hand, he explicitly affirms the state-centric view when he claims: 'Following Rawls I will take human rights to be rights which set limits to the sovereignty of states', but what he adds to this is interesting. He continues 'in that their actual or anticipated violation is a defeasible reason for taking action against the violator in the international arena.'(ibid.) However, this second feature of human rights norms does not require the violator to be a state. Puzzlingly, Raz recognizes this a little bit later when he says: 'I will continue to treat human rights as being rights against states. But I do not mean that human rights are rights held only against states, or only in the international arena. Human rights can be held against international organizations, and other international agents, and almost always they will also be rights against individuals and other domestic institutions. The claim is only that being rights whose violation is a reason for action against states in the international arena is distinctive of human rights, according to human rights practice.' (p. 329) This sounds reasonable, however, as a consequence it seems to follow that Raz has not given us an appropriate characterization of what human rights are. He first makes the very strong claim that he takes human rights 'to be rights which set limits to the sovereignty of states' and he then withdraws that claim later without giving us an alternative account of what human rights are. As he puts it later, strictly speaking his claim is that 'observation of human rights practice shows that they are taken to be rights which, whatever else they are, set limits to the sovereignty of states, and therefore arguments which determine what they are, are ones which, among other things, establish such limits.' His claim is therefore reduced from a very strong definition of human rights (one that provides both necessary and sufficient conditions) to a pretty weak identification of one of their properties (thus at best a necessary but by no means a sufficient condition for something to qualify as a human right). However, it is far from evident that immunity from international intervention against state sovereignty is actually a necessary condition for something to qualify as a human right (cf. 336). This is the strong claim that leads to a pretty truncated list of human rights proper, especially if intervention is understood in the coercive sense of economic sanctions and military intervention. The situation with Pogge is unclear in a different way. Although he does not explicitly endorse it, his conception of human rights is often included among those representative of the practical approach. In addition, many interpreters ascribe to him a state-centric conception of human rights based on a quote from his book *World Poverty and Human Rights*, where it is claimed that 'human rights are, then moral claims on the organizations of one's society' (p. 64). However, interpreting Pogge's institutional view of human rights as endorsing a state-centric conception is clearly incorrect in light of his other claims, such as that 'human rights are moral claims on any coercively imposed institutional order, national or international.' (Pogge 2000) or, even more clearly, that 'human rights are moral claims on global institutions' (Pogge 1998). Thus, it seems more charitable to take the following definition of human rights from his book as his considered view, namely, 'a human right to X entails the demand that, insofar as reasonably possible, any coercive social institutions be so designed that all human beings affected by them have secure access to X.' (p. 46; my emphasis).

widespread support outside the confines of the practical approach as well.¹³ Still, it should be clear that there is no internal connection between endorsing the *methodological* claim that is constitutive of the practical approach and accepting the *substantive* claim about the distinctive function of human rights that characterizes the state-centric conception.

Insisting on this distinction is important for the prospects of defending the practical approach against critics who hold, rightly in my view, that the state-centric claim is false.¹⁴ Whereas defenders of the traditional approach may reject the state-centric conception of human rights and still hold on to their respective accounts of what human rights are (e.g. protections of human agency, autonomy, freedom, etc.), defenders of the practical approach who endorse the state-centric conception are committed to the strong identity claim that human rights *are* norms to regulate state behavior. Thus, if the state-centric claim proves to be untenable, so does their account of what human rights are. Nothing else is left to hold on to. There is a pretty straightforward way to show the untenability of the state-centric claim within the framework of assumptions characteristic of the practical approach. Recall that, according to this approach, it is by understanding the *point* of contemporary human rights practice that we understand the distinctive function that human rights play in that practice, and, in understanding their distinctive function, we thereby come to understand what human rights actually are. Now, according to the state-centric view, human rights are norms that regulate the behavior of states towards their own people. From this it follows that if there were no states (or if the relevant functions of states were transferred to other types of political units such as non-state organizations) there would be no human rights. As many critics have pointed out, this claim seems utterly implausible.¹⁵ Based on past experience, we have plenty of reasons to believe that the

¹³ For some examples see Donnelly (2003), 34ff., Martin (2005), 45ff., Nickel (2007), 7, Talbott (2005), 3, Talbott (2010) 10.

¹⁴ For some examples see Tasioulas (2009), 945ff and Griffin (2010), 751-52.

¹⁵ Tasioulas aptly expresses the objection in the following terms: 'If states are the sole bearers of the primary duties to implement human rights, this would have the peculiar upshot that a universal moral right ceases to be a human right simply because the primary responsibility for its fulfillment has shifted to non-state organizations.' (Tasioulas 2009, 945)

protection of human rights would be a meaningful practice under any plausible division of political space.

Now, what is important to notice in our context is that this argument against the state-centric view is not an argument against the practical approach per se. For what this argument shows is precisely that the state-centric view *misidentifies* the function of human rights in current human rights practice. Since this practice would still have a point in the absence of a division of political space by states, it cannot be the case that the distinctive function of human rights is to regulate the behavior of states by setting limits on their sovereignty. If this is so, what the practical approach demands is an alternative, more accurate account of the *point* of contemporary human rights practice.

IV **An alternative account of the practical approach to human rights**

Now, rejecting the state-centric conception of human rights does not require denying that one of the functions of human rights is to regulate the behavior of states towards their own people. A rejection of the state-centric conception merely denies that this is their distinctive function if for no other reason than the fact that this is the distinctive function of the domestic citizens' rights 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.¹⁶ Moreover, the constitutional rights of many modern states are the result of a long-standing

¹⁶ This claim has no direct bearing on the question of whether international human rights and domestic constitutional rights coincide or differ in content. Instead it is simply a claim about their different functions. The practical conception of human rights is committed to the view that in order to understand what international human rights are we need to understand their specific function 'in a normative practice to be grasped *sui generis*' (Beitz 2009, 12). Different conceptions of the function of human rights 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 (Rawls 1999, 81). But, as we saw above, his notoriously narrow conception of the scope of human rights follows from his narrow conception of the proper function of human rights and not from his endorsement of the practical approach per se.

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.

As we saw before, according to Rawls the point of human rights practice is to set the limits of toleration between peoples. This already indicates that their primary function is not domestic but international. Rawls's claim that 'human rights play a special role in a reasonable Law of Peoples'¹⁷ indicates that the additional element needed to make sense of human rights practice, beyond states and their citizens, is an international community whose members commit themselves to abide by a reasonable Law of Peoples which includes the protection of human rights as one of its core ingredients. However, this implies that the necessary condition for the existence of such practice is not simply mutual toleration but above all *cooperation* among its participants. If their joint commitment to assure the protection of human rights is to have any point at all, what needs to be identified is not so much the limits of their toleration but instead the triggers of their active cooperation such that their shared goal can be achieved. In fact, this is often pointed out in the standard accounts of the emergence of contemporary human rights practice at the beginning of the 20th Century.

According to the standard view,¹⁸ the human rights project emerged at the dawn of a Westphalian conception of international relations, the so-called law of separation, which aimed at the mere co-existence among absolutely sovereign states.¹⁹ Many scholars identify the emergence of an international economy derived from the industrial revolution as an important development that paved the way for a slow shift in international relations towards a law of cooperation instead of a law of separation. The creation of the League of Nations is often identified as the first example of this shift in the conception of international relations because of its explicitly proclaimed aim 'to promote international cooperation and peace

¹⁷ Rawls (1999), 79.

¹⁸ Some authors disagree with the claim that contemporary human rights practice originates with the creation of the UN after WWII and situate their origins more recently, towards the end of the Cold War. For an example see Moyn (2010).

¹⁹ For an example of this view see Salomon (2007), p. 21ff.

and security'. In spite of the League's notorious failure to prevent war and its subsequent demise, the awareness of its members that such common interests and normative goals could only be achieved through cooperation led to the creation of the UN and its Charter after World War II. In addition, the horrors of the Nazi regime, epitomized in the Holocaust, provided an important motivation for adding the protection of human rights to the goals of peace and security in the UN Charter. Its signatories committed themselves to 'take joint and separate action in cooperation with the organization' to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all' (United Nations 1945, article 1.3). Thus the UN Charter laid down the principles of *universal respect* for the human rights of all persons and of *international cooperation to protect and promote* human rights. Shortly after the approval of the Charter in 1945, a UN committee was charged with writing an international bill of rights. This emerged in 1948 as The Universal Declaration of Human Rights, which gave specific content to the international community's commitment to the protection of human rights.²⁰ The Preamble of the Universal Declaration of Human Rights (UDHR) states that 'the General Assembly proclaims this Universal Declaration of Human Rights... to the end that every individual and every organ of society... shall strive... to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.' After the Preamble, a list of rights follows that indicates the kind of human interests that human rights norms are meant to protect (interests in personal or economic security, freedom of expression, etc.), some of the standard threats²¹ to those interests (torture, slavery, arbitrary arrest, etc.), as well as important institutional means for their protection (equal protection under the law, due process, free elections, etc). Towards the end of the document, the aim of securing human rights protections worldwide mentioned in the Preamble is expressed again in Article 28, which makes it explicit that 'everyone is

20 In fact, the rights included in the declaration were taken from already existing national bills of rights. The key difference between them is not their respective content, but the fact that human rights are supposed to apply to all persons in all countries. For an excellent exposition of the drafting process that culminated in the UDHR see Glendon (2002).

21 This expression was originally coined by Shue (1996), but its use has become customary in current accounts of human rights.

entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

All of this suggests that the complex legal and institutional phenomenon that we currently identify as contemporary human rights practice goes back to a joint commitment freely undertaken by the members of the international community to the global political project of 'securing the universal and effective recognition and observance of human rights.' This provides a straightforward answer to the question of the overall aim or purpose of this practice. Now, if we take the goal of securing the protection of human rights worldwide as the overall aim of human rights practice, we can see why the state-centric claim that the distinctive function of human rights norms is to regulate the behavior of states towards their own people is something of a near miss. Indeed, since the abuse of power by states is a particularly salient source of threats to the human rights of their members, limits on state sovereignty are a powerful means to the end of securing the protection of human rights worldwide. However, such limits may not be the only or the most effective means to that end. In fact, depending on the circumstances such limits may prove insufficient or simply useless. The previously mentioned counterfactual scenario of a world without states as its basic political units highlighted such a possibility. But, as the examples of Guantanamo and Haiti indicate, there are already sufficient real world scenarios to illustrate the problem without any need to appeal to remote possible worlds.

The identity claim that human rights are rights that regulate the behavior of states towards their own people runs into some difficult counterexamples when one turns to current debates concerning so-called extraterritorial human rights obligations. These are cases in which states are accused of violating the human rights of persons in other countries as a result of actions or omissions in their international cooperation or foreign policy.²² The precise scope of these obligations is hotly debated and thus open to a variety of interpretations, but the meaningfulness of the question among legal practitioners and scholars suffices to show that the identity claim just cannot be right. There are at least two reasons why an account of human rights norms in which extraterritorial human rights obligations are *ruled out by definitional fiat* seems problematic. On the one hand, since human rights, as opposed to the domestic rights of citizens, are not territorial but

22 For a good overview of the legal complexities of this issue see Gibney and Skogly (2010).

universal, it is hard to see why a territorial understanding of human rights norms should be essential to the very concept of human rights. On the other hand, 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.

An even better way to generate counterexamples to the identity claim is by focusing on current debates regarding non-state actors and their adverse impact on human rights protections. These non-state actors include individuals (e.g. non-state armed guerrilla leaders who engage in ethnic cleansing), multinational corporations that collaborate with governments in violating human rights, and international financial institutions such as the WTO, the IMF and the World Bank whose regulations can have a tremendously negative impact on the protection of human rights, especially those of citizens in poor countries. As with the case of extraterritorial human rights obligations, here too we need not agree on the details of any specific case where a non-state actor is accused of violating human rights in order to see the implausibility of the state-centric identity claim. Since the practical approach takes current human rights practice as authoritative for an understanding of what human rights are, it is important to point out that key elements of current practice, such as human rights campaigns lead by NGOs and reactions from global public opinion, do not seem to be at all sensitive to the distinction between human rights violations perpetrated by state or by non-state actors (nor are they sensitive to the distinction between a state's violations of the rights of its own nationals and the same state's violation of the rights of members of other countries). Of course, if the aim of human rights practice is to secure the protection of human rights worldwide, why should it matter to participants whether potential violators are states or non-state actors?²³ In fact, the policies and regulations of the WTO, the IMF and the World Bank are as much the

23 In light of this question, the state-centric account of the overall aim of human rights practice seems pretty implausible. 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). This account of the aim of human rights practice 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 offered of the normative reasons that could possibly justify this restriction in the eyes of those participating in current human rights practice.

focus of protests by human rights organizations and the subject of reports to the UN Human Rights Council as are the actions of governments towards their own people.²⁴ The human rights obligations of these institutions as well as the compatibility of their policies and regulations with international human rights law are also the focus of extensive analysis and debate among scholars of international law.²⁵

All these recent developments in human rights doctrine seem hard to account for in a reconstruction of the practice that is based on state-centric assumptions. If Nickel's claim were correct and 'the most basic idea of the human rights movement is... the idea of regulating the behavior of governments through international norms' the inclusion of non-state actors within the focus of attention of participants in the human rights movement would make no sense at all. Or, if as Beitz claims, human rights 'consist of a set of norms for the regulation of the behavior of states' the view held by many legal scholars that international financial institutions have human rights obligations would not simply be questionable or contested, as it currently is, but rather senseless. If one buys into state-centric assumptions, then the legal debate about the human rights obligations of international financial institutions ought to be seen as a puzzling misunderstanding of what human rights practice is all about.²⁶ Beitz defends his state-centric interpretation of the practical approach to human rights by claiming that the model he proposes should be descriptively accurate of current practice and thus should

24 Some notorious examples are recent human rights campaigns against the patent rights for pharmaceuticals established by the WTO, as well as long standing criticisms by scholars and NGOs of the structural adjustment programs of the IMF or of the involuntary resettlements involved in the big infrastructural projects funded by the World Bank.

25 For some recent examples see Alston (2005), Clapham (2006), Cottier, Pauwelyn and Bürgi (2005), Darrow (2003), Herstermeyer (2007), Marceau (2002), Salomon (2007), Skogly (2001), Zagel (2005).

26 In fact, the UN itself would seem to misunderstand human rights practice as well. According to the UN Human Development Report of 2000, the shift from a state-centric approach to human rights obligations to a pluralist approach is one of the key shifts needed to advance human rights in the next quarter century. Among 'the 6 shifts from the cold war thinking that dominated the 20th century' that the report identifies, the first two are most significant in our context: '*From the state-centered approaches to pluralist, multi-actor approaches* – with accountability not only for the state but for media, corporations, schools, families, communities and individuals' as well as '*From the national to international and global accountabilities* – and *from the international obligations of states to the responsibilities of global actors.*' (HDR, p. 13; my italics)

not be changed unless the practice itself changes.²⁷ This may seem like a feasible defense of the state-centric model, but in fact it only highlights its problems. Precisely because such changes are perfectly conceivable,²⁸ the fact that the state-centric model would not survive them provides additional evidence of its untenability. The *continuity* of human rights practice throughout those changes is precisely what the state-centric model would not be able to account for. Since the state-centric conception of human rights practice takes a particular distribution of human rights obligations at a given time not as a means for the realization of the human rights project but *as its very goal*, any significant changes in such distribution must lead to the conclusion that the resulting practice is a different project with a totally different purpose.

Now, since individuating human rights norms by identifying states as their primary addressees seems problematic in light of the emergence of powerful non-state actors in the international arena, let's take a look at the other distinctive function that human rights norms play according to the state-centric model. Given that defenders of this model maintain that the point of human rights practice is setting limits on state sovereignty, this commits them to the claim that human rights are essentially triggers for justifiable intervention against a state's sovereignty by external agents. There is perhaps a difference in emphasis among these authors as regards the types of interventions they envisage. Whereas Rawls's analysis, as we saw, seems to emphasize coercive interventions such as economic sanctions or even military intervention,²⁹ Raz and Beitz identify a wider

²⁷ Beitz (2009), 124.

²⁸ In fact, many legal scholars claim that these changes have already happened. Salomon (2007) offers an example. Referring to the legal context, she claims that 'there is widespread consensus that the traditional view of human rights, which focuses solely on the individual obligations of states, is now outdated.' (p. 6) It should be clear that the plausibility of my argument does not depend on the truth of this empirical claim. But I mention it just to point at what seems to me a significant disconnect between the state-centric conception of human rights obligations that is predominant in philosophical debates on human rights and the current discussion on human rights among legal scholars of international law where the issue of the human rights obligations of non-state actors is one of the main foci of current debates.

²⁹ It is not clear to me that coercive interventions play a more distinctive role than non-coercive ones in Rawls's Law of Peoples, since Rawls also contemplates non-coercive interventions, such as providing assistance to burdened societies, which seem intrinsically related to the function of human rights in a reasonable Law of Peoples. Be that as it may, in the present argumentative context nothing turns on determining this issue.

variety of actions (some of which are non coercive) as appropriate methods of intervention. Raz expresses the underlying idea as follows: 'I will take human rights to be rights which set limits to state sovereignty, in that their actual and anticipated violation is a (defeasible) reason for taking action against the violator in the international arena.' (Raz 2010, 328)

Here again, if we take the goal of securing human rights worldwide as the point of human rights practice rather than the goal of setting limits on state sovereignty, we can then see why the state-centric claim that the distinctive function of human rights norms is to trigger external intervention is also something of a near miss. For, indeed, coercive and non coercive interventions by members of the international community that seek to regulate the behavior of states towards their own people are a powerful means to the end of securing the protection of human rights worldwide. But such interventions may not be the only methods available. Again, depending on the circumstances, such interventions may be insufficient or simply useless. If what is hampering the protection of the human rights of a group of people in some country, let's assume, 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.

Now, it should be clear that by characterizing the state-centric focus on intervention as a near miss I agree that it captures something important about the distinctive function of human rights. In my view, the practical approach does indeed require adherents to endorse the view that human rights are essentially triggers for international action.³⁰ However, nothing in the practical approach justifies limiting the appropriate international action in question to interventions against a state's sovereignty in particular. Let me briefly explain why.

As mentioned before, the complex legal and institutional phenomenon that we identify as contemporary human rights practice goes back to a joint commitment by the members of the international community to secure the protection of human

³⁰ In my opinion, this is a necessary, but not a sufficient condition for something to qualify as a human right. So, this claim by no means rules out that human rights fulfill many other functions. For a list of some of these functions see note 10 above.

rights worldwide. This commitment is what lends practical significance to the claim that human rights are a matter of concern for the international community. Thus if members of the international community were to officially deny that potential or actual violations of human rights provide a (defeasible) reason for taking action in the international arena, this act would have the *performative* significance of withdrawing the original commitment on which international human rights practice rests. As a consequence, the practice as we know it would collapse.³¹ The Westphalian view of international relations as a law of separation among absolutely sovereign states would be reinstated as the official doctrine of international law.

However, nothing in this argument justifies the additional claim that appropriate international action must take the form of interventions against a state's sovereignty. From the perspective of the practical approach, what the most appropriate type of action turns out to be in each specific case cannot be determined in advance. The right answer seems contingent on what happens to be the most adequate and efficient means to reach the practice's own goals. Whereas a critical reconstruction of the norms that underlie contemporary human rights practice justifies the identity claim that human rights are rights whose actual or anticipated violation is a defeasible reason for action against the violator by members of the international community, nothing about the norms constitutive of this practice justifies the restriction of possible 'violators' to states and of the appropriate 'actions' to interventions against a state's sovereignty.³² Taking this contingent feature of current practice as one of its constitutive norms seems to be a clear case of giving undue authority to the status quo. However unintended, this argumentative move serves the ideological purpose of closing off – by conceptu-

³¹ This claim should not be misunderstood as involving any optimistic assessment regarding the seriousness with which members of the international community take their commitment to protect human rights. From the point of view of identifying one of the enabling conditions of contemporary human rights practice, it is enough that they continue to offer at least lip service to that commitment. This is the minimally needed basis for the legitimacy (as well as the potential 'power') of the actions of other participants in human rights practice such as NGOs, UN human rights agencies, etc.

³² At the beginning of his book, Beitz mentions that 'it is not clear why a practice that aims to protect individual persons against various threats should assign responsibilities primarily to states rather than to other kinds of agents.' (p. 2) I could not agree more. However, given his acceptance of the state-centric conception of human rights, this claim suggests that he may provide some justificatory answer to this question later in the book. But if so, I must confess that I have not been able to find it.

al fiat – substantive normative questions that ought to be open to serious debate within the practice, namely, the nature and extent of human rights obligations held by non-state actors, the appropriate actions of members of the international community in light of new global threats to human rights, etc. In light of the international community's commitment to secure human rights worldwide, the only normatively plausible interpretation of the above mentioned function of human rights norms is an understanding of 'violators' as whoever happens to be actual violators in each specific case and an understanding of 'actions' as whichever available actions would be most effective for avoiding or remedying the violations at issue. It is hard to see how any other interpretation of human rights norms could avoid the objection that 'the practice's norms are ill-suited to advance its aims', to use Beitz's own expression.

This critical reconstruction of contemporary human rights practice has revisionary consequences. However, they are quite different from those of other proposals that follow the practical approach. As was noted before, in the case of Rawls's account of human rights, his interpretation of the function of human rights norms as triggers for coercive intervention against a state's sovereignty lead to a revision of the list of human rights proper that bears little resemblance to the rights included in the Conventions and treaties that have been already signed by most countries. However, one may wonder whether my alternative proposal does not suffer from the opposite defect. By broadening the meaning of 'intervention' beyond the well-defined limits of the state-centric conception, this interpretation may fail to offer any guidance at all in determining the set of human rights proper. As I will try to show in what follows, I think that this fear is unfounded.

IV.1 The dynamic character of human rights norms

Even in its broad interpretation, accepting the identity claim that human rights are essentially triggers for international action has substantive implications, for it imposes significant constraints on what can plausibly be claimed to be a human right. As Raz puts it, 'international law is at fault when it recognizes as a human right something which, morally speaking, is not a right or not one whose vio-

lation might justify any kind of international action³³ against the violator. Two important constraints follow from accepting the view that human rights are essentially a matter of concern for the international community. Human rights are not simply rights worthy of protection. They are those rights (1) whose protection can be meaningfully achieved by institutional means, and (2) whose actual or anticipated violation provides a (defeasible) reason for some type of action against the violator by the international community.

These constraints help avoiding the danger of over-inclusiveness that is likely to result from traditional approaches to human rights that do not include this kind of considerations (e.g. those approaches that define human rights simply as moral rights that all human beings have in virtue of their humanity). Adding these constraints explains why the core human rights documents do not contain rights such as the right to be told the truth or not to be betrayed in personal relations. It is true that adding these constraints does not provide a criterion that singles out once and for all the definitive list of human rights proper. But in my opinion, this is not a weakness but rather a strength of this interpretation of the practical approach. For it highlights a crucial feature of human rights practice that any plausible conception of human rights has to be able to account for, namely, their essentially *dynamic* character.³⁴

This important feature of human rights norms can be illustrated by paying attention to their internal complexity. Following the description we used before to characterize the list of human rights contained in the UDHR, we can say that human rights are norms to protect all human beings against standard threats to some of their most important interests by the most reliable institutional means available

33 Raz (2010), 329. I quote here only the first part of Raz's statement, with which I agree. However, his complete statement adds a qualification that restricts international action to actions against states. It reads: 'International law is at fault when it recognizes as a human right something which, morally speaking, is not a right or not one whose violation might justify international action against a state, as well as when it fails to recognize the legitimacy of sovereignty-limiting measures when the violation of rights morally justifies them.' (Raz 2010, 329)

34 On the dynamic character of the content of human rights see Beitz (2009), 31, 44; also Buchanan (2010), 57, 75. My exposition follows Buchanan's account of the consequences of taking the dynamic character of human rights seriously, although it is not clear to me whether he would situate himself among those who defend a practical approach of the kind I am defending here.

at any given time.³⁵ On the basis of this schematic definition, we can distill three core elements of human rights norms:

- 1 The fundamental interests that have the moral significance of grounding human rights (i.e. of grounding protection claims),
- 2 The standard threats against those interests (i.e. the range of social, economic or political dangers and abuses that are likely to occur in a given social context), and
- 3 The appropriate (institutional) means for their protection (i.e., the range of national and international actions that can reliably prevent or remedy their violation)

It is true that in order to identify the human interests to which human rights norms refer a plausible justification is needed as to why those human interests in particular have the moral significance of grounding human rights, and this step indeed requires ordinary moral reasoning. However, in light of the empirical nature of the other two elements of human rights norms it is also clear that their content cannot be *solely* specified by determining the first element, namely, these permanent features that are shared by all human beings in virtue of their humanity. The (2) relevant standard threats as well as (3) the appropriate institutional means of protection against them are essential elements of the very *content* of human rights norms.³⁶ In fact, many of the rights specified in the existing human rights documents do not necessarily refer to the underlying interests shared by all human beings. As we mentioned before, some of the rights refer to the standard threats against those interests that can be expected in modern societies (e.g.

35 In my view, the human interests that have the moral significance of grounding human rights are those whose satisfaction is needed for leading a dignified human life. I cannot address this issue in depth here, but I will just mention that all of the main human rights documents make reference to the notion of human dignity, whereas none of them mentions some of the alternative notions that are often referred to in philosophical accounts of human rights such as 'minimal' or 'urgent' interests or those whose satisfaction is needed for a minimally 'decent' life, etc. In fact, I agree with Beitz that the normative standards identified in the existing human rights documents far from minimal are actually quite demanding. Moreover, I think that the notion of 'human dignity' contains an element of equal status and therefore its satisfaction is a comparative issue and not a matter of meeting some fixed threshold of minimal 'decent' conditions.

36 See Buchanan (2010), 86.

the right against arbitrary arrest or torture) or to specific institutional means for their protection (e.g. the right to equal protection under the law or to free elections). However, since these two elements of human rights norms change over time and under varying social circumstances, the precise content of human rights norms is in need of ongoing legal and institutional specification and cannot be determined once and for all by ordinary moral reasoning alone in the way that philosophical accounts of natural rights have traditionally proceeded.³⁷

Seen from this perspective, the main difference between the practical and the traditional approach is not that the former can dispense with the philosophical task of providing a plausible account of the first element (i.e., an account of which human interests have the moral significance of grounding human rights and why).³⁸ In fact, this task is not only a legitimate philosophical enterprise, but one that has practical significance, since it seems necessary for proper adjudication in cases of potential conflict among rights.³⁹ In my view the crucial difference between

³⁷ In light of their internal complexity and dynamic character, human rights norms are best interpreted as 'unsaturated' placeholders, to use Habermas's expression. They are abstract norms essentially in need of ongoing legal and institutional specification according to the changes in social and historical circumstances. In *Between Facts and Norms*, Habermas defends this interpretation of the various bills of rights contained in national constitutions (see Habermas 1999, 123-31). On the basis of what he calls a procedural paradigm of law, he claims that national constitutions are best understood as ongoing historical projects in need of specification and revision in light of changing social and historical circumstances. The same seems obviously true of human rights norms. As much as national constitutions are best understood as historical projects, human rights practice is an ongoing global political project. As social, institutional and historical conditions change, so do the relevant standard threats to human interests as well as the available institutional means to their protection and thus the specification of the *content* of human rights must change accordingly. Thus any account of human rights that does not pay attention to these essentially empirical and changeable components won't provide an account of human rights as the elements of contemporary human rights practice, but of some other kind of moral or natural rights.

³⁸ However, even if the need to accomplish this philosophical task is recognized, focusing on the distinctive roles that human rights norms play in contemporary human rights practice gives two significant advantages to the practical approach: (1) it can go a long way in clarifying very important aspects of that practice without having first to determine which of the possible ways of grounding human rights norms on different conceptions of human nature or human freedom is correct and (2) it can leave open the possibility that a plurality of such conceptions may be able to support the same human rights norms from within a variety of cultural context and traditions.

³⁹ Since most human rights documents appeal to the concept of human dignity as the key consideration in order to determine among all possible human interests those that ground human rights, this makes reflection about what human dignity requires unavoidable in order to resolve conflicts among rights. For

both approaches is that the practical approach acknowledges the essentially *dynamic* nature of human rights norms, and thus rejects as wrongheaded the static assumption behind the traditional project of trying to derive a definitive list of human rights from some fundamental value or principle that stands upon the basis of moral reasoning alone. For even if one assumes that the fundamental interests of human beings which have the moral significance of grounding human rights are universal and do not change, the other two components are contingent, change historically, and need to be adapted to new circumstances. The standard threats to important human interests as well as the most effective institutional arrangements available for their protection vary with the different social, political, economic and cultural circumstances in which human beings find themselves. However, all three elements are equally relevant for the task of determining the full *content* of human rights.⁴⁰

From the practical perspective it is easy to understand why the standard threats as well as the most appropriate institutional arrangements for protection against them are essential components of human rights norms. For they address the crucial question of the counterpart *obligations* to those rights. By indicating the kinds of actions or omissions relevant to human rights protections they help answer the question of which actors have which obligations with regard to which rights. And this is a question that cannot be settled just by providing plausible justifications of the moral significance of the interests to be protected. What is required, in addition, is plausible justifications of why some specific agents rather than others have the obligation to contribute to their protection, why some agents rather than others should bear the costs of their implementation, why it is not unreasonably burdensome for them to do so, etc. As Beitz convincingly argues, by focusing on the philosophical task of determining the fundamental interests that ground human rights (on the basis of some fundamental principle or value) traditional approaches tend to be too recipient-oriented and their account of human rights neglects the question of the proper allocation of the obligations that correspond to those rights. Indeed, the allocation of obligations is treated as a subsidiary issue that has no direct bearing on the content of hu-

an interesting analysis of this crucial function of the notion of human dignity for legal adjudication see McCrudden (2008).

⁴⁰ See Buchanan (2010), 5.

man rights. However, it seems obvious that a practice that seeks to achieve the protection of human rights through institutional means and international action must involve considerations regarding (1) the proper allocation of human rights obligations from among those agents in a position to act and (2) the proper identification of the most effective institutional protections from among those available at any given time. A practice that can only achieve its goals by identifying appropriate agents and actions cannot view allocation issues as simply a subsidiary question. Whether a right is amenable to protection by institutional means, whether its protection could provide some intelligible reason for action by members of the international community, and whether some permissible form of international action could effectively protect it are *essential* considerations to determine whether or not a putative right is a human right proper. On this point I totally agree with Beitz. However, in my opinion he fails to appreciate all the implications of acknowledging the *dynamic* character of human rights.

If the proper allocation of human rights obligations essentially depends on the kind of actions and agents required for human rights protections and this in turn necessarily depends on the nature of the standard threats to be expected as well as on the most effective institutional arrangements for protection against those threats that are available in a given social context at a given historical time, then the historical and social dimension of *contingency* inherent in these two factors implies that *no specific allocation of human rights obligations can be taken as definitional of what human rights are*. If the intrinsically dynamic character of international human rights endorsed by the practical approach is correct, it follows that the appropriate answer to the question of which agents have which obligations cannot be determined in advance, since it is contingent on the nature of currently existing threats, the feasible institutional means to confront them, the agents who are in a position to implement those means, etc. Changes in social circumstances cause new threats to emerge and new institutions to be created and this can give rise to *new* rights that were not previously conceived.⁴¹ These changes may in turn necessitate a new determination of which agent or agents and which institutional safeguards are best suited to provide the relevant protections. This suggests that, contrary to what is generally assumed, *adopting the practical approach is actually incompatible with taking the state-centric distribu-*

⁴¹ See McCrudden (2008), 721ff; Habermas (2010), 467-8; Buchanan (2010), 57.

tion of human rights obligations as an intrinsic feature of human rights practice. Adhering to any particular allocation of human rights obligations without taking stock of the changes in standard threats to fundamental human interests or of the changes in the available institutional means that can reliably contribute to their protection would predictably undermine the ability of the practice to reach its goals. Thus, if participants in the practice take these goals seriously, if they accept that human rights are rights whose actual or anticipated violation is a defeasible reason for action against the violator by members of the international community, then there is no possible justification for the a priori restriction of possible ‘violators’ to states and that of the appropriate ‘actions’ to interventions against a state’s sovereignty. The only norm suited to reach the practice’s goals is one that interprets ‘violators’ as whoever happens to be the actual violators in a given case and that interprets appropriate ‘actions’ as those actions that would actually be effective for avoiding or remedying the violations at issue.

Still, I do not mean to deny that accepting such an unrestricted or pluralistic norm would require a revision of the current view of human rights obligations by the international community.⁴² But, if my general argument is plausible, there are many ways to revise the state-centric allocation of human rights obligations that would nevertheless be recognizable continuations of current human rights practice to the extent that they are perfectly compatible with its core normative principles and its justifying goals. In fact, as I will briefly indicate in what follows, some recent developments of human rights practice already point in that direction.

⁴² I disagree with two elements of Beitz’s own description of the current allocation of human rights obligations. According to Beitz’s ‘two-level model of human rights’, states have the primary responsibility to respect and protect the human rights of their own citizens (cf. p. 108). This claim seems incorrect. 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. But I do agree that states have the primary responsibility to *protect and promote* the human rights of their citizens. However, regarding the secondary responsibilities of the international community, Beitz’s description seems to me weaker than what it is currently recognized. According to him, the actual or anticipated violation of human rights provides merely *pro tanto* reasons for outside agents to act, but this falls short of an strict obligation to protect from violations by third parties of the kind that states have vis-a-vis their own citizens. As Beitz puts it, ‘a human rights failure in one society will not *require* action by outside agents.’ (p. 117) This is surely true for many violations of human rights. However, by signing the document of the 2005 World Summit, all members of the UN General Assembly have explicitly recognized their responsibility to protect all persons from violations committed by third parties in an analogous manner to the responsibility to protect that states have with regard to

IV. 2 A pluralist conception of human rights obligations: the principle of universal respect for the human rights of all persons

When thinking about potential ‘violators’ from the perspective of the alternative account defended here, the unrestricted interpretation of the meaning of human rights norms requires members of the international community to explicitly extend the circle of actors whose behavior is subject to international human rights norms beyond states to any non-state actors with the capacity to hamper the protection of human rights.⁴³ To some extent, this has already occurred in the domain of international criminal law, but it could be extended to other domains. This extension could be carried out in different ways, some of which are perfectly compatible with ascribing primary responsibility to states for the protection of the human rights of their own members. If, following what has become standard terminology, we distinguish between the duties to *respect*, *protect* and *fulfill* human rights,⁴⁴ it is clear that the obligation to ‘protect’ human rights can have very different meanings. These different 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 members, it does not seem at all plausible to claim that states are the only actors that bear primary responsibility for *respecting* the human rights of their members. The obligation of respecting the human rights of all persons in the sense of not contributing to their violation is a universal obligation and thus one that binds states just as much as non-state actors.

As far as global governance institutions such as the WTO, the IMF or the World Bank are concerned, the relevant difference between promoting and respecting human rights is the difference between *taking the fulfillment and enforcement of human rights as their own goal* (i.e., becoming a human rights organization) and *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 an adverse impact on the protection of human rights. Whereas the former question is complex and its appropriate answer is therefore highly contested, the positive answer to the latter question seems hardly questionable from a normative point of view.⁴⁵ As many legal scholars argue, global governance institutions such as the WTO, the IMF or the World Bank could acknowledge their obligation to *respect* human rights by creating institutional mechanisms to ensure that the policies and regulations they enforce do not impair the enjoyment of human rights. They could discharge their obligation to exercise human rights *due diligence*, for example, by engaging in human rights impact assessments of their proposed policies and regulations before enforcing

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). Although Beitz does not mention this development, I think that it provides direct support to his repeated claim that participants in human rights practice have, since its inception, contemplated some role for international action aimed at protecting human rights. In my view, this is not just a contingent, empirical claim that may turn out to be false. It is a conceptual claim. Since contemporary human rights practice originates in a commitment by members of the international community to secure the protection of human rights worldwide, this is the *point* of the practice and not just one of its contingent features. From this perspective, the explicit recognition of the responsibility to protect expressed in the 2005 World Summit Outcome document is just a further specification of the exact meaning and implications of the original commitment to protect human rights that enables and sustains human rights practice as we know it.

43 To use Pogge’s terminology, what makes any actor’s behavior subject to international human rights norms is specifically their capacity to undermine the *secure access* to the object of human rights. See Pogge (2002).

44 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).

45 For a comprehensive overview of the vast legal literature on this issue see Skogly (2001) and Darrow (2003).

them.⁴⁶ Acknowledging the legal obligation to respect human rights in this strict sense falls well short of an obligation to actively *protect* and promote human rights of the kind that states and human rights agencies have and it is perfectly compatible with maintaining the latter.⁴⁷

From a normative point of view, applying the due diligence standard to global governance institutions is clearly the minimum requirement compatible with maintaining a credible commitment from the international community to ensuring the protection of human rights worldwide. In fact, many legal scholars argue that global institutions already have this legal obligation under international law, since their members are legally bound by the UN Charter to respect the human rights of all persons.⁴⁸ From a viewpoint of somber realism, there is no denying the fact that if members of the international community were to take legal steps in that direction it would indeed be an extraordinary achievement. However, the

⁴⁶ The standard of due diligence has been recently recognized by the UN Human Rights Council as appropriate to discharge the responsibility to respect human rights by transnational corporations. In June 2008, the Council explicitly confirmed the responsibility of transnational corporations to respect human rights and requested the Special Representative of the Secretary-General on this issue, John Ruggie, to ‘elaborate further the scope and content’ of that responsibility (see paragraph 4(b) of Resolution 8/7, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>). 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.’ (available at <http://www2.ohchr.org/english/issues/globalization/business/docs/A.HRC.8.5.pdf>) 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 in the activities of MNCs seem easily applicable to international financial institutions. For an in depth analysis of the possibilities and difficulties in institutionalizing human rights impact assessments of trade agreements in the WTO see Walker (2009) and Zagel (2007). For an analogous analysis regarding the IMF and the World Bank see Darrow (2003).

⁴⁷ I offer an overview of various institutional proposals for legally entrenching the obligation to respect human rights in international financial institutions that are currently under discussion among legal scholars in Lafont (2010).

⁴⁸ For an interesting example of this line of legal argument that focuses on the human right to food see Narula (2006). Although the author recognizes that globalization requires challenging the state-centric ascription of human rights obligations, her argumentative strategy consists in deriving the human rights obligations of global governance institutions such as the IMF or the World Bank from the obligations of their member states.

utopian character of this revision pales in comparison to the revisions that the unrestricted interpretation of human rights norms defended here would involve regarding the range of appropriate actions that could be expected or required from members of the international community. Here is where the revisionary potential of this reconstruction of human rights practice really shows its normative teeth.

IV.3 A structural approach to human rights protections: the principle of international cooperation to protect human rights

By freely undertaking a commitment to ensure the protection of human rights worldwide, members of the international community have imposed on themselves an obligation that goes beyond the universal ‘duty to respect’ that actors can fully discharge simply by exercising human rights due diligence, that is, by making sure that their actions do not contribute to the violation of human rights. They have undertaken a ‘responsibility to protect’ against human rights violations perpetrated by third parties, notably (but not exclusively) states. In fact, the UN General Assembly explicitly recognized this responsibility in the outcome document of the 2005 World Summit.⁴⁹ This document only concerns the international community’s ‘responsibility to protect’ against four types of violations of international criminal law (genocide, war crimes, ethnic cleansing and crimes against humanity) and it therefore only makes reference to the types of peaceful and coercive actions that the international community may justifiably take with regard to these specific types of violations. Nevertheless, this is an important first step in the ongoing process of legally specifying the precise content and scope of the international community’s ‘responsibility to protect’ human rights. This process is far from accomplished and is therefore still open to a diversity of possible

⁴⁹ On 15 September 2005, UN General Assembly Member States embraced the ‘Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’. See paragraph 139 of the Outcome Document of the 2005 World Summit: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No5/487/6o/PDF/No54876o.pdf?OpenElement>.

interpretations among the different participants of contemporary human rights practice. However, as previously argued, the practice's own aims rule out the possibility that the future legal specification of this responsibility could amount to anything less than an acknowledgment that the actual or anticipated violation of human rights is a defeasible reason for some type of preventive or remedial action by members of the international community. For denying this would be tantamount to withdrawing the commitment to secure the protection of human rights worldwide on which human rights practice is based. Thus it seems that the logical extension of the 'responsibility to protect' to other domains of international human rights law would require a specification of (1) the kinds of human rights violations or deprivations that are (defeasible) triggers for action by the international community and (2) the kinds of actions that can reliably prevent or remedy those types of violations.

Although this process is still in its early stages, some legal scholars cite the UN General Assembly Declaration on the Right to Development from 1986 as evidence that human rights practice is evolving in that direction. Among the many salient features of this human rights declaration, the most interesting feature for present purposes is that it involves adopting a *structural* approach to human rights protections.⁵⁰ The need to adopt this approach is strongly suggested by the affirmation (in Article 6.2) of the indivisibility and interdependence of all human rights (civil, political, economic, social and cultural rights) – something that has become the UN's official doctrine ever since. According to the relatively weak interpretation provided by the Office of the High Commissioner for Human Rights, this doctrine states that 'the improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.' To the extent that this is so, states must adopt a structural approach to human rights protections in order to successfully discharge their human rights obligations. In addition, the Declaration establishes a direct link between the right to development and the existence of an international economic order in which all human rights can be fully realized.

On this basis, the structural approach to human rights protections is not limited to the specification of actions that states must take in order to discharge their primary responsibility to protect the human rights of their own people. The struc-

⁵⁰ See Salomon (2007), 50-64.

tural approach is also taken in order to specify the kinds of actions that members of the international community must undertake in order to discharge their own responsibility towards human rights protections which, in this Declaration, is designated as a 'duty to co-operate' in order to ensure development and eliminate obstacles to development.⁵¹ As is stated at the beginning of the Declaration, 'efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order.' Although the Declaration clearly falls short of specifying more precisely the kinds of actions that would be required to do so, it does indicate that the 'duty to co-operate' includes direct assistance from developed towards developing countries in Article 4.2, which states that 'sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, *effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.*'⁵² From this perspective, the UN Millennium Development Goals⁵³ can be seen as an attempt by the international community to specify the content of the 'duty to co-operate' recognized in the Declaration to the Right to Development by indicating specific steps, actions and measures that must be taken in order to discharge the self-imposed obligation to secure the protection of human rights worldwide.⁵⁴

At first sight, this may seem to amount to nothing more than a 'duty of assistance' from rich to poor states and thus as perfectly compatible with a state-centric conception of human rights. However, a careful reading of the content that the

⁵¹ For a very interesting collection of analyses on how to integrate the human rights and development agendas see Alston and Robinson (2005).

⁵² Article 7 even suggests a specific reallocation of resources as one of the appropriate ways to reach that end, namely to use 'the resources released by effective disarmament measures... for comprehensive development, in particular that of the developing countries.'

⁵³ See *UN Millennium Declaration*. General Assembly Resolution 55/2, 2000. www.un.org/millennium/declaration/ares552e.htm. For a critical analysis of the diluted scope of some of these goals compared to prior more ambitious commitments of the international community see Pogge (2010), 57-74.

⁵⁴ As some legal scholars argue, the duties specified in the Declaration to the Right to Development give specific content to the already existing legal obligation 'to act jointly and separately for the realization of human rights' and '(for) economic and social progress and development' as stipulated in the UN Charter at Articles 55 and 56. On this point see Marks (2010), 172ff.

Declaration gives to the 'duty to co-operate' shows that this is not the case. For, in addition to providing assistance to developing countries, members of the international community are required to establish a new international economic order 'based on sovereign equality, interdependence, mutual interest and co-operation among all states' (Article 3.3).

Needless to say, the seriousness of members of the international community in discharging any of the self-imposed obligations expressed in this Declaration is questionable, to put it mildly. But, unfortunately, this is true of the seriousness of members with regard to discharging the human rights obligations identified in any of the Declarations. The question that matters in our context, though, is not how realistic it is to expect that members of the international community will discharge any of their obligations, but rather what the most plausible reconstruction of the norms underlying contemporary human rights practice is. From this normative perspective, it seems to me that a state-centric conception of human rights has a hard time accounting for these recent developments of human rights practice. In fact, none of the accounts offered by defenders of the practical approach so far addresses them at all. But it is also hard to see how they could do so. If, according to the state-centric conception, the point of human rights practice is to regulate the behavior of states towards their own people and to impose limits to internal sovereignty when states fail to comply with human rights norms then it is hard to see how the Declaration of the Right to Development can be seen by its participants as a meaningful way to continue that very same practice. From the standpoint of a practice that distinctively aims at regulating the behavior of states towards their own nationals what possible rationale endogenous to that practice could ever explain an evolution in the direction of adding norms that impose a 'duty to cooperate' on the international community to establish a new international economic order in which all states can participate as equals?

Moreover, it seems that neither the identified threats to the human right to development nor the institutional arrangements required for its protection fit the mold of the state-centric framework. For according to the Declaration, the major threat to the human right to development is not the behavior of any individual state towards its own people but rather the global economic order. Consequently, the protection of the right to development requires some institutional arrangements that (1) cannot be implemented by individual states but instead only through cooperation among all members of the international community, (2) do not concern the behavior of states towards their members but rather towards

all persons, and (3) require a kind of international action that is not adequately characterized as external intervention against the sovereignty of any state, but rather as cooperation among states to allow all of them to participate as equals in the global economic order.

Of course, defenders of the state-centric view may deny that the right to development is a human right. In fact, the worry of rights inflation is widely shared among human rights scholars, so perhaps there are good normative reasons to exclude this right from the list. However, this ought to be a debate internal to human rights practice based on substantive normative considerations about the merits of the case, like all other cases of controversial human rights. It should not be excluded simply because it is an anomaly within the state-centric conception of human rights. This seems especially important just in case it turns out that the current global economic order is indeed a major threat to the project of securing human rights worldwide and, therefore, that the state-centric allocation of human rights obligations is a major obstacle to the project of securing the protection of human rights in an increasingly globalized world.



LECTURE II

Challenging the state-centric conception of human rights without endorsing the ideal of a world state

I began the previous lecture by focusing attention on the mismatch that globalization has brought to the fore between, on the one hand, the universality of human rights which gives expression to a cosmopolitan ideal of equal moral concern for all human beings and, on the other, the institutional reality of a political space divided into states that seems incompatible with the ideal of equal concern. To the extent that states hold the primary responsibility for defending the interests and rights of their citizens, it seems that each state must give priority to their own citizens over citizens of other countries. Representatives of democratic states are also politically accountable to their own citizens for such a prioritization.

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 accountability.⁵⁵ 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 decision-takers. Thus, strengthening the

⁵⁵ I leave aside the obvious additional problems that arise from the fact that the proximate principals of delegates in global financial institutions are governments and that their political agenda and perception of the national interest often differs from those of their citizens. This is especially (although not only) the case with governments of countries that have no democratic structures of accountability.

accountability of state delegates to their own citizens can only exacerbate the problem rather than solve it.⁵⁶

In the first lecture I defended a pluralist conception of human rights obligations as a first step towards addressing this accountability gap within global governance institutions. According to this conception, the circle of actors whose behavior is regulated by international human rights norms extends beyond states to any non-state actors who have the capacity to hamper the protection of human rights. Implementing this extension would require global governance institutions to legally recognize their obligation to respect human rights by creating institutional mechanisms to ensure that the policies and regulations they enforce do not hamper the protection of human rights. Whereas in the previous lecture I focused on the various *legal* mechanisms that would be needed in order to entrench human rights obligations in those institutions, here I would like to address the *political* implications of a pluralist conception of human rights obligations.

It seems clear that the above mentioned accountability gap can be effectively addressed by imposing the obligation to respect the rights of all persons (rather than simply the rights of one's own citizens) upon representatives in global governance institutions. What is less clear is whether making representatives accountable to all those subject to their decisions is also compatible 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 respect 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.

In what follows, I would like to show that this is not necessarily the case. Entrenching human rights obligations in current global governance institutions such as the WTO, the IMF or the World Bank in no way undermines the ability of its participants, as representatives of states, to discharge the special obligations they have

⁵⁶ For a similar argument see Buchanan and Keohane (2010), 113.

towards their own citizens. To the extent that this is so, those who defend a statist conception of justice and reject cosmopolitan ideals of global democracy have no reason to reject the pluralist view of human rights obligations. I hasten to add that my main motivation in showing that a pluralist conception of human rights obligations does not require embracing the ideal of a world state is in no way related to my own convictions regarding either the *desirability* or the *feasibility* of that ideal. In fact, my argument won't make any use of my own views regarding the ideal of a world state. My motivation is exclusively based on my convictions about the *urgency* of moving the human rights project forward amidst the increasingly globalized world in which we find ourselves at this particular historical juncture. Given this urgency, it is important to show that extending human rights obligations to all actors in the global arena who have the capacity to impair the protection of human rights is indeed compatible with the current state system because this then means that such a transformation can be implemented here and now, in our current situation. Moreover, it is also important to show that such a transformation does not require commitment to a specific ideal for a new international order and therefore does not preclude the pursuit of other legitimate political projects, including those that aim at dismantling current forms of global political decision-making in order to strengthen the self-determination of states. Having legally entrenched human rights obligations in current global governance institutions in no way precludes dismantling them in the future. It only precludes institutions from enforcing regulations and policies in disregard of their impact on the protection of human rights as long as these institutions exist. Thus, one can acknowledge that as long as these institutions exist they should exercise human rights due diligence and also simultaneously defend the need to dismantle them either in order to strengthen the democratic sovereignty of states or to replace them with the genuinely democratic political institutions of a world state.

Since the pluralist conception of human rights obligations I defend is compatible with a variety of political projects, this compatibility also indicates the conception's modest aspirations. Precisely because this proposal tries to be sufficiently realistic so that it can be implemented in the here and now, it also lacks sufficient utopian import such that it could, on its own, realize the cosmopolitan ideal of equal concern for all human beings that underlies the human rights project. As a first step, this proposal merely identifies the threshold below which global gov-

ernance institutions lack any legitimacy.⁵⁷ But such identification is no substitute for determining additional political conditions that these institutions would need to satisfy in order to achieve democratic legitimacy or to reach decisions on regulations and policies that meet more demanding normative standards of justice, equality, etc.⁵⁸ An appropriate answer to these questions is likely to require taking sides on some political ideal for a future international order and perhaps the ideal of a global democracy is actually the best ideal. But even those who are convinced that this ideal is desirable nevertheless concede that it is not something that can realistically be expected to happen any time soon. Thus, in light of the urgent need to improve human rights protections worldwide, even those who endorse the ideal of a world state should be able to acknowledge the importance of defending proposals for improvement that are susceptible of implementation in our current situation alongside their own long-term ideals. Global governance institutions are currently organized by state membership. Therefore, in order to argue that a pluralist conception of human rights obligations can be 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 (I).

Although this may seem like a disappointingly modest proposal to some, the claim that it is politically feasible may seem laughable to others. For this reason, in the last section of this lecture I will briefly assess the prospects for current human rights practice to evolve in such a way that human rights obligations become legally entrenched in global governance institutions such as the WTO, the World

57 Buchanan and Keohane (2010) identify ‘respect for the least controversial human rights’ as one of three substantive criteria of legitimacy for global governance institutions. They call this criterion ‘minimal moral acceptability’ and situate it on a par with the criteria of ‘comparative benefit’ and ‘institutional integrity’ (see pp. 117ff). However, they do not offer an analysis of specific institutional mechanisms by which human rights obligations could be legally entrenched in those institutions in order to meet the ‘minimal moral acceptability’ criterion of legitimacy.

58 For an overview of proposals of reform of global governance institutions to meet more demanding standards of democratic legitimacy see Patomäki and Teivainen (2004), 41-108.

Bank and the IMF. Using the ‘spiral model’ developed by Risse, Ropp and Sikink to explain the globalization of human rights norms among states I will identify some recent developments in the attitudes and actions of these institutions which give us a basis for guarded optimism with respect to the prospects of moving the human rights project forward in a globalized world (II).

I **Pluralist human rights obligations in a world of states**⁵⁹

As already indicated, a pluralist conception of human rights obligations may seem to face the obvious objection that entrenching human rights obligations within current global governance institutions requires dismantling the current state-based system and creating a new system of institutions with global political authority in its place. To the extent that the cosmopolitan moral ideal of equal concern for all human beings translates into the political requirement of achieving inclusive accountability at the global level, implementation only appears to be possible within the political institutions of a world state that, as a single agent, would be accountable to all world citizens as a single principal. 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 why a world state is needed for transnational democracy⁶⁰, others use this purported connection against cosmopolitan claims to global justice which 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 signifi-

59 In this section I draw from Lafont (2010).

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

cant. 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.*⁶¹

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

Thus, in order to address this objection we need to examine the precise content and scope involved in ascribing primary responsibility to states for the protection of their citizens' interests and rights. This ascription is at the core of the dominant conception of human rights obligations, according to which states bear the primary responsibility for protecting the human rights of their own people. In spite of the widespread acceptance of the state-centric conception of human rights obligations its normative credentials are nevertheless worth examining,

61 Nagel (2005), 139-40. 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 the last section I briefly indicate how the proposal I defend bears on some of Nagel's claims regarding the second question.

for the fragmentation of principals that makes inclusive accountability without a world state appear incoherent is a direct consequence of the ascription of responsibilities characteristic of the state-centric conception. The line of argument that I develop in what follows actually accepts two of the claims that lead to the normative dilemma pointed out by Nagel. I agree that some assumptions of the state-centric conception of human rights are incompatible with the ascription of inclusive accountability to institutions of global governance, and I also agree that the formation of a world state is the only way to make inclusive accountability at the global level compatible with the state-centric conception of human rights obligations. But these two claims do not amount to a genuine dilemma, since there is a third (more attractive) alternative open. Instead of having to bite the bullet of a world state or to renounce the demand of inclusive accountability at the global level, it seems best to reject the problematic assumptions of the state-centric conception of human rights.

1.1 Challenging the state-centric conception of human rights

In his book *The Idea of Human Rights*, 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.'⁶² 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.'⁶³ Thus, according to the state-centric conception of human rights, states bear the primary responsibility for protecting and promoting the rights and interests of their own citizens. The international community bears some responsibility in the protection of human rights, but, in contradistinction to states, this responsibility is sec-

62 Beitz 2009, p. 13.

63 Beitz 2009, p. 44.

ondary (or residual),⁶⁴ and this is in two senses. First, the international community's responsibility is secondary in the sense that it is activated only if and when states are unwilling or unable to protect the rights of their own people. Second, the responsibility of the international community is secondary in the sense that it is not supposed to replace the protective function of states. The international community may provide (temporary) assistance to states through the different institutions that act as its agents, but none of these institutions are supposed to provide the kinds of protections, entitlements and services that states provide to their own members. Whereas states are directly subject to human rights obligations, the protective function of the international community consists in holding states accountable for the treatment of their own members. This function is exercised by a variety of international and transnational agents and through a variety of measures. These measures include monitoring states' compliance with international standards of human rights, offering economic and other incentives for compliance (e.g. aid conditionality or preferential treatment in economic relations), using coercive measures such as threats of economic or diplomatic sanctions and, in cases of gross human rights violations, military intervention.

Although the state-centric conception of human rights obligations is widely accepted, it has some problematic consequences. One striking feature of this conception is its remarkable silence regarding the obligations of non-state actors (from individuals⁶⁵ to multinational corporations⁶⁶ or international financial institutions like the WTO, IMF or the World Bank). If states bear the primary responsibility of respecting and protecting the human rights of their own people and the secondary responsibility of the international community consists in holding states accountable for the treatment of their own people, it seems that non-state

64 See Goodin 2003, p. 76f.

65 One example of the disconnect between the state-centric conception of human rights and current human rights practice is that it is possible to prosecute leaders of non-state armed rebel groups for human rights violations such as genocide or ethnic cleansing, irrespective of any recognition that they were acting as official agents of a state. On this issue see Clapham (2006), 271-316.

66 Another example of current human rights practice that cannot be easily accounted for within the limits of the state-centric conception is the possibility of prosecuting multinational corporations in US Courts for violations of international human rights law under the Alien Tort Claims Act. 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).

actors do not have any responsibility to respect human rights and, consequently, that the international community has no responsibility to hold such actors accountable for the impact their own actions or decisions have on the protection of human rights. However, under current conditions of globalization, it is becoming increasingly clear that decisions about global economic regulations taken 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 do not have any human rights obligations? Even worse, how can the international community hold states accountable for the consequences of global regulations that are not in their hands to determine? Shouldn't the international community hold those actors accountable whose decisions and actions hamper the protection of human rights, whether or not they happen to be states, instead of holding states accountable for the consequences of decisions or actions that are beyond their effective control?

The important question here, of course, is whether there is a politically plausible alternative to the status quo. Under the current division of political space by states, is it plausible to claim that non-state actors such as the WTO have an obligation to protect human rights? Wouldn't this require the WTO to cease to be a voluntary association designed to facilitate trade among its member states and to become a human rights organization instead? Now, in order to show how an alternative to the state-centric conception's monistic ascription of human rights obligations does not also need to lead to such implausible consequences, it is important to pay attention to the ambiguity within the notion of 'protecting' human rights that I mentioned in the previous lecture.⁶⁷ If, following what has become standard terminology, we distinguish between the duties to *respect*, *protect* and *fulfill* human rights, it is clear that speaking of the obligation to 'protect' human rights can have very different meanings. These different 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

67 See pp. 36-37 above.

the only actors that bear primary responsibility in *respecting* the human rights of their citizens. The obligation of respecting 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 or 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. It is the difference between *taking the fulfillment and enforcement of human rights worldwide as their own goal* (i.e., becoming a human rights organization) and *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 protection of human rights worldwide. Whereas the former question is complex and its appropriate answer is therefore highly contested, the positive answer to the latter question seems hardly questionable from a normative point of

view.⁶⁸ As I argued in the previous lecture, global governance institutions such as the WTO, the IMF or the World Bank could recognize their obligation to *respect* human rights by legally entrenching a positive duty of *due diligence* that they could discharge, for example, by engaging in human rights impact assessments of their proposed policies and regulations before enforcing them. 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 people. To the extent that this is so, it is not obvious why legal entrenchment of the standard of due diligence in global governance institutions should be incompatible with maintaining the special obligations that states currently have with respect to their own people.

1.2 Achieving inclusive accountability through a pluralist conception of human rights obligations

This brings us back to the initial 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 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. 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 possibility of protecting 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 citizens from the regions they represent as strongly as pos-

⁶⁸ For a comprehensive overview of the vast legal literature on this issue see Skogly (2001).

sible. 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 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 recognized as 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.⁶⁹ 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)⁷⁰

Nagel's view of the regulations of international institutions such as the WTO as 'pure contracts' (and thus as exempt from any constraints of justice, however minimal)

69 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.

70 For a convincing criticism of this claim see Cohen and Sabel (2006), 171.

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 representatives of states have the responsibility of advancing 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 statisticians 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*.' (p.39; my emphasis) 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*.' (p. 51; my emphasis) 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 to the criticism that inclusive accountability is conceptually incompatible with domestic accountability. For exercising the collective responsibility of equally advancing the interests of all world citizens would leave no space for exercising the responsibility of advancing 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 different from their own representatives. Let's take the WTO as an example and for the sake of the argument let's accept the view suggested by Nagel (as it is quite widespread) that this institution is designed merely to facilitate bargaining among mutually self-interested parties seeking their own advantage.⁷¹ On such an understanding, WTO 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

⁷¹ 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 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 *unreciprocated* 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.)

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 obviously (and foreseeably) violating the basic human rights of others. Since avoiding the latter does not require giving equal weight to the interests of all world citizens beyond a relevant threshold, an obligation of respecting human rights that is shared by all 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.

Now, moving from the normative question of plausibility to the practical question of feasibility, there is no denying that the practical difficulties in implementing mechanisms that would entrench human rights obligations in global institutions are immense. Beyond the usual fear that these mechanisms could be manipulated by the powerful as much as the current ones are, an additional problem is that no coherent set of criteria is currently available for evaluating the specific impact of global economic regulations on human rights protections. Obviously, such criteria won't be available any time soon unless there is prior agreement among members of the international community that they are needed. In any event, the development of such a set of specific criteria would be crucial for coordinating the work of the different international financial institutions and thereby achieving greater coherence in global economic policymaking. Certainly, agreement on the specific criteria for assessing basic human rights protections by the international community may be hard to achieve and it may also be contested whenever it is perceived as politicized or tainted by an ideological bias. But however imperfect, contested and in need of revision such agreements may be, implementing them would certainly be an improvement over the alternative of leaving the impact of global economic regulations on human rights protections entirely out of the equation in the decision-making process of global institutions. If the criteria agreed upon are minimal or too narrowly construed establishing internal mechanisms of accountability within global institutions that guarantee

their obligations to respect human rights are discharged may prevent only the most obvious cases of gross human rights violations. But in the absence of any such mechanisms there is no reason to expect that even the most obvious violations will be prevented at all. Even such a modest aspiration seems out of reach unless and until there is widespread agreement on the need and the normative appropriateness of entrenching human rights obligations in global institutions.

II Applying the spiral model to global governance institutions

From a realistic perspective, the most pressing question is whether and to what extent it is likely that the international community can persuade global governance institutions to legally entrench human rights obligations. With this question in mind, I would like to briefly turn to an interesting approach that was proposed at the start of this decade – an approach that tried to answer the same question with regard to the prospects that individual states would increasingly recognize human rights norms. In their famous study *The Power of Human Rights*⁷², Risse, Ropp and Sikkink offered the so-called ‘spiral model’ as a theoretical tool to analyze the impact that human rights norms have on state behavior. The work as a whole demonstrated the theoretical fruitfulness of their particular model by showing how it could make sense of diverse findings across several case studies conducted in countries with serious human rights situations, covering all major geographical regions of the world. The model specifies a sequence of five phases in which governments of states can be situated depending on their official attitudes towards human rights norms and some causal mechanisms of ‘entanglement’ that under favorable circumstances may⁷³ induce them into an ‘spiral’ whereby it becomes harder and harder to avoid embracing their human

⁷² See Risse, Ropp and Sikkink (1999).

⁷³ As I indicate later, the authors do not interpret the spiral model as suggesting that there is an inevitable path that would move an actor from one stage to the next, inevitably leading to the final stage of compliance.

rights obligations. What makes the model interesting is that it does not rely on the actors in question possessing normative motivations ‘to do the right thing’, especially in the initial stages. To the contrary, the model shows how strategic and instrumental motivations of different kinds can nonetheless trigger mechanisms that lead these actors into this spiral of stages, regardless or even in spite of their initial motivations to the contrary. In a nutshell, the gist of the model is that actors can be led to do the right thing for a variety of wrong reasons. From this perspective, the short answer to our question can be conveyed by applying what Churchill once said about Americans to the international community as a whole, namely, that ‘it can always be counted upon to do the right thing – after all other possibilities have been exhausted.’

Despite this rather pessimistic or ‘realistic’ feature of the model, it has nonetheless been criticized for being too optimistic in that it seems to suggest some inevitable path from an initial phase of denying human rights norms all the way towards a final phase of actual compliance. Critics are quick to point out that, while it may be true that within the last decade the vast majority of states have in fact signed up to most human rights conventions and treaties (as the model suggests), the record of compliance is still depressingly low, contrary to what the model would lead one to expect. However, the criticism doesn’t really stick. The authors repeatedly indicated that their model does not assume an inevitable, evolutionary progress and that acceptance of their model therefore does not involve the assumption that the spiral will necessarily lead actors to reach the model’s final phase of compliance with human rights norms, let alone to do so within any specific time frame. The model simply identifies some important mechanisms that help in explaining the transition from one phase of the model to the next and specifies the prevailing logic of action in each of these phases. Thus it explains not only progress, but variation and lack of progress as well.

I mention this important point here as a disclaimer that equally applies to my own attempt to retool the ‘spiral model’ from its original purpose of analyzing the behavior of states to the quite different purpose of analyzing the behavior of non-state actors such as global governance institutions. In doing so, I do not mean to suggest any optimistic prediction about the likelihood that human rights obligations will become legally entrenched within these institutions any time soon. I use the ‘spiral model’ in this context because its direct applicability is simply striking. The kind of reactions that the spiral model identifies as symptomatic of the transition from initial to later stages bears a striking similarity to many of

the actual reactions that all three global financial institutions have had with regard to human rights norms. Before I mention some interesting examples, let me briefly describe the five stages or phases contained in the ‘spiral model’⁷⁴. They are as follows:

- 1 *Repression and activation of networks*: massive violations of human rights by a state lead to the activation of some transnational advocacy network that gathers information about the violations. Once the norm-violating state is put on the international agenda of the network this raises the level of international public attention.
- 2 *Denial*: the initial pressure by the international human rights community leads almost invariably to denial. The norm-violating government refuses to accept the validity of international human rights norms, it opposes the suggestion that its national practices in a given area are subject to international jurisdiction and charges that the criticism constitutes an illegitimate intervention in the internal affairs of the country. The denial of the validity of human rights norms rarely takes the form of open rejection of human rights,

⁷⁴ The model relies on three different mechanisms that are operative at different stages:

The first type of processes consists in the *instrumental adaptation to external pressures*. Governments adjust their behavior to normative pressures for purely instrumental reasons (e.g. to remain in power) and thus without believing in the validity of human rights norms. Examples of that type of adaptation are tactical concessions. States may release some prisoners or sign some international agreements, they may even start ‘talking the talk’ of human rights in their public activities.

The second type of processes consists in *moral argumentation and persuasion* that can lead actors to accept the validity of norms and to interpret their interests and preferences accordingly. Persuasion is not devoid of conflict, it may involve the ‘blaming and shaming’ of the actors in violation of human rights norms by international activists. Shaming may persuade governments that aspire to belong to the ‘civilized community of states’ to change their behavior. Governments that start ‘talking the talk’ of human rights get entangled in a moral discourse, which may be hard to escape in the long run. The more they engage in human rights rhetoric and justify their interests in those terms, the more they get entangled in arguments with their opponents (e.g. human rights advocates such as NGOs) and the logic of argumentative rationality slowly takes over.

The third type of processes consists in *institutionalization and habitualization*. These processes are essential to transition from mere recognition of the validity of human rights norms to actual compliance. Once human rights norms are incorporated in the standard operating procedures of domestic institutions, norms get implemented largely independently of the attitudes and beliefs of individual actors. Institutionalization and habitualization are necessary to ‘depersonalize’ norm compliance and to insure their implementation irrespective of individual beliefs.

but is instead expressed in the form of appeal to an allegedly more valid international norm such as national sovereignty.

- 3 *Tactical concessions*: if international pressures continue or escalate the norm-violating state seeks cosmetic changes to pacify international criticism (as well as for other strategic reasons such as the desire to remain in power, the need for economic aid, etc.). These cosmetic changes (e.g. releasing prisoners or greater permissiveness of domestic protest activities) may allow the internal opposition to gain courage and space and to amplify their demands in the international arena. In this phase the norm-violating state no longer denies the validity of human rights norms, but typically denies the allegations. By doing so it gets entangled in a public controversy with critics who usually respond by justifying their accusations. The more states argue with their critics the more likely they are to make argumentative concessions. At this point reputational concerns tend to keep the government in a dialogical mode of arguing, so that its own instrumental reasons reinforce the argumentative process. This process of ‘self-entrapment’ into argumentative behavior also implies that the government begins taking the advocacy networks more seriously and that they have also begun to seriously engage in a dialogue about how to improve the human rights situation.
- 4 *Prescriptive status*: in this phase the main actors involved regularly refer to the human rights norms to describe and comment on their behavior. The validity of the norms is no longer controversial, even if the actual behavior continues to violate the norms. States ratify the respective international human rights conventions and treaties, the norms are institutionalized in the constitution or domestic law, there is some institutionalized mechanism for citizens to complain about human rights violations, etc.
- 5 *Rule-consistent behavior*: if pressure ‘from below’ and ‘from above’ continues international human rights norms are fully institutionalized, norm compliance becomes a habitual practice of actors and it is enforced by the rule of law.

Now, if one takes the ‘spiral model’ as a guide to understanding the developing attitudes of global governance institution such as the WTO, the IMF or the World Bank regarding human rights norms, it is not hard to show how, so far, they appear to have moved along the path from stages one and two to stage three. This is quite significant, as stage three immediately precedes the legal recognition of human rights obligations.

As for the first phase, the repression and activation of human rights networks, each of these three financial institutions have been the focus of strong public criticism about how their respective policies have negatively impacted human rights. There are so many examples of this dynamic that it is impossible to list them all, but just to mention some of the best known cases: criticisms of the IMF’s ‘structural adjustment programs’ imposed on Third World countries (especially during the 80’s and 90’s) that notoriously undermined the ability of recipient states to protect the most basic human rights of their citizens; criticisms of the World Bank’s support for big infrastructural projects that caused the displacement of huge populations in total disregard of their most basic human rights (and which caused all kinds of ecological disasters); and human rights campaigns against the WTO’s policies on intellectual property rights over pharmaceutical products that chocked off access to essential medicines from citizens of poor countries, most notably access to cheap generic versions of retroviral HIV/AIDS.

With respect to the second phase of denial, each of these institutions has at some point or another rejected the validity of human rights norms in precisely the same way that the ‘spiral model’ predicts states will reject them. More specifically, these institutions have not rejected the validity of human rights norms themselves, but have instead denied that these norms apply to their activities and offered alternative standards and goals that in their view should be used for assessing the appropriateness of their actions and policies. This strategy of denial typically trades on the ambiguous meaning of the obligation to protect human rights that I mentioned before. Taking the obligation in the expansive sense of ‘promoting and enforcing’ human rights, these institutions insist that such goals are not part of their legal mandate and therefore lie beyond their competence. They insist that the institutions in charge of fulfilling those functions are states and non-financial entities such as the United Nations treaty monitoring bodies and regional human rights organizations. An example of this position can be found in a letter written by Sergio Pereira Leite, an assistant director of the European office of the IMF, with the title ‘The International Monetary Fund and

Human Rights’, which was published in *Le Monde* in September of 2001 and can be found in the official IMF website.⁷⁵ He rejects the notion that the promotion and enforcement of human rights is part of the IMF mandate, when he states:

.....
 ‘Since 1999, the IMF has stressed the central role of poverty reduction in the Fund’s strategy for low-income countries... It is important to remember, however, that the ownership of the poverty reduction strategy needs to remain with the country. While human rights advocates should be given every opportunity to participate in the PRSP (poverty reduction strategy paper) consultations, *they should not expect the IMF to impose human rights conditions on its assistance to member countries. The IMF simply does not have the expertise required to make judgments in this area....* (It) should be recognized that *the IMF was created to promote international monetary cooperation and orderly balance of payment adjustment.*’ (my italics)

As mentioned above, whereas the validity of human rights norms is not denied, the applicability of such norms to the activities of the IMF is denied through a variety of alternative principles and standards. For example the statement cites other valid principles, such as the contention that IMF assistance should not affect the sovereignty of states in creating their own policies to protect the rights of their citizens, and it also appeals to other valid standards (such as economic cooperation, financial stability, etc.) as the relevant metrics for judging the appropriateness of their activities. However, regarding the much narrower obligation to *respect* human rights, the IMF can hardly openly defend an interpretation of its legal mandate as consisting in the single-minded pursuit of its specific economic goals in total disregard of their impact on the most basic human rights of the world’s population. In fact, after stating the IMF’s lack of mandate and expertise

⁷⁵ The letter can be found at the following address within the IMF website: <http://www.imf.org/external/np/vc/2001/090401.htm>. A longer version of the letter was published later in the IMF’s magazine *Finance & Development*. This longer version is also available on the IMF website at the following address: <http://209.133.61.129/external/pubs/ft/fandd/2001/12/leite.htm>. In the longer version, the titles of the sections where each of the passages quoted here are found are even more revealing. They read: ‘What is the IMF’s contribution to human rights?’ and ‘Do IMF-supported programs harm economic, social, and cultural rights?’ respectively.

in the area of promoting and enforcing human rights, in the same document we find indirect recognition of the obligation to make sure that the IMF's own policies do not have a negative impact on the enjoyment of human rights⁷⁶:

.....
 'The International Monetary Fund recognizes that *it should be aware of any adverse side effects of policies it proposes*. In those cases, it is often necessary to introduce appropriate safety nets to help alleviate adverse social consequences. This is fully accepted by the IMF... The IMF *should endeavor to be open to criticism and undertakes to change its policies when results are disappointing*.'
 (my italics)

Obviously, such vague statements fall far short of an explicit recognition of any legal human rights obligations, but they suggest that the institution in question has entered the third phase of tactical concessions, as described by the spiral model. The 'self-entrapment' into argumentative behavior through an explicit response to public controversy is evidenced by the question to which the passage quoted above is supposed to provide an answer, namely, 'Do IMF-supported programs harm economic, social, and cultural rights?' As the spiral model predicts, once an institution gets entangled in publicly addressing such objections, it is likely to make argumentative concessions like the one quoted above. In fact, in contradistinction to the WTO, which avoids any reference whatsoever to the term 'human rights' in any of its public statements, the IMF and the World Bank are already clearly 'talking the talk' of human rights in many of their statements that have been prompted by public criticism about the impact that their activities have on the protection of human rights. Although they do not recognize human rights obligations as part of their legal mandate, in many of their official statements and in their web pages they insist that their work 'promotes' and 'contributes to the

76 The term 'human rights' is not explicitly used in the sentence that describes the IMF's obligations, although when taken in context it is clear that the enjoyment of human rights is the elliptical object of reference for the 'adverse side effects' explicitly mentioned in the sentence. In fact, the official documents of all three institutions go to great lengths to avoid the explicit use of the term 'human rights' when describing their own obligations and responsibilities.

realization' of human rights.⁷⁷ Obviously, by making such argumentative concessions, they invite greater public scrutiny of their policies and modes of operation as well as open themselves to the risk of being proven wrong by empirical studies that may demonstrate their policies actually have negative impacts on human rights protections. This, in turn, would force them to make further changes and concessions regarding their basic modes of operation.

In fact, the available evidence clearly suggests that all three global financial institutions currently find themselves in the third phase of making tactical concessions. These concessions are not merely 'argumentative' in nature, but include actual changes in institutions's modes of operation in an effort to avoid massive public criticism. As described in the passage quoted above, the IMF's inclusion of poverty reduction strategies as an essential component of financial aid is a clear step in that direction.⁷⁸ Similarly, the World Bank's inclusion of 'social impact assessments' was in direct response to the catastrophic consequences of various large-scale infrastructural projects that have been financed by the Bank over the past few decades. Although the purpose of these assessments is characterized in a way that makes no explicit reference to human rights,⁷⁹ the Bank does explicitly say their purpose is to calibrate the social impacts that the Bank's policies and programs have within the recipient countries with respect to their affects on 'the well-being or welfare of different stakeholder groups, with particular focus on the poor and vulnerable.'⁸⁰ As for the WTO, the 2005 amendment to the TRIPS Agreement regarding patent protections on pharmaceutical products offers the clearest example. After extended pressure by well-publicized human rights

77 For some official statements of the World Bank along these lines see the information on 'Human Rights' contained in the Frequently Asked Questions section of the Bank's webpage at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/o,,contentMDK:20749693~pagePK:98400~piPK:98424~theSitePK:95474,00.html>

78 The Poverty Reduction Strategy Paper (PRSP) process was introduced in 1999 as a condition of eligibility for debt relief among Heavily Indebted Poor Countries, but has since become ubiquitous in the operations of the IMF and the World Bank regarding development aid. For an evaluation of its impact on human rights so far see the contributions on the topic in Alston and Robinson (2005), 447-508.

79 An interesting exception within the World Bank Group are the 'Performance Standards' adopted by the IFC which make explicit reference to several UN conventions on human rights. See 'Performance Standards and Guidance Notes – 2012 Edition' at the IFC's official website <http://www.ifc.org/>

80 World Bank 2002, at 2.

campaigns worldwide, in 2005 members of the WTO agreed to amend the TRIPS Agreement in order to allow the issuance of compulsory licenses in developed countries for the export of essential medicines to poorer countries. Although the amendment is an obvious response to the negative impact of pharmaceutical patent laws on the human right to health of millions of citizens in poor countries, the text carefully avoids any use of the term ‘human rights’. Instead of using the term ‘right to health’, less committal expressions such as ‘concern for public health’ are employed; instead of referring to WTO’s members obligations to protect their citizens’ human right to health (or their right to have access to essential medicines), less committal expressions are used like in the following example: ‘the Agreement can and should be interpreted and implemented in a manner supportive of *WTO member’s right to protect public health* and, in particular, to *promote access to medicines for all.*’ (my emphasis). As in the case of the IMF quoted above, the amendment’s explicit recognition of the priority of public health over intellectual property rights falls short of an official recognition that the WTO might have any legal human rights obligations. On the other hand, the actual modifications of current patent law (which add some ‘flexibilities’ in its application) are not simply argumentative concessions, but are also attempts to actually address the negative impact that WTO’s policies have had on human rights protections, however insufficient these attempts have been so far.

Perhaps the closest piece of evidence of an institution moving towards the spiral model’s fourth ‘institutionalization’ phase is the World Bank’s establishment of the Inspection Panel in 1993. Its mandate is to review complaints from any group of private persons alleging that they are suffering or expect to suffer adverse material effects from the failure of the Bank to follow its operational policies and procedures. Although no explicit reference is made to human rights in characterizing its legal mandate, this Panel is the closest thing one can find to an institutionalized mechanism for individuals to complain about human rights violations in a global financial institution. The main normative significance of the Panel’s establishment in our context is that it constitutes the first formal acknowledgment that international organizations are accountable not just to their member states, but also to individuals or private parties who are affected by their opera-

tions, independently of the relationship that either the organization or the private actor has to a member state.⁸¹

It is hard to predict whether these timid steps will lead global governance institutions to move to the next stages of the spiral model any time soon. As mentioned in the previous lecture, if members of the international community were to take the next step of legally entrenching human rights obligations within global institutions this would be an extraordinary achievement. And, of course, if the institutional mechanisms for enforcement were efficient enough to lead these institutions to the last stage of actual compliance with human rights norms this would be utterly astounding. But, following the realistic spirit of the spiral model, perhaps all that one may dare to say at this point is that if the increasing entanglement of global institutions with the discourse of human rights can be taken as a sign that all other possibilities have already been exhausted, perhaps it is not too optimistic to expect that these institutions may do the right thing at last.



⁸¹ 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.

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