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Kristina Daugirdas

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How and Why International Law Binds International Organizations*

Kristina Daugirdas**

ABSTRACT

For decades, controversy has dogged claims about whether and to what extent international law binds international organizations (IOs) like the United Nations and the International Monetary Fund. The question has important consequences for humanitarian law, economic rights, and environmental protection. In this article, I aim to resolve the controversy by supplying a theory about when and how international law binds IOs. I conclude that international law binds IOs to the same degree that it binds states. That is, IOs are not more extensively or more readily bound; nor are they less extensively or less readily bound. This means that IOs, like states, are not bound by treaties without their consent, with some very narrow exceptions that apply to states and IOs alike. It means that IOs, like states, are bound by jus cogens rules, which are mandatory for states and IOs alike. And it means that IOs, like states, are bound by general international law—but only as a default matter. Like states, IOs may contract around such default rules, except to the extent that individual IOs lack the capacity to do so because of their limited authorities.

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Contents

Which international law rules bind international organizations (IOs)?[1] Does the Security Council have a legal obligation to prevent genocide?[2] Does the International Monetary Fund have an obligation to ensure that its loan conditions don't impede borrowing states' efforts to provide an education?[3] Must the World Trade Organization recognize the precautionary principle in international environmental law? The charters of the United Nations, the IMF, and the WTO do not clearly impose these obligations. Nor are these IOs parties to treaties that impose such obligations. So if these obligations bind these IOs—and many commentators think they do—it must be for another reason.

This article considers two possibilities. One is that these treaty provisions reflect customary international law or general principles[4] (collectively, general international law), and that general international law binds IOs as well as states. Indeed, the International Court of Justice (ICJ) has averred that "[i]nternational organizations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law."[5] Many scholars echo this language

[1] This article uses the definition of international organizations articulated by the International Law Commission: "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality." Draft Articles on the Responsibility of International Organizations, art. 2(a).

[2] José Alvarez, *Review of Dan Sarooshi, International Organizations and Their Exercise of Sovereign Powers*, 101 AM. J. INT'L L. 674, 677-78 (2007) (describing this as a hard question).

[3] *Compare* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 148-51 (2006) (arguing in the affirmative) with François Gianviti, *Economic, Social, and Cultural Human Rights and the International Monetary Fund* 113, 121-22 in NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston, ed. 2005) (arguing in the negative).

[4] Exactly which rules fit into the general principles category is contested. As traditionally conceived, general principles include those legal principles "derived from, and evidenced by, the consistent provisions of various municipal legal systems—principles *in foro domestico*—which can be validly transposed into international law." JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 125-26 (2003); *see also* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 26-28 (2005). These may include principles such as estoppel or res judicata that relate to judicial proceedings. Some scholars argue that this category also includes fundamental human rights norms. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. INT'L L. 82 (1989). The argument in this article does not turn on resolving this debate about which rules qualify as general principles or whether any particular norm is more appropriately characterized as customary international law or a general principle.

[5] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 para. 37.

and affirm that general international law binds IOs.[6] But this one sentence hardly settles the matter.[7] Not only is the ICJ's opinion devoid of reasoning and unsupported by state practice, but the ICJ's precise legal conclusion is unclear.[8] Some scholars continue to think that whether customary international law binds IOs at all is a hard question, while others suggest that only a subset of general international law binds IOs.[9]

The second possibility is that treaties can bind IOs even when they are not parties and have not consented. But whether treaties can bind IOs without their consent is disputed. On the one hand, the view that IOs are automatically bound by their member states' treaty obligations is in tension with IOs' separate, independent legal personality. And the 1986 Vienna Convention on the Law of IO Treaties (VCLT-IO) says that treaties do not bind IOs without their consent.[10] On the other hand, the VCLT-IO remains controversial and, nearly 30 years after its adoption, has failed to attract enough ratifications to enter into force.[11] In the meantime, a number of scholars—including the authors of a leading treatise on IOs—have insisted that IOs can be so bound.[12]

As it stands, then, significant disagreement and uncertainty persists about which international law rules bind IOs and which they are legally free to ignore. To resolve these competing claims, this article offers a theory of how and why international law binds IOs. The central thesis of this article is that international law binds IOs to the same degree that it binds states. That is, IOs are not more extensively or more readily bound; nor are they less extensively or less readily bound. This means that IOs, like

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[6] *See infra* note 26 and accompanying text.

[7] *See infra* Part I.A.1; *see also* Jan Klabbers, *The Paradox of International Institutional Law*, 5 INT'L ORG. L. REV. 151, 165 (2008) ("[T]he discipline may claim, following the ICJ in 1980, that international organizations are subjects of international law, and thus also subject to international law, but it remains unclear which international law and why: there is no plausible theory of obligation.").

[8] *See infra* notes 27-36 and accompanying text.

[9] *See supra* note 2; *infra* notes 37-41 and accompanying text.

[10] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations art. 34, *opened for signature* Mar. 21, 1986, 25 ILM 543 (1986) (not yet in force), [hereinafter VCLT-IO] ("A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.").

[11] Thirty-five states must become parties before the VCLT-IO enters into force; so far, only 31 have done so. *See* VCLT-IO art. 85; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en.

[12] *See infra* notes 52-59 and accompanying text.

states, are not bound by treaties without their consent, with some very narrow exceptions that apply to states and IOs alike. It means that IOs, like states, are bound by *jus cogens* rules, which are mandatory for states and IOs alike. And it means that IOs, like states, are bound by general international law—but only as a default matter. Like states, IOs may contract around such default rules, except to the extent that individual IOs lack the capacity to do so because of their limited authorities.

At bottom, the debate about IOs' legal obligations boils down to this: when and why should obligations that were created by states and for states bind IOs?[13] To begin to answer this question, consider IOs' relationship to states in the international legal system. A defining feature of IOs is that they are simultaneously in a vertical and a horizontal relationship with states. IOs are subordinate to states because states are the entities that create, sustain, and—potentially—dismantle IOs (the vertical relationship). States are the principals, IOs are the agents. At the same time, IOs are separate legal persons under international law with a significant degree of autonomy (the horizontal relationship). Among other things, IOs can call states to account for violations of international obligations using the same methods that states, as sovereign equals, use to resolve disputes among themselves. In addition, comprehensive immunity shields IOs from the regulatory authority of individual states. Both features distinguish IOs from other non-state actors, including corporations and NGOs.

The vertical relationship suggests that IOs are appropriately characterized as vehicles through which states operate. The horizontal relationship, by contrast, suggests that IOs are states' peers on the international plane. Of course, these two perspectives

[13] Whether IOs can contribute to *making* customary international law is also contested. The ILC has recently begun to tackle the question. *See* Second Report of the Special Rapporteur on Identification of Customary International Law (20 May 2014), UN Doc. A/CN.4/672, paras. 43-44; Identification of Customary International Law, Text of Provisionally Adopted Draft Conclusions ("In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law."). Some scholars have suggested that IOs should be bound by customary international law only to the extent that they can contribute to making customary international law. *See infra* notes 40-41 and accompanying text. But this need not necessarily be the case. Armed opposition groups, for example, are bound by customary international humanitarian law, but on most accounts they do not have any role in shaping the content of customary international humanitarian law. *See* Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Law*, 37 YALE J. INT'L L. 107 (2012).

are not genuinely dichotomous. No IO is purely a vehicle, and no IO is wholly autonomous. The two conceptions are poles at the ends of a wide spectrum. Some IOs will be closer to the peer end, perhaps because of their resources or authorities. Others will be closer to the vehicle end, perhaps because of their decision-making structure or limited membership.[14] Indeed, the same IO might look more like a peer or more like a vehicle depending on the angle from which it is scrutinized. Focus on the Secretary-General, and the United Nations looks more like a peer; focus on the Security Council or the General Assembly, and it looks more like a vehicle.

These two conceptions correspond to two distinct apprehensions that motivate the arguments about IOs' obligations. If IOs are conceived as vehicles through which states operate, the fear is that states might exploit IOs to evade their international obligations.[15] If IOs are conceived as peers, however, the underlying concern is quite different: it's that states have created entities with significant authorities and power that they don't or can't fully control. This latter concern might be labeled the Frankenstein problem.[16]

Yet both conceptions of IOs lead to the same conclusion about their international obligations: general international law and treaties bind IOs to the same degree that they bind states. In other words, regardless of whether IOs are seen as peers or vehicles, the same international obligations bind them. By building the theoretical infrastructure for that conclusion from these two diverging perspectives, I hope to assuage the concerns raised by those who remain unpersuaded that general international law binds IOs. At

[14] The vehicle perspective may seem especially appropriate for an IO like NATO, for example, in light of its limited membership and the rule that its 28 member states must reach consensus before making important decisions. *See* UN Doc. A/CN.4/637 at 11-12 (NATO's submission to the ILC).

[15] August Reinisch, *Securing the Accountability of International organizations*, 7 GLOBAL GOVERNANCE 131, 134 (2001) ("Where states cooperate well and use an international organization as a vehicle to carry out activities that they themselves may be prevented from engaging in either under their domestic law or under international law, the lack of substantive and procedural restraint may pose a serious problem. This is where the lawyers' interest in protecting against worst-case scenarios begins.").

[16] Others have made this comparison. The epigraph to Jan Klabbers's casebook is a quotation from Mary Shelley: "You are my creator, but I am your master; obey!" JAN KLABBERS, INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2d ed. 2009); *see also* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 585 (2005); Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999 (2014).

the same time, the article exposes the view that treaties can bind IOs without their consent as untenable in the vast majority of cases.

Drawing on these theoretical foundations, this paper turns to a practical and startlingly underappreciated question: what do IOs themselves think? A number of IOs have in fact communicated their views on the scope of their international obligations to the International Law Commission (ILC).[17] In these comments, participating IOs staked out a position that tracks this paper's theoretical conclusions. They emphatically rejected the possibility that treaties bind them without their consent. They also embraced the conclusion that they were bound by *jus cogens*, customary international law, and general principles. Finally, participating IOs asserted that their charters constitute *lex specialis*—that is, that their charters reflect action by states to alter the application of customary international law or general principles by elaborating or carving out exceptions to it. The view that IO charters constitute *lex specialis* necessarily rests on the view that general international law binds IOs except to the extent that those IOs or their member states have contracted around it. In other words, there is some evidence that IOs themselves recognize that general international law binds them, but only as a default matter.

At the end of the day, then, states enjoy wide latitude to create *lex specialis* and adjust the legal obligations that bind the IOs they establish. States can exercise that discretion to create IOs that are free to ignore certain international rules vis-à-vis their member states. States might choose to do so because they believe that such institutions will be more efficient or effective at achieving their policy goals.[18] The result may well be

[17] The ILC is a subsidiary body that the General Assembly created in 1947 to fulfill its responsibility under the Charter to initiate studies and make recommendations for the purpose of encouraging the codification and progressive development of international law. UN Charter art. 13. The ILC is made up of 34 expert members with "recognized competence in international law" who serve in their personal capacities rather than as representatives of their States of nationality. Statute of the International Law Commission arts. 2(1), 3. No two members of the Commission may be nationals of the same state, and, in electing the members, the General Assembly must ensure that the "main forms of civilization" and the "principal legal systems of the world" are represented. *Id*. arts. 2(2), 8.

[18] *See infra* note 68 and accompanying text; *cf*. W. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 395 ("[T]here is a limit to 'institutional elasticity,' i.e., the extent to which institutions created and still used for other purposes

problematic along some dimensions: IOs that are licensed to ignore certain international norms might undermine those norms or work at cross-purposes to policy goals that states are advancing in other arenas.[19] But such conflicts are an inevitable feature of an international legal system that is based largely on state consent. Although IOs are creatures of international law, it does not follow that they are obliged to follow or reinforce all international norms.

That said, states' discretion to fashion IOs is not unlimited. States cannot create IOs that are authorized to violate *jus cogens*. Nor can states establish or act through IOs to erase general international law obligations they owe to non-member states. It is one thing when states agree, collectively, to authorize an IO to disregard certain general international law obligations in its interactions with member states. It is another thing altogether for states to use an IO to sidestep their international obligations to states that are not participating in the IO. While this article's account of IO obligations does not promise to eliminate all conflicts in the international legal system, it does seek to ensure that IOs do not supply threads that, once pulled, could unravel the international legal order.

I. Disputes and Uncertainty About IO Obligations

A. Disputes and Uncertainty

A sampling of IO charters highlights their ambitious goals: "international peace and security,"[20] "the attainment by all peoples of the highest possible level of health,"[21] and "long-range balanced growth of international trade,"[22] to name just a few. Even as IOs contribute to achieving these goals, the possibility that they might exacerbate the

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can be 'stretched' in order to get them to perform human rights functions, especially when those functions are accomplished *at the expense* of their manifest functions.").

[19] *See, e.g.*, Siobhán McInerney-Lankford, *Human Rights and Development: Regime Interaction and the Fragmentation of International Law*, 4 World Bank Legal Review (Hassane Cissé et al., eds.) (2013) (arguing that the absence of policy coherence across human rights and development regimes is problematic).

[20] UN Charter, art. I(1).

[21] WHO Constitution, art. 1.

[22] IBRD Articles of Agreement, art. 1.

problems they were meant to alleviate or otherwise cause harm along the way has, in recent decades, gained more and more attention. Concerns about "IO accountability" have mounted. There are various ways to define accountability and to try to ensure IOs are accountable.[23] One is to look to international law. The ILC's 2011 draft articles on IO responsibility address the consequences for IOs that violate their international legal obligations. But the articles are silent on what those international obligations are, and the question remains mired in dispute and uncertainty. As August Reinisch put it at the 2015 Annual Meeting of the American Society of International Law, when it comes to IOs, it is only a "little bit exaggerating" to say that "we don't know what the wrongful acts are."[24]

1. General International Law

Scholars have taken a range of positions about whether and how general international law binds IOs. Some hesitate to stake out a position, considering it a hard question. Others argue that only a subset of general international law binds IOs. Still others suggest not only that the entire corpus of general international law binds IOs, but that these rules constitute mandatory rather than default rules for IOs.

A single sentence in the ICJ's 1980 *WHO-Egypt* advisory opinion supplies the foundation for many positions about IO obligations under general international law. In full, it reads: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[25] Paraphrasing this key sentence, a number of scholars have affirmed that

[23] *See generally* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005); Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211 (2014).

[24] August Reinisch, Adapting to Change: The Role of International Organizations, 2015 ASIL Annual Meeting (April 20, 2015), at https://www.youtube.com/watch?v=4fW-YR6HqW0.

[25] Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, para. 37.

general international law binds IOs.[26] But others are less sure. One source of doubt that the *WHO-Egypt* opinion settles the question is the dearth of state and IO practice supporting its conclusion.[27]

A closer look at the *WHO-Egypt* opinion reveals additional reasons why it cannot settle the question about IOs' obligations—or even shed much light on it. The case arose when Arab states sought to transfer a WHO regional office away from Alexandria after Egypt agreed to the Camp David Accords with Israel.[28] (Arab states numerically dominated the WHO regional committee that supervises the Alexandria office.[29]) Egypt protested that such a transfer would violate a 1951 treaty it had signed with the WHO. Other states argued that the 1951 treaty did not apply to the transfer decision. The ICJ did not resolve this question; instead, it asserted that the "true legal question" was which legal principles and rules governed the relocation of regional offices.[30] The ICJ stated that IOs are bound by general rules of international law in the course of a paragraph that makes the obviously correct and rather trivial point that IOs lack an absolute right to select the location of their headquarters or a regional office:

> States for their part possess a sovereign power of decision with respect to their acceptance of the headquarters or a regional office of an organization within their

[26] *See, e.g.*, Olivier de Schutter, *Human Rights and the Rise of International Organizations* 51, 72-73, in ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANIZATIONS (Jan Wouters et al. 2010) ("We may conclude that international organizations, as subjects of international law, must comply with general public international law in the exercise of their activities, and that this includes a requirement to comply with the Universal Declaration on Human Rights as general principles of law."); EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 99 (2014) ("[A]s an international person, an [IO] is subject to general international law. Therefore [IOs] are subject to customary international law and general principles of law."); August Reinisch, *Securing the Accountability of International organizations*, 7 GLOBAL GOVERNANCE 131, 136 (2001) ("[S]trong arguments in favor of an obligation to observe customary law may be derived from more general reflections concerning the status of the UN as an organization enjoying legal personality. It has been forcefully stressed that the Security Council is 'subject to' international law because the UN itself is a 'subject of' international law, and this reasoning may be applied more generally to other international organizations.").

[27] Alvarez, *supra* note 2, at 677.

[28] As explained in the Written Statement made to the ICJ by the Syrian Arab Republic, "[t]he cause of the increasingly tense and troubled situation obtaining in the Eastern Mediterranean Region, which has made it necessary to transfer the regional office, lies in the agreements signed at Camp David in the United States of America on 27 September 1978."

[29] WHO Constitution arts. 46-47, 50; Interpretation of the WHO-Egypt Agree-ment, 1980 I.C.J. Rep. at 85 paras. 28-29.

[30] Interpretation of the WHO-Egypt Agreement, 1980 I.C.J. Rep. at 88 para. 35; *see also infra* notes 198-200 (describing the ICJ's conclusion about the principles and rules applicable to the possible transfer).

> territories; and an organization's power of decision is no more absolute in this respect than is that of a State. As was pointed out by the Court in one of its early Advisory Opinions, there is nothing in the character of international organizations to justify their being considered as some form of "super-State." International organizations are subjects of international law and as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[31]

The ICJ's opinion thus offers nothing to bolster its statement that IOs, as subjects of international law, are bound by general rules of international law. The equation of being a subject with being bound by general international law is hardly obvious. As the universe of entities with rights or obligations (or both) under international law has expanded beyond states and IOs to include individuals and armed opposition groups, both the prerequisites and the consequences of being a subject of international law have grown increasingly contested.[32]

Even if we accept the ICJ's conclusion, it's difficult to wring much content from it. After all, the ICJ wrote that IOs are bound by "any obligations *incumbent upon them* under general rules of international law." Maybe all of general international law is "incumbent upon" IOs. But maybe only some (unspecified) subset is. The phrase "general rules of international law" compounds the confusion because the ICJ has not used this term (or its many variations) consistently.[33] Sometimes the term refers to customary international law and general principles.[34] Other times the term refers to

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[31] Interpretation of the WHO-Egypt Agreement, 1980 I.C.J. Rep. at 89-90 (citation omitted).

[32] As a result, some scholars endorse discarding the "subject" concept altogether. *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49 (1994) (arguing that the notion of "subjects" and "objects" of international law has "no credible reality" and serves "no functional purpose.").

[33] G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 9-10 (1993) (noting various ways that the term "general international law" and similar variations are used); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 436-437 (1983) (same).

[34] *Id*.

norms that are mandatory and binding without exception.[35] Still other times it is used as a synonym for customary international law.[36]

Jan Klabbers has argued that *WHO-Egypt* is best read to indicate that only a subset of general international law binds IOs. That subset includes rules on the "making, application, and enforcement" of international law, such as rules about treaty law or responsibility, and excludes rules that require, permit, or prohibit particular conduct.[37] In his view, the ICJ likely did not mean to refer to all of customary international law. Had it meant to do so, he argues, the ICJ would have done it explicitly.[38] After all, in 1980, when the ICJ had issued its opinion, the prospect of wrongdoing by IOs was still seen as "a remote, largely hypothetical, possibility."[39] Moreover, Klabbers argues, the view that customary international law rules created by and for states might bind other actors contravenes the very concept of customary international law as resulting from "the aggregate of activities of the members of a political community."[40] If all customary international law binds IOs, he argues, there's a troubling misalignment between IOs' obligations and their limited ability to contribute to making customary international law.[41]

WHO-Egypt thus fails to resolve which international law rules bind IOs, and the question remains unsettled. But even if there were agreement about which rules bind IOs, scholars have disagreed about whether those rules are mandatory or default rules.[42]

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[35] *Id*.

[36] *Id*.

[37] Jan Klabbers, *Review of The UN and Human Rights: Who Guards the Guardians? by Guglielmo Verdirame*, 11 INT'L ORG. L. REV. 235, 237 (2014); *see also* Jan Klabbers, *The Sources of International Organizations Law* in THE OXFORD HANDBOOK ON SOURCES OF INTERNATIONAL LAW (forthcoming).

[38] *Id*.

[39] *Id*.

[40] Klabbers, *The Sources of International Organizations Law*, *supra* note 37.

[41] *Id*. ("Surely, if one is to become bound by a customary rule, it is only fair that one is also in a position to contribute to its formation—yet with international organizations this possibility is practically ruled out on topics other than those falling within the competences of the organization."). *But see* CLAPHAM, *supra* note 3, at 28 (arguing that general international law can bind IOs without IOs having any role in making those rules). *See also supra* note 13.

[42] The *WHO-Egypt* opinion does not speak to this question; nor do some of the scholars who have written about IO obligations. *See, e.g.*, CLAPHAM, *supra* note 3; De Schutter, *supra* note 26. These authors may not have addressed the question because they have focused on IOs' human rights obligations, and states

Some have affirmed that states can contract around general international law when establishing IOs,[43] but others have suggested they cannot[44]—or at least expressed some sympathy for the view that they cannot.[45]

In short, the answers that scholars have given to the question of whether general international law binds IOs include: yes, maybe, sometimes, and always.

2. Treaties

There is also disagreement about whether treaties can bind IOs without their consent. Treaties do not bind states without their consent; the ability to pick and choose among treaties is one of the fundamental rights associated with statehood.[46] Indeed, if one state can bind another entity to international obligations without the latter's consent, it is good evidence that the entity lacks the independence that is a requisite

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and IOs may not be able to contract around such norms even if they do not have *jus cogens* status. *See infra* note 119 and accompanying text.

[43] Daniel Halberstam & Eric Stein, *The United Nations, The EU, and The King of Sweden*, 46 COMMON MARKET L. REV. 13, 21 (2009) (arguing that the United Nations is bound by customary international law as well as general principles of law, "at least to the extent that the UN Charter does not provide otherwise"); Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?* 46 INT'L & COMP. L. Q. 309, 320 (1997) ("Where the Charter gives the Council a right to derogate from international law it is clear that that right exists. Where no express permission is given the right does not exist.").

[44] Tomuschat starts with the proposition that IOs must be bound by *jus cogens* norms like the ban on the use of force in the UN Charter: "If states could evade this central rule of today's legal order by founding an international organization, it would soon totally lose its practical impact." Christian Tomsuchat, *Ensuring the Survival of Mankind on the Eve of a New Century*, 62 RECUEIL DES COURS 23, 135 (1999). He then argues that the "constraints" on IOs include "ordinary norms" as well as *jus cogens* norms. *Id*. at 135-36. States can contract around such ordinary customary international law norms if they so choose. Thus, for example states may choose to vary by mutual agreement the rules relating to territorial seas or exclusive economic zones. By contrast, in his view, it appears that IOs cannot do so, for the "[l]egal clarity brought about by the UN Law of the Sea Convention and the customary rules which have emerged against its background should not be susceptible of being undermined by rather simplistic legal tricks" like the establishment of an IO. *Id.* at 136.

[45] Reinisch writes that "the assumption that the UN member states could have succeeded in collectively 'opting out' of customary international law and general principles of law by creating an international organization that would cease to be bound by those very obligations appears rather unconvincing." August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 858 (2001).

[46] International Law Commission, Draft Articles on the Law of Treaties, with commentaries. Yearbook of the International Law Commission, 1966, vol. II, at 226.

feature of statehood.[47] The 1969 Vienna Convention on the Law of Treaties (VCLT) codified this principle in article 34: "A treaty does not create either obligations or rights for a third State without its consent."[48] It is known as the *pacta tertiis* rule.[49]

According to the VCLT-IO, the *pacta tertiis* rule also applies to IOs. The VCLT-IO provides that "[a] treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization."[50] But the VCLT-IO has not garnered enough ratifications to enter into force,[51] and a number of scholars disagree with the VCLT-IO. They take the position that treaties can—at least sometimes—bind IOs without their consent. One argument is that IOs are "transitively bound" by their member states' treaty obligations.[52] That is, "an organization formed by states will be bound by the obligations to which the individual states were committed when they transferred powers to the organization."[53] Alternatively, if states are bound by certain treaty obligations, they can't create an organization that has the capacity to violate those obligations.[54] In both cases, the rationale is that "no subject of international law may transfer to another subject more powers than those which it possesses."[55] Most scholars do not address whether this argument applies to treaty

[47] CRAWFORD, *supra* note 196, at 71.

[48] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331.

[49] *See* CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 25 (1993) ("Treaties bind consenting parties only, and strangers to any treaty are legally unaffected by it. This is the classic rule of treaties and third parties: *pacta tertiis nec nocent nec prosunt*.").

[50] VCLT-IO, *supra* note 10, art. 34.

[51] *See supra* note 12.

[52] Frédéric Mégret & Florian Hoffmann, *The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsi-bilities*, 25 HUM. RTS. Q. 314, 318 (2003) (describing the position that the United Nations is bound by international human rights standards "as a result and to the extent that its members are bound.").

[53] HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW (4th rev. ed. 2003), at 995 § 1574 ("According to principles of state succession, a new state is often bound by the obligations of its predecessor. By analogy, an organization formed by states will be bound by the obligations to which the individual states were committed when they transferred powers to the organization."). *See also infra* notes 221-222 and accompanying text (describing additional arguments framed in terms of functional succession).

[54] De Schutter, *supra* note 7, at 62-63.

[55] *Id*. at 62 (noting, in addition, that this reflects the maxim *nemo plus juris transferre potest quam ipse habet*).

obligations that are common to all member states, common to some fraction of member states, or to the treaty obligations of any member state.[56]

Henry Schermers and Neils Blokker, the authors of a leading treatise on IOs, are the most prominent exponents of the view that treaties can bind IOs without their consent, although they do not define the universe of treaties that would automatically bind IOs. They have made the argument set out above as well as two others to support this conclusion.[57] Schermers and Blokker point out that IOs' nonparty status to multilateral treaties does not necessarily indicate a desire not to be bound because multilateral treaties typically permit only states to become parties.[58] They also argue that IOs are more subordinate to international law than states are because IOs are creatures of international law.[59]

B. Illustrating the Stakes

To illustrate the stakes of the debate over IOs' obligations and the range of settings in which such debates have arisen or could arise, this section sets out three concrete examples touching on economic rights, humanitarian law, and environmental protection, respectively.

1. Conflict Underway: The IMF and Economic Rights

States established the IMF in the wake of World War II "to promote international monetary cooperation," "to facilitate the expansion and balanced growth of international trade," and "to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members."[60] To accomplish

[56] De Schutter argues that, "in principle, such obligations should correspond to any international obligation of *any* Member State of the organization, without it being necessary that *all* the member States are bound by the said obligation." *Id*. at 64.

[57] *See supra* note 53.

[58] SCHERMERS & BLOKKER, *supra* note 53, at 995-996 § 1574.

[59] *Id.* ("International organizations, although established by states, have never possessed a potent legal order of their own. They are established under international law. Their constitutional roots are in international law. No superiority over international law can be pleaded on their behalf.").

[60] IMF articles of agreement, art. I.

these goals, the Fund "exercise[s] firm surveillance over the exchange rate policies of members."[61] It also lends money to its members, subject to certain conditions.[62]

For decades, international lawyers have debated what obligations, if any, the IMF might have to protect the economic rights of individuals in discharging its responsibilities. The UN General Assembly first enumerated economic rights in the Universal Declaration of Human Rights in 1948. They were subsequently incorporated into the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted in 1966. Such rights include the right to work; the right to enjoyment of "just and favourable conditions of work;" the right to an adequate standard of living, including adequate food, clothing, and housing; and the right to an education.[63] Not all states will be in a position to implement these obligations immediately. Recognizing this, the ICESCR requires them to take incremental steps towards the "full realization" of the enumerated rights.[64]

In the 1980s, human rights advocates and scholars began to criticize the IMF. In their view, the conditions that the IMF imposed on its loans were so draconian that they inevitably led borrowing states to violate their ICESCR obligations.[65] This concern has persisted. In 1999, for example, the Committee on Economic and Social Rights, a group of experts charged with monitoring states' compliance with the Convention, asserted that the IMF and the World Bank "should pay greater attention to the protection of the right to food in their lending policies and credit arrangements and in international measures to deal with the debt crisis."[66]

The policy question aside, there has been vigorous debate about whether the IMF is *legally* bound by international obligations to protect economic rights. According to François Gianviti, the IMF's former general counsel, the IMF has no legal obligations to

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[61] *Id*. art. IV.

[62] Gianviti, *supra* note 3, at 134-35.

[63] ICESCR arts. 6, 7, 11, 13.

[64] ICESCR art. 2.

[65] *See, e.g.*, Alston, *supra* note 12, at 476.

[66] Committee on Economic, Social and Cultural Rights, General Comment 12: The Right to Adequate Food, UN Doc. E/C.12/1999/5 (May 12, 1999).

protect economic rights.[67] Indeed, Gianviti argues, an undue short-term focus on economic rights might compromise not only the IMF's core mission, but also the realization of economic rights themselves, at least in the long run.[68]

The IMF is not a party to the ICESCR. Indeed, the ICESCR's final clauses permit accession only by states.[69] Some have nevertheless argued that the ICESCR binds the IMF because its member states are parties to the ICESCR.[70] This argument is hotly contested on a number of grounds, including the fact that some of the IMF's member states are not parties to the ICESCR.[71]

Alternatively, some scholars have argued that the IMF is bound by general international law and that economic rights constitute customary international law or general principles.[72] Others disagree with this conclusion, either doubting that these rules bind the IMF[73] or contesting that economic rights have the status of customary international law or general principles.[74]

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[67] Gianviti, *supra* note 3.

[68] *Id*. at 130-32, 137.

[69] ICESCR art. 26.

[70] Alston, *supra* note 12, at 479-80 (1987) (asserting that there is a "strong legal argument[]" that the IMF is bound because its member states "have all ratified various human rights conventions and in accordance with the relevant principles of international law the IMF ought not to encourage or facilitate a state's violating those international legal obligations by encouraging it, or in effect forcing it to enter into an agreement which in fact violates the economic rights of the citizens of that country"); SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 83 (2001) (describing Schermers and Blokker as making a "plausible" argument that treaties can bind IOs without their consent).

[71] Gianviti, *supra* note 3, at 115; *see also id*. (arguing in addition that even if all of the IMF's member states were parties to the ICESCR, the IMF would not be so bound).

[72] SKOGLY, *supra* note 70, at 76-79, 84-90, 120-25; CLAPHAM, *supra* note 3, at 148-51.

[73] Klabbers, *supra* note 7, at 166 (describing the IO literature as "replete with eventually somewhat unsatisfactory statements holding the World Bank and the International Monetary Fund bound by human rights because human rights are morally desirable.").

[74] Gianviti, *supra* note 3, at 121-22 ("[I]t is not generally accepted that the [ICESCR] (or the norms contained in it) form part of general or customary international law."); *see also* August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 862 (2001) ("There is no consensus that the contents of [the ICESCR], as well as the economic rights contained in the Universal Declaration, can be considered to represent established customary law or general principles.").

2. Conflict Deferred: The UN and International Humanitarian Law

UN peacekeepers operate under UN command and control. Does the United Nations have an international obligation to ensure that they comply with international humanitarian law? The question first arose more than a half-century ago, yet the answer remains unclear.

Over the years, the United Nations has taken various measures to ensure that UN peacekeepers do in fact comply with international humanitarian law. And a number of scholars have argued that these steps reflect not only sound policy, but also the United Nations' legal obligations: peacekeepers must comply with international humanitarian law because customary international law binds the United Nations.[75] Although there is little doubt that many international humanitarian law rules are part of customary international law—the UN Secretary General has affirmed as much[76]—the United Nations has conspicuously avoided taking a position about whether it is bound by those rules.[77]

At the same time, the United Nations' willing compliance with humanitarian law has prevented debates about its legal obligations from coming to a head. This avoidance strategy is common among IOs; they often comply with international law rules without confirming that they have an obligation to do so.[78] That is one reason why uncertainty about IOs' legal obligations has endured for so long.

Shortly after the first UN peacekeeping force was established in 1956, the International Committee of the Red Cross (ICRC) wrote to the United Nations, expressing concern that UN peacekeepers were "directly dependent on the United

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[75] *See, e.g.*, R. SIMMONDS, LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO 178-80 (1968); MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES 36 (1995).

[76] *See, e.g.*, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para 35; *see also, e.g.*, Sandesh Sivakumaran, BINDING ARMED OPPOSITION GROUPS, 55 INT'L & COMP. L.Q. 369, 372-73 (2006).

[77] *See, e.g.*, HIRSCH, *supra* note 75, at 34; Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695, 705 (2005).

[78] Kristina Daugirdas, *Reputation and the Responsibility of International Organizations*, 25 EUR. J. INT'L L. 991, 1012-14 (2014) (describing other examples of IOs complying with international law obligations without making explicit their reason for doing so); *see also* ALVAREZ, *supra* note 16, at 179.

Nations, which was not, as an Organization, a party to the [Geneva] Conventions."[79] The ICRC thus proposed issuing instructions to the peacekeepers requiring compliance with the Geneva Conventions.[80] In response, UN Secretary-General U Thant agreed those treaties were important; he affirmed that the "Geneva Conventions of 1949 constitute the most complete standards granting to the human person indispensable guarantees for his protection in time of war or in case of armed conflict whatever form it may take."[81] Thant went on to say that he had issued regulations requiring peacekeepers "to respect the principles and the spirit of the general international Conventions relative to the conduct of military personnel.[82] Notably, Thant did not say that the Geneva Conventions themselves bound the United Nations, either as a treaty obligation or as customary international law.[83]

In 1972, the ICRC proposed amending the Geneva Conventions to allow the United Nations to accede.[84] The United Nations objected:

> [Those conventions] contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to territorial sovereignty. Thus the United Nations is unable to fulfill obligations which for their execution

[79] FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 190 (1966).

[80] *Id*.

[81] Letter from U Thant, UN secretary General to Leopold Boissier, President of the International Committee of the Red Cross (undated), *reprinted in* INTERNATIONAL REVIEW OF THE RED CROSS (January 1962), at 29.

[82] *Id*. The regulations for subsequent peacekeeping operations included similar language. *See, e.g.*, Reg 40 of the Regulations for the UN Force in Cyprus, UN Doc. ST/SGB/UNFICYP/1 (April 25, 1964).

[83] At least one scholar writing in 1968 concluded that these regulations do "constitute a recognition of the applicability of the general (or customary) international law of war rather than of those detailed provisions of the relevant conventions which do not as yet constitute customary international law." SIMMONDS, *supra* note 75, at 192.

[84] Report of the Secretary-General, Human Rights in Armed Conflicts, UN Doc. A/8781 (Sept. 20, 1972).

require the exercise of powers not granted to the Organization, and therefore cannot accede to the Conventions.[85]

Ultimately, the ICRC's proposal was not adopted.

By the mid-1990s, it became clear that instructing peacekeepers to respect the "principles and spirit" of the Geneva Conventions was not enough. The trouble stemmed in part from new peacekeeping missions that blurred the line between peace*keeping* and peace *enforcement*. For example, in Somalia, the UN peacekeepers' mandate included disarmament, which required the use of force when arms were not turned over voluntarily.[86] Furthermore, because the peacekeepers were operating in an urban environment, civilians were often in harm's way.

Working with the ICRC, the United Nations developed more detailed rules.[87] In 1999, Secretary-General Kofi Annan issued new regulations that set out in specific, concrete terms the international humanitarian law principles and rules with which peacekeepers had to comply.[88] The regulations also included provisions that are reflected in multilateral treaties but probably do not (yet) reflect customary international law, such as prohibitions on methods of warfare intended to seriously damage the natural environment.[89] The new regulations both codified customary international law and went beyond it, draining legal questions about the source and extent of the United Nations' obligations of their urgency. The United Nations thus avoided the question again.

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[85] Legal Opinion of the Secretariat of the United Nations, Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims 1972 UN JURIDICAL YEARBOOK 153, 154.

[86] *See* UNSC Res. 814, para. 7 (Mar. 26, 1993).

[87] Daphna Shraga, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AM J. INT'L L. 406, 407-08 (2000).

[88] Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (1999).

[89] Shraga, *supra* note 87, at 408.

3. Conflict Anticipated: The Asian Infrastructure Investment Bank and International Environmental Law

On June 29, 2015, representatives of 57 states signed an agreement to establish a new regional development bank—the Asian Infrastructure Investment Bank (AIIB).[90] China has led the effort, seeking to address a massive gap in infrastructure funding in Asia.[91] China is supplying about 30 percent of the Bank's $100 billion in authorized capital and will exercise just over 26 percent of the voting power.[92]

At least for the time being, the United States does not intend to become an AIIB member.[93] In fact, the United States had discouraged its allies from joining the AIIB, citing a concern that the AIIB would fail to incorporate the "high standards" of the World Bank and other regional development banks with respect to governance and environmental and social safeguards.[94] Nevertheless, on March 12, 2015, the United Kingdom became the first major Western state to apply for membership in the AIIB.[95] Others soon followed.[96]

President Obama described the United States' concerns at a joint press conference with Japanese Prime Minister Abe in April 2015. He explained:

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[90] Simon Denyer, *China Launches Development Bank for Asia, Calls It First Step in 'Epic Journey,'* WASH. POST, June 29, 2015.

[91] *Why China is creating a new "World Bank" for Asia*, THE ECONOMIST (Nov. 11, 2014).

[92] *Id.*; *see also* Press Release, The State Council, The People's Republic of China, Key Legal Framework Laid for China-Initiated AIIB (June 29, 2015), at http://english.gov.cn/news/top_news/2015/06/29/content_281475136908926.htm.

[93] *How a Chinese Infrastructure Bank Turned into a Diplomatic Fiasco for America*, vox.com (April 1, 2015).

[94] *UK Support for China-Backed Asia Bank Prompts US Concern*, bbc.com (13 Mar. 2015), at http://www.bbc.com/news/world-australia-31864877 (quoting US National Security Council spokesperson Patrick Ventrell); Daily Briefing by White House Press Secretary Josh Earnest (Mar. 17, 2015), at https://www.whitehouse.gov/the-press-office/2015/03/17/daily-briefing-press-secretary-josh-earnest-031715.

[95] UK Announces plans to join Asian Infrastructure Investment Bank (12 Mar. 2015), at https://www.gov.uk/government/news/uk-announces-plans-to-join-asian-infrastructure-investment-bank.

[96] Andrew Higgins & David E. Sanger, *Three European Powers Say They Will Join China-Led Bank*, N.Y. TIMES (Mar. 17, 2015); Choe Sang-Hun, *South Korea Plans to Join Regional Development Bank Led by China*, N.Y. TIMES (Mar. 26, 2015).

> As Prime Minister Abe said, the projects themselves may not be well-designed. They may be very good for the leaders of some countries and contractors, but may not be good for the actual people who live there. And the reason I can say that is because, in the past, some of the efforts of multilateral institutions that the United States set up didn't always do right by the actual people in those countries. And we learned some lessons from that, and we got better at making sure that we were listening to the community and thinking about how this would affect the environment, and whether it was sustainable.[97]

Just before prospective founding members met to sign the AIIB's charter, Jin Liqun, who headed an AIIB working group and was subsequently named the AIIB's President-elect, said the Bank was committed to being "lean, clean, and green."[98] Jin explained that the working group had already drafted an environmental document for approval by member states.[99]

Depending on which international law rules bind IOs—and whether these rules are mandatory or default rules—an argument could be made that certain kinds of environmental policies, for example, reflect not only sound policy but also legal requirements. The ICJ has held, for example, that general international law requires environmental impact assessments, at least where there is a risk that the proposed project will have a significant adverse transboundary impact.[100] The World Bank and other regional development banks already require environmental impact assessments before they fund projects. Given the views that scholars have articulated about IOs' international obligations, it's only a matter of time before observers assert that the AIIB is legally required to do the same.

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[97] Remarks by President Obama and Prime Minister Abe of Japan in Joint Press Conference (April 28, 2015), *at* https://www.whitehouse.gov/the-press-office/2015/04/28/remarks-president-obama-and-prime-minister-abe-japan-joint-press-confere.

[98] Zheng Yangpeng, *AIIB to Be 'Lean, Clean, and Green,'* CHINA DAILY (June 29, 2015), at http://www.chinadailyasia.com/business/2015-06/29/content_15283091.html; Mark Magnier, *China's Jin Liqun Named President-Elect of Asian Infrastructure Investment Bank*, WALL ST. J. (Aug. 24, 2015).

[99] *Id*.

[100] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, at para. 204.

II. IOS AS VEHICLES

To begin to sort through the competing claims and open questions about IOs' obligations, this Part focuses on IOs' vertical relationship with their member states—and the conception of IOs as vehicles through which states act. From the vehicle perspective, the underlying apprehension is that states will try to evade their international obligations by acting through IOs.[101] There are at least two ways to try to prevent such evasions. One is to make states responsible when they act through IOs to violate their obligations.[102] Indeed, several rules of state responsibility already seek to ensure that states cannot avoid the consequences of violating their international obligations by blaming other actors over which they exercise control. For example, a state is responsible for internationally wrongful acts that are undertaken (1) by private corporations empowered by the government or (2) by private actors under the direction or control of the government.[103] A state is similarly responsible when it directs or aids another state in taking actions that would violate the first state's international obligations.[104] The ILC has explained that "[t]he essential principle is that a State should not be able to do through another what it could not do itself."[105]

The IO Responsibility Articles likewise include a provision that specifically addresses the risk that states might circumvent their international obligations by acting through an IO. Article 61 provides:

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[101] *See, e.g.*, Halberstam & Stein, *supra* note 43, at 21 (2009) ("States cannot simply avoid international human rights by bringing to life an international organization and charging it with tasks that would violate human rights standards if undertaken by the members of that organization themselves."); Reinisch, *supra* note 6, at 143 ("Stated less politely, one could say that states should not be allowed to escape their human rights obligations by forming an international organization to do the 'dirty work.'").

[102] Halberstam and Stein argue that one consequence of the principle of non-circumvention is that "States may remain liable for the human rights abuses of an international organization that they direct and control or to which they transfer powers to act on their behalf." Halberstam & Stein, *supra* note 43, at 22.

[103] State Responsibility Articles, arts. 5 & 8.

[104] *Id*. arts. 16 & 17.

[105] SRA art. 17 note (8) at 69; *see also* SRA art. 16 note (6) at 66 ("[A State cannot do by another what it cannot do by itself.").

> A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

Article 61 applies in only a narrow set of circumstances—where a state acts through an IO with the *intent* of avoiding its international obligations and that same state *causes* the IO to take the action that violates the state's obligations.[106] These limitations render article 61 inapplicable where states lack the requisite intent (for example, where states simply neglect to consider the full range of their international obligations when acting in connection with an IO), or where states lack the power to shape IO conduct unilaterally. Nor would article 61 apply where IO officials initiate the conduct that violates a state's international obligations. Thus, in many cases, the link between state and IO conduct will be too attenuated to pin responsibility on member states under article 61. For these reasons, article 61 alone does not adequately address the risk of evasion.

A second solution to the evasion problem—which could complement provisions like article 61 of the IO Responsibility Articles—is to impose certain international obligations directly on IOs.[107] Scholars and the ILC have both cited the risk of circumvention to

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[106] DARIO art. 61 note (2) (explaining that the "use of the term 'circumvention'" implies "the existence of an intention to avoid compliance"; and that "[i]nternational responsibility will not arise when the act of the international organization . . . has to be regarded as an unintended result of the member State's conduct"); DARIO art. 61 note (7) (identifying conditions for responsibility under art. 61, including "a significant link between the conduct of the circumventing member State and that of the international organization. The act of the international organization has to be caused by the member State.").

[107] Still another possibility would be to attribute IO conduct to states in a broader set of circumstances. *Cf.* Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 347-48 (2010) (options for expanding responsibility associated with human rights abuses include both assigning more actors obligations to respect and attributing to states a greater share of such abuses). Attributing *all* IO conduct to states could threaten IOs' independence and their separate legal personality, thereby compromising states' ability to cooperate to achieve shared goals. *Cf.* Report prepared by Rosalyn Higgins, *The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties*, 66 Annuaire de l'Institut de Droit International (Session of Lisbonne, vol. 1, 1995), at 419, para. 121 ("[I]f members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership. If members were liable for the defaults of the organization, its independent personality would be likely to be increasingly a sham.").

explain why certain international obligations bind IOs. But they don't necessarily specify or agree about which obligations bind IOs for this reason. Some have limited the argument to a narrow set of obligations.[108] But others have made variations of the argument that sweep more broadly.[109]

This Part argues that the IOs-as-vehicles view, coupled with the concern about member states evading their own obligations, supports some—but not all—of the claims that have been made about IO obligations. Some of these claims founder because they take too broad a view of what constitutes an evasion. The view that general international law necessarily binds IOs, for example, suggests that any attempt by states to deviate from these rules constitutes an evasion. But states actually have considerable latitude to contract around customary international law. Likewise, the view that member states' treaty obligations automatically bind IOs ignores the discretion that states have to modify their treaty obligations and even to enter into conflicting treaty obligations.

Properly understood, the IOs-as-vehicles view leads to the conclusion that *jus cogens* norms always bind IOs and that general international law binds IOs as a default matter. Member states' treaty obligations, in contrast, do not automatically bind IOs.

A. Foundations of the View

The IOs-as-vehicles view emphasizes the principal-agent nature of the relationship between states and IOs.[110] IOs, like every agent, enjoy some discretion. But states

[108] Daniel Halberstam and Eric Stein argue that one consequence of the principle of non-circumvention is that the obligations of member states will indirectly bind IOs in a limited set of cases: "when an international organization exercises the powers formerly belonging to a State or group of States in the context of a particular international legal regime, then such international organization succeeds that group of States not only in their rights but also in their obligations under that international regime." Halberstam & Stein, *supra* note 43, at 22-23. They frame this argument in terms of functional succession, which is addressed in more detail in Part III.B.2.

[109] *See, e.g.*, MORGENSTERN, *supra* note 6, at 32 ("There is no reason why rules of international law which are generally recognized as applicable between States and which are not by their nature unsuitable for international organizations should not be automatically binding on the latter. Such a conclusion has been justified on the grounds that States bound by rules of international law should not be able to evade them collectively."); *see also supra* note 44.

[110] *See, e.g.*, Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 134-35 (1993) ("Substantively, international organizations may be characterized as common agencies operated by States for the fulfillment of certain common tasks.").

remain in charge. They decide to establish IOs, define their purposes, and determine their authorities. States also play a critical role in IOs once they're up and running. Through bodies like the UN General Assembly and the Security Council, states set IO policies and select key IO officials. States also determine the size of IOs' budgets and how to allocate them. To be sure, states won't always find it easy to correct course in the short run when IOs exercise discretion in a way that diverges from states' preferences.[111] In the long run, however, IOs must satisfy their principals or their principals will restrain or dismantle them.[112]

At the same time that states play this "outsider" principal role, they simultaneously play an "insider" role in the IOs they establish. An IO's member states collectively make decisions in the name of the IOs they create through organs that are comprised entirely of member states—and seemingly every IO has at least one such organ. (For instance, the United Nations has the General Assembly, the Security Council, and the Economic and Social Council.) Not only do states provide critical inputs to IO decisions—they often also play a crucial role on the back end in implementing those decisions. To take an especially significant example, it is UN member states that implement Security Council authorizations to use force. Thus, while IOs have separate legal personality as a formal legal matter, as a practical matter there is no sharp and fundamental distinction between IOs and their member states.

B. Implications of the IOs-as-Vehicles View

If states cannot use IOs as vehicles to evade their own international obligations, what are the implications for IOs' international obligations? To answer that question, we must first answer another: what exactly counts as an evasion? Treaty law as codified in the VCLT would seem to be the appropriate reference point for figuring out what counts as an evasion.[113] If that's right, the rule that follows is straightforward: what states can

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[111] *See generally* DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins et al., eds. 2006).

[112] Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 768 (2001).

[113] Even at the time it was being drafted, the VCLT was described as a constitution for the international legal system. Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT'L L. 780, 791, 808-09 (2013).

do directly by treaty, they can do indirectly through an IO. And what states cannot do directly by treaty, they cannot do indirectly through an IO.

1. Jus Cogens

On the vehicles view, the explanation for why *jus cogens* norms bind IOs is straightforward. As the ILC explained, *jus cogens* norms must bind IOs as well as states to prevent states from circumventing their obligations: "despite a personality which is in some respects different from that of the States Parties to such treaties [i.e., treaties that establish IOs], [IOs] are nonetheless the creations of those States. And it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization."[114]

While many aspects of *jus cogens* are contested, it is perfectly clear that states cannot enter into treaties that violate *jus cogens* norms.[115] *Jus cogens* norms bind IOs because states cannot, by treaty, establish IOs that are authorized to violate *jus cogens* norms.[116]

2. General International Law

When it comes to customary international law and general principles, the analysis is more complicated. States are not categorically prohibited from entering into treaties that derogate from general international law. To the contrary, it is well established that states can enter into treaties to either elaborate or modify the general international law rules that would otherwise govern. This is the *lex specialis* principle.[117] Of course, states'

[114] Yearbook of the ILC (1982) vol. II, part 2, at 56.

[115] VCLT art. 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."); *id*. art. 64 ("If a new peremptory norm of international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

[116] *See, e.g.*, Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) (report of the study group of the International Law Commission), para. 346 ("If United Nations Member States are unable to draw up valid agreements in dissonance with *jus cogens*, they must also be unable to vest an international organization with the power to go against peremptory norms.").

[117] North Sea Continental Shelf (Ger./Den. & Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, 43 para. 72 (noting that "it is well understood" that "rules of international law can, by agreement, be derogated from

capacity to create *lex specialis* is not unlimited. States need to find willing treaty partners. Even then, states cannot contract around *jus cogens* norms.[118] And some scholars have argued that certain non-*jus cogens* norms are likewise non-derogable.[119] Nevertheless, it is worth emphasizing that creating *lex specialis* is not considered a devious and troubling technique for states to evade obligations under general international law. To the contrary, *lex specialis* offers states a way to achieve more tailored—and more effective—regulation.[120] Thus customary international law and general principles need not categorically bind IOs the way that *jus cogens* norms do.[121]

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in particular cases, or as between particular parties."); Amoco International Finance Corporation v. Iran ("As a *lex specialis* between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law."); Koskenniemi, *supra* note 116, at para. 79 ("That treaty rules enjoy priority over custom is merely an incident of the fact that most of general international law is *jus dispositivum* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behavior."); PAUWELYN, *supra* note 4, at 212-36.

[118] VCLT arts. 53 & 64.

[119] *See, e.g.*, Koskenniemi, *supra* note 116, at para. 108 ("A]side from *jus cogens*, there may be other types of general law that may not permit derogation. In regard to conflicts between human rights norms, for instance, the one that is more favorable to the protected interests is usually held overriding. At least derogation to the detriment of the beneficiaries would seem precluded."); *see also id*. at para. 109 ("Whether derogation by way of *lex specialis* is permitted will remain a matter of interpreting the general law. Concerns that may seem pertinent include at least the following: the normative status of the general law (is it *jus cogens*?), who the beneficiaries of the obligation are (prohibition to deviate from the law benefiting third parties, including individuals or non-state entities); whether non-derogation may be otherwise inferred from the terms of the general rule (for instance its 'integral' or 'interdependent' nature, its *erga omnes* character, or subsequent practice creating an expectation of non-derogation)."); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 211-12 (2010) (It is accepted that a CIL rule can be overridden by a later-in-time treaty, but only as between the parties to the treaty. In that case, the [customary international law] rule continues to bind nonparty states as well as parties in their relations with nonparty states. As a practical matter, therefore, the treaty-override option not only requires obtaining the agreement of other nations, but also that the CIL obligation be such that a nation can differentiate in its conduct between parties to the treaty and nonparties. This will not be possible for some CIL obligations, such as those that concern the human rights obligations of a nation to its citizens or the resource or environmental obligations of a nation with respect to something regarded as a global commons (such as the air, the seabed, or outer space.").

[120] Koskenniemi, *supra* note 116, at para. 60. ("A special rule is more to the point . . . than a general one and it regulates the matter more effectively . . . than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances. The need to comply with them is felt more acutely than is the case with general rules. They have greater clarity and definiteness and thus often felt 'harder' or more 'binding' than general rules which may stay in the background and be applied only rarely. Moreover, *lex specialis* may also seem useful as it may provide better access to what the parties may have willed.").

[121] *Contra* Tomuschat, *supra* note 107, at 135 (arguing that IOs should be bound by "ordinary" customary international law norms to preclude states from evading their international obligations).

Few scholars acknowledge this point explicitly[122]—although, as Part IV explains, it is central to the way IOs view their own charters.

While states have significant flexibility to contract around general international law when they establish IOs, that flexibility is not infinite. One especially important limitation involves non-member states. A handful of states cannot, by entering into a treaty among themselves, alter the application of customary international law vis-à-vis a third state. This result would contravene the *pacta tertiis* rule that treaties cannot alter the obligations or rights of third states without their consent.[123] In other words, unless IOs are bound by customary international law vis-à-vis non-member states, the IOs' member states could evade settled limits on their capacity to contract around customary international law.

Consider NATO and the Asian Infrastructure Investment Bank. Even if they wished to, NATO's member states simply could not establish an organization unbound by general international law in its interactions with non-member states. At the same time, nothing prevents NATO's member states from authorizing NATO to enter into treaties with non-member states to take actions that would otherwise be prohibited by customary international law. NATO has done so through status-of-forces agreements with non-member states like Afghanistan.[124]

With respect to the AIIB, recall that general international law requires states to complete environmental impact assessments before undertaking industrial projects with significant adverse transboundary effects.[125] The AIIB's member states cannot eliminate or modify this obligation to non-member states by entering into a treaty among themselves. Nor can they do so by establishing the AIIB. For this reason, if the AIIB funds projects that would have a significant adverse impact *on non-member states*, the

[122] *See supra* note 43.

[123] *See* VCLT art. 34.

[124] *See, e.g.*, Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan (Sept. 30, 2014), *available at* http://www.nato.int/cps/en/natohq/official_texts_116072.htm.

[125] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, para. 204.

AIIB will have to undertake environmental impact assessments—whether its member states would prefer to avoid that obligation or not. At the same time, the AIIB's member states have considerable discretion to elaborate or modify the application of general international law when it comes to the AIIB's interactions *with its member states*. Relieving the bank of obligations to undertake environmental impact statements for projects that exclusively affect member states may well be misguided. But international law does not prohibit the AIIB's member states from doing just that.

Except to the extent that states have made clear their desire to diverge from it, general international law binds the IOs they establish in their interactions with member states as well. This conclusion accords with the ordinary rule in treaty interpretation that treaties are presumed not to contract around general international law unless they do so expressly.[126] Thus, general international law binds IOs as a default matter.

3. Treaties

As explained earlier, a number of scholars have advanced the view that IOs are "transitively bound" by their member states' treaty obligations, or that IOs necessarily lack the authority to violate their member states' treaty obligations because states can't empower IOs to do that.[127] This argument might support diverging conclusions about IOs' obligations, depending on (1) what fraction of an IO's member states must be bound before the IO is bound, and (2) what exactly counts as a transfer. If states transfer authorities to an IO only at the moment they establish the IO, then the IO would be bound by the treaty obligations of all or some or any of its member states at precisely that moment. But states might also "transfer" authorities over time as they assign new and additional tasks to previously established IOs. If that's right, then IOs might incur

[126] *See, e.g.*, PAUWELYN, *supra* note 4, at 205-07, 240-42; Koskenniemi, *supra* note 116, at para. 37 (citing Jennings and Watts for the presence of a "presumption that the parties intend something not inconsistent with generally recognized principles of international law"); Elettronica Sicula S.p.A. (ELSI), Judgment, 1989 I.C.J. Rep. 15, 31 para. 50 (July 20) ("The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of the treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.").

[127] *See supra* notes 52-57 and accompanying text.

new obligations as the treaty obligations of their member states (or any member state) change over time.

Olivier de Schutter, for example, argues that if the rationale for binding IOs is that states cannot transfer to IOs more powers than they have, then IOs should be limited by the treaty obligations of *any* member state.[128] On this view, what matters are states' treaty obligations at the moment they become members of an IO. Even so, de Schutter points out, an IO's obligations might change over time its membership changes. Specifically, an IO's authorities would shrink if it accepted new member states bound by more extensive treaty obligations than the IO's earlier member states.[129] Indeed, de Schutter concludes that this account of IOs' obligations is defensible in theory but unworkable in practice because IOs would become straitjacketed by their member states' manifold treaty obligations.[130]

At bottom, the view that member states' treaty obligations automatically limit IOs is an argument about how to avoid—or resolve—conflicts between treaties that establish substantive obligations and treaties that establish IOs. If, for example, the IMF is bound by the ICESCR because the IMF's member states are so bound, the IMF will have legal obligations to avoid working at cross-purposes with its member states' obligations under the ICESCR. At first glance, this might seem like an appealing way to avoid the risk that states will evade their treaty obligations. But this view is problematic, and not only because of the practical consequences de Schutter identified. The problem with this view, in all its permutations, is much more fundamental: it contravenes the rules codified in the VCLT that govern precisely such treaty conflicts. It is also in serious tension with the normative principles that animate those rules.

To see the problem, start with what might initially appear to be the strongest case for the view that member states' treaty obligations transitively bind IOs in order to prevent states from circumventing those obligations. Suppose three states—A, B, and C—enter

[128] De Schutter, *supra* note 26, at 64.

[129] *Id*.

[130] *Id*.

into a treaty, and those same three states subsequently establish an IO with authorities that relate to the same subject-matter as the earlier treaty. Because all of the IO's member states are parties to the treaty at the time they establish the IO, it might be superficially appealing to say that the IO they create ought to be bound by the prior treaty too.

Nothing in the VCLT, however, actually supports that conclusion. When the same group of states enters into two successive treaties relating to the same subject matter, the VCLT sets out some default rules but ultimately leaves it to the participating states to determine how to structure the relationship between the two treaties to the extent they conflict.[131]

Accepting the argument that the common treaty obligations of an IO's member states automatically bind the IO at the moment of its establishment would diminish the very wide discretion that states have under the VCLT to shape and revise their treaty obligations. When the same group of states first enters into a treaty and subsequently creates an IO that is unbound by the obligations in the earlier treaty, those states are not evading anything. They are modifying their obligations, in the same way that states might modify otherwise-applicable customary international law by creating *lex specialis*. Because such modifications are wholly compatible with international law, there's nothing impermissible or even especially troubling about states choosing to establish an IO that is unbound by treaty obligations to which those same states previously agreed.

Let's now turn to the more complicated case—where the members of an IO (states A, B, and C, and no other states) overlap only partially with the parties to a treaty imposing substantive obligations (states A, B, and D, and no other states). Let's assume again that the IO's activities relate to the same subject matter as the treaty between A, B, and D. Do the obligations in the treaty between states A, B, and D affect the IO established by states A, B, and C? The answer might depend on which treaty came first in time.

[131] VCLT arts. 30(2)-(3) & 59. As the International Law Commission put it when the provision that became article 30 was being formulated, "the parties to the earlier treaty are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object." Yearbook of the International Law Commission, 1964 vol. II at 38 para. 13.

Suppose first that A, B, and C, establish the IO *before* A, B, and D enter into the separate treaty. This hypothetical tracks the participation and sequencing of the IMF and the ICESCR: the IMF opened its doors in 1945, some three decades before the ICESCR entered into force,[132] and the IMF's membership partially overlaps with state parties to the ICESCR.[133] Considering the IMF transitively bound by the ICESCR would have significant consequences. First, it would violate the *pacta tertiis* rule, pursuant to which the ICESCR should not have any legal consequences for non-parties. Second, it would bypass the carefully designed amendment procedures in the IMF's charter, pursuant to which proposed amendments go into effect only after the Board of Governors approves them and at least "three-fifths of the members, having eighty-five percent of the total voting power" formally accept them.[134] Finally, it would arguably nullify a provision in the ICESCR that explicitly addresses the relationship between the ICESCR and the IMF charter. Article 24 of the ICESCR states:

> Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies [including the IMF] which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.[135]

Under the VCLT, this provision is surely relevant to the relationship between the ICESCR and the IMF charter. Indeed, the IMF's former general counsel argued that this provision confirms that the ICESCR "does not affect" the IMF's charter, "including its mission and governing structure."[136] Ignoring this provision and concluding that the

[132] The ICESCR entered into force on January 3, 1976. See http://www.ohchr.org/EN/Professional Interest/Pages/CESCR.aspx.

[133] The IMF has 188 member states, of which 161 are parties to the ICESCR. *See* https://www.imf.org/external/np/sec/memdir/memdate.htm; https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty. Twenty-seven states are members of the IMF but not parties to the ICESCR; Liechtenstein, North Korea, and Palestine are parties to the ICESCR but not members of the IMF. *Id*.

[134] IMF Articles of Agreement, Article XXVIII(a).

[135] ICESCR art. 24.

[136] Gianviti, *supra* note 3, at 119.

ICESCR automatically binds the IMF would effectively elevate the ICESCR's provisions to *jus cogens* status, contrary to the VCLT's accordance of equal status to treaties. For all of these reasons, an IO should not be bound by a treaty into which a subset of its member states enter after establishing the IO.

Now suppose that states A, B, and D entered into the substantive treaty *before* states A, B, and C established the IO. Does the treaty between A, B, and D affect the kind of IO that states A, B, and C can establish? If states can only transfer to an IO the lowest common denominator of powers among them (as de Schutter suggests ought to be the case if we take seriously the principle that states can't transfer to an IO more power than they have), then the answer is yes.

But that is not the VCLT's answer. The argument that states lack the capacity to establish IOs that are unbound by their treaty obligations harkens back to an argument made by early international law scholars, including Vattel, that states lack the capacity to enter into conflicting treaty obligations.[137] Having entered into a treaty with one state to do one thing, a state could not subsequently enter into another treaty with a different state to do the opposite: the later treaty would be void.[138] Consistent with this view, Hersh Lauterpacht, the ILC's second special rapporteur on treaties proposed a general rule (with some exceptions) providing that a treaty would automatically be void "if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties."[139]

But Vattel and Lauterpacht's views have been decisively rejected, and for good reason. The ILC's third special rapporteur, Gerald Fitzmaurice, worried that holding treaties invalid on account of conflicting obligations would unfairly penalize parties to the later treaty, who may not be aware that their treaty partners had previously entered into treaties with conflicting obligations.[140] Fitzmaurice also worried that a rule

[137] Wolfram Karl, *Treaties, Conflicts Between*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolf Bernhardt, ed. 2000) 935, 937.

[138] Karl, *supra* note 137, at 937 ("[Vattel] and many other writers conceived the question as one of incapacity to conclude the later treaty, and thus as a question of essential validity.").

[139] 1953 Yearbook of the ILC vol. II 156-59; 1954 Yearbook of the ILC vol. II 133-39.

[140] Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, 1958 Yearbook of the International Law Commission, vol. II., at 41-42.

prescribing invalidity on account of conflicting obligations would introduce undesirable rigidity into international law; many international regulatory efforts evolved through the development of new treaties that did not necessarily bind all of the parties to the prior treaty.[141] Given the manifold purposes that treaties serve, Fitzmaurice urged caution before prescribing invalidity as the solution to treaty conflicts, and suggested that invalidity was appropriate only in a handful of exceptional cases.[142] The fourth special rapporteur, Humphrey Waldock, went even further and eliminated altogether any role for invalidity in dealing with treaty conflicts (except those involving *jus cogens*). Waldock and Fitzmaurice agreed that the solution to conflicting treaty obligations was state responsibility—not invalidity.[143] That is, the conflicting treaties would both remain valid, but the state that entered into the conflicting obligations would face the consequences of breaching one treaty or the other. The existence of a conflicting treaty obligation would not excuse the breach. The VCLT ultimately codified Waldock's position; only treaties that violate *jus cogens* are void.[144]

The VCLT sets out a two-part rule for dealing with conflicting treaties where the parties to the later treaty do not include all of the parties to the earlier treaty.[145] For states that are parties to both treaties, the later-in-time rule applies: the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. When it comes to the relationship between a state that is a party to both treaties and a state that is a party to only one of the treaties, a different rule applies: the treaty to which both states are parties governs their mutual rights and obligations.

To illustrate, suppose that states A, B, and C are parties to the first treaty and states A, B, and D are parties to a second treaty. As between A and C, the earlier treaty governs. As between A and D, the later treaty governs. If the later treaty includes provisions that conflict with the earlier treaty, A could have an international obligation to do one thing

[141] *Id*. at 43-44.

[142] 1963 Yearbook of the ILC, at 56 para. 14.

[143] 1964 Yearbook of the ILC at 44 para. 34.

[144] VCLT art. 53.

[145] VCLT art. 30(4)-(5).

with respect to C while simultaneously having an international obligation to do a different thing with respect to D. Complying with both international obligations might be, quite literally, impossible. In these circumstances, the VCLT does not privilege one obligation over the other; both obligations are equally valid.[146] Instead, the VCLT leaves it to A to choose the obligation with which it will comply, and the obligation that it will breach.[147] But, importantly, the VCLT makes clear that if A chooses to comply with its obligation to C, it will incur international responsibility for the breach to D, and vice versa.[148] Under these rules, it's wrong to say that A can "evade" its obligation to C by entering into an incompatible obligation with D. A will still incur international responsibility for any breach of its treaty with C.

In short, there is no rule that prohibits states from entering into treaties and becoming members of IOs that work at cross-purposes. Except for treaties that violate *jus cogens*, the VCLT *never* prescribes invalidity of a treaty as the consequence of a treaty conflict. Under the VCLT, then, states are perfectly free to create IOs that do not share their member states' pre-existing treaty obligations—although states that do so could face responsibility for violating those obligations.

In some cases, states will be able to avoid a breach of their treaty obligations by ensuring that IOs adopt particular policies. Consider, for example, the *Waite and Kennedy v. Germany* case before the European Court of Human Rights.[149] The case involved a potential conflict between Germany's obligations as a member of the European Space Agency (ESA) and its obligations as a party to the European Convention

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[146] *Pacta sunt servanda*, the principle that treaties must be obeyed, applies to both obligations.

[147] PAUWELYN, *supra* note 4, at 427, quoting Wolfram Karl: ("With the law stepping back, a principle of political decision takes its place whereby it is left to the party to the conflicting obligations to decide which treaty it prefers to fulfill.").

[148] VCLT art. 30(5) (specifying that that VCLT article 30(4) is "without prejudice . . . to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."); *see also* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 242 (2011) ("Just as I can conclude two equally valid contracts whereby I commit to sell the same thing to two different people, and then have to face a choice as to which obligation to fulfill and which to breach and hence suffer the consequences, so a state can enter into two mutually contradictory, yet equally valid, from which the only escape is a political one.").

[149] Case of Waite & Kennedy v. Germany, Application No. 26083/94, European Court of Human Rights (1999).

on Human Rights (ECHR). Waite and Kennedy argued that by according immunity to the ESA and precluding German courts from hearing their employment dispute with the ESA, Germany had violated its obligation under article 6 of the ECHR to guarantee a right of access to courts. The European Court of Human Rights ultimately held that according ESA immunity was consistent with the ECHR—but the court emphasized that a "material factor" in its decision was the availability to the applicants of a "reasonable alternative means to protect effectively their rights under the Convention."[150] In particular, Waite and Kennedy had recourse to an independent body set up specifically for resolving employment disputes with the ESA.[151] In the absence of this mechanism for reconciling Germany's obligations under the ECHR with its obligations to provide immunity for the ESA, Germany would have faced consequences for failing to comply with its obligations under the ECHR, including the payment of "just satisfaction" to Waite and Kennedy.

But there's a wrinkle here that needs to be addressed. In particular, the circumvention problem threatens to resurface because of an important difference between states entering into ordinary treaties containing conflicting obligations and states establishing an IO that is authorized or required to take action that violates a member state's treaty obligation. This discontinuity results from IOs' separate legal personality—and the possibility that the conduct that causes the breach of the treaty obligation will be attributed exclusively to the IO, thereby putting the breaching state into a position where it can say: "*I* didn't undertake the wrongful act; the IO did. Therefore, the IO should bear international responsibility, not me."[152] If this argument is accepted, then the breaching state *will* be able to avoid consequences for breaching its treaty obligations. And if the breaching state can avoid the consequences of the breach, there *is* a circumvention problem.

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[150] *Id*. para. 68.

[151] *Id*. para. 69.

[152] For a state (or IO) to be responsible for a violation of international law, the act or omission constituting the wrongful conduct must be attributable to that state (or IO). State Responsibility Articles, art. 2; IO Responsibility Articles, art. 4.

The concern is not merely hypothetical. In the wake of the 1999 NATO bombing campaign in the former Yugoslavia, the then-Federal Republic of Yugoslavia brought ten individual cases against NATO members, seeking provisional measures requiring each of those states to "cease immediately its use of force and . . . refrain from any act of threat or use of force against the Federal Republic of Yugoslavia."[153] Because the ICJ's jurisdiction over contentious cases is limited to states, Yugoslavia could not file a case against NATO directly. In response, France argued, among other things, that the conduct on which Yugoslavia's case was based was attributable exclusively to NATO—not to France.[154] Because it dismissed all ten cases on jurisdictional grounds, the ICJ never ruled on this argument.[155]

At first glance, France's argument sounds plausible—and therefore the risk of circumvention is significant. Under the IO Responsibility Articles, the conduct of IO organs, IO officials, and IO agents is generally attributed to the IO itself.[156] But these attribution rules don't allow IOs' member states to dodge the consequences of breaching their treaty obligations because the analysis does not end there. The ILC's commentary makes clear that attributing conduct to IOs doesn't preclude also attributing conduct (and responsibility) to states in the same set of circumstances.[157]

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[153] Application of Yugoslavia, Legality of Use of Force (Yugo. v. Can.), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. Fr.), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. Fed. Rep. Ger.), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. Italy), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. Neth.), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. Port.), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. Spain), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. U.K.), 1999 I.C.J. (Apr. 29, 1999); Application of Yugoslavia, Legality of Use of Force (Yugo v. U.S.), 1999 I.C.J. (Apr. 29, 1999).

[154] Legality of Use of Force (Yugo. v. Fr.), Preliminary Objection, at 26-29 (July 5, 2000), http://www.icj-cij.org/docket/files/107/10873.pdf.

[155] The ICJ dismissed the cases against Spain and the United States in 1999. Legality of Use of Force (Yugo. v. U.S.), Provisional Measures, 1999 I.C.J. Rep. 916 (June 2); Legality of Use of Force (Yugo. v. Spain), Provisional Measures, 1999 I.C.J. Rep. 761 (June 2). The eight remaining cases were dismissed five years later. *See* John Crook, *Court Finds No Jurisdiction in NATO Bombing Cases*, 99 AM. J. INT'L L. 450 (2005).

[156] IO Responsibility Articles, arts. 6 & 7.

[157] *See* IO Responsibility Articles, art. 3 comment (6) ("The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances."); *see also id*. Part Five, Comment (2) ("Not all questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles. For instance, questions relating to

In some cases, states won't be able to avoid the consequences of a breach because their treaty obligations will encompass their interactions with an IO.[158] Let's return to the IMF and the ICESCR. The ICESCR supervisory body—the Committee on Economic, Social, and Cultural Rights—has trained its attention not only on the domestic policies that states adopt, but also on their interactions with the IMF. Thus, it has directed wealthier states like Belgium that are in a position to influence the IMF's policy decisions to do "all [they] can to ensure that the policies and decisions" of the IMF "are in conformity with the obligations of States parties to the Covenant."[159] To states like Morocco that borrow from the IMF, the Committee strongly recommended that their "obligations under the Covenant be taken into account in all aspects of [their] negotiations" with the IMF "to ensure that economic, social, and cultural rights, particularly of the most vulnerable groups of society, are not undermined."[160] Even if the ultimate decisions the IMF takes are attributed to the IMF, Belgium's interactions with the IMF are attributable to Belgium, while Morocco's interactions with the IMF are attributable to Morocco.

In other cases, the conduct attributable to member states is the implementation of an IO decision or obligation of IO membership. Consider *Waite and Kennedy* again. In state responsibility terms, the conduct that was attributable to Germany—and that

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attribution of conduct to a State are covered only in the articles on the responsibility of States for internationally wrongful acts. Thus, if an issue arises as to whether certain conduct is to be attributed to a State or to an international organization or to both, the present articles will provide criteria for ascertaining whether conduct is to be attributed to the international organization, while the articles on the responsibility of States for internationally wrongful acts will regulate attribution of conduct to the State."). The decision of the European Court of Human Rights in *Behrami and Saramati* has been rightly excoriated for ignoring the possibility of attributing conduct to both IOs and states. *See* Marko Milanovic & Tatjana Papic, *As Bad As It Gets: The European Court of Human Rights's* Behrami and Saramati *Decision and General International Law*, 58 INT'L & COMP. L.Q. 267 (2009).

[158] *See* IO Responsibility Articles, art. 58 comment (5) (States may have primary obligations that "encompass the conduct of a State when it acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would . . . [incur responsibility] under the articles on the responsibility of States for internationally wrongful acts.").

[159] *See, e.g.*, Concluding Observations of the Committee on Economic, Social and Cultural Rights (Belgium), UN Doc. E/C.122/1/Add.54, para. 31 (Dec. 1, 2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights (Italy), UN Doc. E/C.12/A/Add.43, para. 20 (May 23, 2000).

[160] VCLT art. 59.

potentially put Germany in breach of the ECHR—was adopting the legislation and regulations that provided for the ESA's immunity.[161]

Returning to France's argument in the NATO bombing case, it should be similarly straightforward to identify conduct that is attributable to France. One could point to the decision by French government officials to vote in favor of authorizing the bombing campaign. Or one could point to France's participation in carrying out that authorization. The general point is that it should usually be possible to identify actions attributable to a state in connection with its participation in an IO.[162] And so long as this is the case, states will not be able to avoid the consequences of breaching their treaty obligations when they participate in an IO that engages in conduct that is inconsistent with those treaty obligations.

In the end, the argument that states should not be able to evade their international obligations by joining with other states to establish an IO does successfully explain why certain international rules bind IOs. It explains why *jus cogens* binds IOs and why general international law binds IOs as a default matter. But it fails to establish that member states' treaty obligations automatically bind IOs.

III. IOs AS PEERS OF STATES

While the IOs-as-vehicles view focuses on the vertical relationship between states and IOs, the IOs-as-peers view emphasizes their horizontal relationship. Not merely the servants of states, IOs are powerful and autonomous actors on the world stage. They can enter into treaties and call states to account for violations of international law. IOs might extend or withhold loans to economies on the brink of collapse (as the IMF has done) or govern territory (as the United Nations did in Kosovo and East Timor).[163]

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[161] *See also* Nada v. Switzerland, App. No. 10593/08, Eur. Ct. H.R. (2012) at 39 para. 121 (measures imposed and other acts taken to implement Security Council resolutions imposing targeted sanctions attributable to Switzerland).

[162] A potentially difficult case could arise where a state unsuccessfully *opposed* the decision by the IO that violated its treaty obligations *and* that state did not take any steps to implement the IO decision. In this situation, it may be trickier to identify conduct that is attributable to the state. That said, the concern that the state is acting through an IO to evade its treaty obligations is more attenuated in this kind of situation because the state is taking affirmative steps to align IO actions with its treaty obligations.

[163] Ralph Wilde, *Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at* Stake, 12

Indeed, it is this combination of independence and power that generates anxiety about how international law binds IOs.

In thinking through the implications of this view, the relationship between new states and international law supplies a strikingly on-point analogy. In fact, IOs and new states have a lot in common: they are independent actors on the international stage with the potential to undermine the international legal order if they are wholly unbound by international law. And from the moment that they emerge, new states are bound by *jus cogens*, and, as a default matter, by customary international law and general principles. This is so even though new states had no opportunity to participate in forming those rules—and therefore no opportunity to protest or opt out of any they might have found objectionable.[164]

The best account of these obligations grounds them in new states' status as members of the international community.[165] The members of this community "exist side by side" in a horizontal relationship with one another. They also share and act on a conviction that certain reciprocal rules bind them.[166] All states—including new states—share certain rights and obligations by virtue of their status as members of the international community and regardless of their individual consent. After all, international law could

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ILSA J. INT'L & COMP. L. 395, 396 (2006) ("For those states that become the target for concerted international intervention, the power wielded by international organizations can be acute, especially in circumstances where international organizations assert administrative prerogatives over territory.").

[164] *See, e.g.*, DANILENKO, *supra* note 33, at 113-16 (1993); Weil, *supra* note 33, at 434 ("It is this opportunity for each individual state to opt out of a customary rule [during its period of formation pursuant to the persistent objector rule] that constitutes the acid test of custom's voluntarist nature.").

[165] Tomuschat, *supra* note 110, at 218-19, 227, 305-06; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 190-92 (1990); HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY (1980); DANILENKO, *supra* note 33, at 13-14 ("[W]hile the existing divisions indeed prevent far-reaching integration and community actions in many areas, there has always been at least one element that served as a sufficient ground for basic legal integration of the community of states. States have always recognized that there are some fundamental principles of international law of both procedural and substantive character which unite them into a legal community governed by law."). Some scholars have expressed doubts about this account of international obligations. *See, e.g.*, Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 301 & n.27 (describing doubts as to whether the requisite shared sense of group solidarity exists).

[166] MOSLER, *supra* note 165, at 1-2; FRANCK, *supra* note 165, at 197 ("The difference between a rabble or even a primitive association and a developed community is the latter members accept reciprocal obligations as a concomitant of membership in that community, which is a structured, continuing association of interacting parties.").

not function "if there were white spots on the map with States not bound by any legal rule and therefore not legally prevented from acting in the most irresponsible and irrational manner."[167]

Or consider entities that *de facto* meet the criteria for statehood even though they are not recognized as states. Such entities are in a horizontal relationship with established states: no other power has authority over them.[168] And established states treat such entities as having both rights and obligations under international law.[169] Thus, for example, in 1968 the United States protested when North Korea seized a U.S. naval vessel sailing on the high seas as a violation of international law—even though the United States did not recognize North Korea as a state at the time.[170] Indeed, if North Korea were not bound by these international law rules it would be in a position not only to cause genuine harm but to undermine established rules governing navigation on the high seas.

Just so with IOs. like new and *de facto* states, IOs are in a horizontal relationship with established states; indeed, this horizontal relationship is a defining feature of IOs. Furthermore, as increasingly significant and autonomous actors in the international legal system, IOs would constitute "white spots on the map" if unregulated by international law. Like other members of the international community, they must be bound by certain rules for the international legal system to function.

A. Foundations of the View

The view that IOs are peers—and, like states, members of the international community—finds support in IOs' exemption from the regulatory control of any single member state, in ICJ opinions that have bolstered IOs' status under international law,

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[167] Tomuschat, *supra* note 110, at 306.

[168] MOSLER, *supra* note 165, at 46 ("It follows from the very fact that no other power has authority over them, that they must have a certain status in international relations.").

[169] *Id.* at 43 ("The State of Israel was, from the very beginning of its existence in 1948, at war with its Arab neighbours. They never recognized it as a State, but the laws and customs of warfare binding belligerent States under international law were applicable to the struggle between them and the several cease-fire, armistice and disengagement of forces agreements were valid under international law.").

[170] 58 State Dep't Bull. 194, 194-97 (1968).

and in the on-the-ground autonomy that IOs enjoy.[171] And, of course, IOs' legal status encourages states to view IOs as their peers, making it easier for IOs to act independently.

1. Insulation from Individual States' Authority

Like states (and unlike natural persons, corporations, and NGOs), IOs are regulated exclusively by international law and by their internal legal orders, although they may consent to abide by particular regulations. The primary mechanism for ensuring that IOs remain outside individual states' regulatory authority is immunity. States take on international obligations to recognize IOs' immunities in the international agreements that establish IOs or in subsequently negotiated headquarters agreements.[172] These international agreements typically render IOs immune from all judicial process and render IO employees and officials immune for all acts taken in their official capacity.[173] These agreements usually also shield IO premises, archives, and communications.[174]

For example, New York City can't—and doesn't—enforce its fire code in the United Nations' headquarters. On paper, the city's fire code applies: according to the UN headquarters agreement, federal, state, and local laws apply to UN headquarters unless the United Nations has adopted inconsistent regulations, and the United Nations does not appear to have done so.[175] But the New York Fire Department can inspect UN Headquarters for compliance only with the UN's consent.[176] In fact, the fire department

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[171] Scholars writing about the international community as a source of (some) international obligations have suggested that IOs are members of the international community without delving into the implications of this status. *See, e.g.*, FRANCK, *supra* note 165, at 184; MOSLER, *supra* note 165, at xv; DANILENKO, *supra* note 33, at 12-13.

[172] *See also* Michael Wood, *Do International Organizations Enjoy Immunity Under Customary International Law?* 10 INT'L ORG. L. REV. 287 (2013).

[173] *See, e.g.*, UN Convention on the Privileges and Immunities of the UN; Convention on the Privileges and Immunities of the Specialized Agencies; The International Organizations Immunities Act, 22 U.S.C. § 288 et seq.

[174] *See, e.g.*, Agreement Regarding the Headquarters of the United Nations, U.S.-UN, June 26, 1947, 61 Stat. 3416, 11 UNTS 11 (subsequently supplemented and amended).

[175] *Id*. art. III secs. 7-8.

[176] *Id*. art. III sec. 9(a) ("The headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military, or police, shall not enter the

has inspected the UN just once since it was built in the 1940s.[177] It took the city nine months to secure permission for that 2007 inspection, which identified 866 violations.[178] But New York City had almost no leverage to insist that the UN address those violations. The mayor's office was reduced to threatening that "the city will be forced to direct the cessation of all public school visits to the United Nations" if the headquarters were not brought up to code.[179]

Likewise, IOs need not comply with federal employment discrimination laws, including Title VII of the Civil Rights Act. That's why, for example, the D.C. Circuit dismissed a suit against the World Bank by a former employee alleging that she was the victim of sexual harassment and discrimination.[180] In affirming the World Bank's immunity, the court explained:

> Like the other immunities accorded international organizations, the purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide. But beyond economies of administration, the very structure of an international organization, which ordinarily consists of an administrative body created by the joint action of several participating nations, requires that the organization remain independent from the international policies of its individual members.[181]

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headquarters district to perform any official duties therein except with the consent of and under conditions approved by the Secretary-General.").

[177] Anthony Ramirez, *Bringing the U.N. Up to Code*, N.Y. TIMES, (Nov. 23, 2007).

[178] *Id*.

[179] *Id*.

[180] Mendaro v. World Bank, 717 F.2d 610 (1983).

[181] *Id*. at 615-16.

Immunity does not mean that IOs' headquarters will be firetraps or that they'll discriminate against female employees. But it does mean that domestic laws do not apply to them the way that they do to other entities (like corporations and NGOs).

2. Status and Capacities on the International Plane

Two influential ICJ opinions have contributed to IOs' capacity to act as peers of states. The first, the 1949 *Reparation for Injuries* opinion, held that the United Nations has separate legal personality from its member states and therefore has the independent capacity to pursue claims for violations of international law.[182] The second—the previously discussed *WHO-Egypt* opinion—held that the WHO and the states that host its offices have mutual obligations to consult in good faith in the event that either party wishes to relocate WHO offices.[183] Both opinions reflect the view that, while IOs are different from states, IOs and states interact on the same plane in the international legal system. Like states, IOs can make international law,[184] break international law, be victims of violations of international law, and call other actors to account for such violations.

In *Reparation for Injuries*, the ICJ considered whether the United Nations could bring an international claim on its own behalf against a state that had failed to protect a UN agent. At the time the General Assembly requested the opinion, an extremist faction in Israel had just assassinated Count Bernadotte, the UN Mediator in Palestine.[185] Israel was not then a member of the United Nations.

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[182] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174 (Apr. 11).

[183] Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, paras. 48-49; *see supra* notes 28-31 and accompanying text.

[184] While the question of whether IOs can directly contribute to the formation of customary international law is contested, IOs have entered into thousands of treaties. Three decades ago, IOs were already parties to more than 2,000 treaties. CATHERINE BRÖLMANN, THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW: INTERNATIONAL ORGANIZATIONS AND THE LAW OF TREATIES 125-28 (2007).

[185] David J. Bederman, *The Reparation for Injuries Case: The Law of Nations is Transformed Into International Law* in INTERNATIONAL LAW STORIES 307-16 (John E. Noyes et al., eds. 2007).

The first notable feature of the *Reparation for Injuries* opinion is that the ICJ did not hesitate to assume that non-member states could have international law obligations to the United Nations. The ICJ simply accepted that the reparations claim arose "from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties."[186] Just as states have a duty under international law to protect other states' nationals within their territories, the Court seemed to reason, so too could a state (even a non-member state) have comparable obligations with respect to UN agents.[187] In making this assumption without further comment, the ICJ telegraphed its willingness to equate the status of states and IOs.

Second, the ICJ framed its analysis around the question of whether a level playing field existed between states and the United Nations. Traditionally, when one state violated its international obligations and failed to protect another state's nationals, the injured individuals could not themselves call the violating state to account. Instead, the individuals' state of nationality could espouse the claim and seek reparation from the offending state. As the ICJ explained, an international claim "takes the form of a claim between two political entities, equal in law, similar in form, and both direct subjects of international law."[188] The methods for presenting international claims are thus designed for peers. They include protest, request for an enquiry, and negotiation; international claims cannot be submitted to an international tribunal "except with the consent of the States concerned."[189]

The question for the ICJ was, in essence, whether the United Nations could use those methods for resolving disputes among peers—or whether the United Nations' member states needed to espouse the claim first, as they would if their nationals had been injured. The Court equated asking whether the United Nations has legal personality

[186] Reparation for Injuries, 1949 I.C.J. Rep. at 177.

[187] DAMROSCH ET AL., INTERNATIONAL LAW 1062 (5th ed. 2009) (citing, inter alia, the William E. Chapman Claim (United States v. Mexico) 4 U.N. Rep. Int'l Arb. Awards 632 (1930) (holding Mexico liable for, inter alia, failure of Mexican authorities to take appropriate steps to protect a U.S. Consul who was shot and seriously wounded after threats to U.S. diplomatic and consular representatives had been communicated to Mexican authorities.)

[188] Reparation for Injuries, 1949 I.C.J. Rep. at 177-78.

[189] *Id*. at 177-78.

with asking "whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights *which it is entitled to ask them to respect*."[190]

The ICJ held that the United Nations does have legal personality separate from its member states and thus could itself pursue international claims. To support this conclusion, the ICJ cited the purposes for which the United Nations was established, the intentions of its founding states, and the United Nations' practice of entering into treaties. This practice, the ICJ averred, "confirmed" the character of the organization, "which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations."[191] As a separate legal person under international law, the United Nations enjoys rights under international law as well as the capacity to "maintain [those] rights." In other words, the ICJ's conclusion emphasized the co-equal status of states and the United Nations. The ICJ nonetheless took pains to emphasize that the United Nations was not "'a super-State,' whatever that expression may mean."[192]

Finally, the ICJ's separate conclusion that *all* states must recognize the United Nations' legal personality—not just its member states—likewise reflects the status of the United Nations as a peer of states.[193] The ICJ's analysis on this point is rather thin; it consists of a single sentence affirming that "fifty States, representing the vast majority of members of the international community, ha[ve] the power, in conformity with international law, to bring into being an entity possessing objective personality, and not merely personality recognized by them alone, together with capacity to bring international claims."[194] The ICJ held that once the United Nations emerged on the international scene, all states had to respect its rights under international law—not just

[190] *Id.* at 178 (emphasis added).

[191] *Id.* at 179.

[192] *Id.*

[193] MOSLER, *supra* note 165, at 36 (1980) ("[T]hird parties who are not members of the Organization and who have not otherwise recognized it cannot ignore its existence as a subject of international law. In the event of any contact between them and the Organization the latter must be treated as a member of the international community, and relations so established are governed by international law.").

[194] Reparation for Injuries, 1949 I.C.J. Rep. at 185.

the United Nations' member states.[195] The parallel is clear: states have obligations towards all other entities that *de facto* meet the criteria for statehood, not just those they formally recognize.[196]

Three decades later, the World Health Assembly asked the ICJ to resolve the dispute between the WHO and Egypt over the legal requirements for relocating the WHO's regional office.[197] Once again, the ICJ issued an opinion that characterized the relationship between the IO and one of its member states as a relationship between peers. That relationship was the product of "common action based on mutual consent;" its "very essence" is "a body of mutual obligations of cooperation and good faith."[198] Before delineating the specific obligations of the WHO and Egypt, the ICJ surveyed a number of host agreements, the provisions of the VCLT, and the draft articles that would later become the VCLT-IO. It then observed that these provisions "are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty."[199] The ICJ thus concluded that "on the basis of the legal relations between the Organization and Egypt under general international law, under the Constitution of the Organization and under the agreements in force between Egypt and the Organization," a possible transfer of the regional office entailed a duty on both the WHO and Egypt to "consult together in good faith," to ensure any transfer of the regional office occurs "in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt," and following a "reasonable period

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[195] MOSLER, *supra* note 165, at 36 (1980) ("[T]hird parties who are not members of the Organization and who have not otherwise recognized it cannot ignore its existence as a subject of international law. In the event of any contact between them and the Organization the latter must be treated as a member of the international community, and relations so established are governed by international law.").

[196] States have obligations to unrecognized states; these include respecting the unrecognized state's territorial sovereignty and accepting its right to grant nationality to persons and vessels. RESTATEMENT (3D) OF FOREIGN RELATIONS LAW § 202 comment (c); Nkambo Mugerwa, *Subjects of International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 247, 269 (Max Sorenson ed. 1968); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 26-27(2d ed. 2006) (denial of recognition to an entity otherwise qualifying as a state does not entitle the non-recognizing State to act as if the latter is not a State—that is, the non-recognizing state may not ignore the latter's nationality or intervene in its affairs).

[197] *See supra* notes 28-30 and accompanying text.

[198] Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. at 93, para. 43.

[199] *Id*. at para. 47.

of notice."[200] In other words, the WHO and Egypt needed to approach and resolve their disputes as peers operating within the international legal system.

3. On-the-Ground Autonomy

As a practical matter, IOs—and especially their secretariats—operate with significant autonomy. This autonomy is not unbounded, of course. But IO officials, especially those in leadership positions, share the "first-mover" capacities that executives in national governments enjoy.[201] They can set agendas, define problems, and delimit the range of acceptable solutions, using their prestige and visibility both to influence representatives of member states and to go "over the heads" of those representatives by directly addressing the public.[202] IO bureaucracies enjoy legitimacy and power that stems from their apparently neutral and impersonal technocratic decision-making style.[203] IOs' expertise and their control over information that is not readily available to other actors—including their member states—reinforce their authority.[204] This combination of discretion and authority gives international civil servants a significant role in making policy.

IOs' international legal status and legal authorities help to both bring about and reinforce this autonomy. For example, IOs' independent legal personality not only imbues the actions or omissions of IOs with legal consequences, but also sends a signal

[200] *Id*. at para. 49.

[201] *Cf*. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132 (1999) (describing the first-mover advantages that presidents enjoy because of the discretion, opportunities, and resources that are available to them).

[202] THOMAS M. FRANCK, NATION AGAINST NATION 94-133 (1985); Ian Johnstone, *The Secretary-General as Norm Entrepreneur*, in Simon Chesterman, ed., SECRETARY OR GENERAL? (2007).

[203] Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of IOs*, 53 INT'L ORG. 699, 707-10 (1999).

[204] *Id*. at 707-15 (describing how IOs structure knowledge by (1) classifying the world and creating categories of actors and action; (2) fix meanings in the social world; and (3) articulate and diffuse new norms, principles, and actors around the globe).

that IOs are to be taken seriously, while making it easier for IOs to shield themselves from outside interference.[205]

B. Implications of the IOs-as-Peers View

When new states emerge on the international scene, *jus cogens* norms bind them; so too does general international law. Treaties do not bind new states without their consent, with some possible exceptions as a result of state succession. If the analogy of IOs to new states holds, then the same conclusions would seem to follow for IOs.

But does the analogy hold? Because of course, even if they are members of the international community, IOs are not identical to new states. Indeed, in the *Reparation for Injuries* opinion, the ICJ specifically said that concluding the United Nations is a legal person is "not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State."[206] Most significantly, states have general competence to act on the international plane. IOs do not. As the ICJ put it, IOs are "governed by the 'principle of speciality,' that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them."[207] The remainder of this Part explores the implications of this distinction.

1. Jus Cogens *and General International Law*

One might think that because IOs enjoy only a subset of the authorities that states do, IOs ought to be bound by only a subset of the obligations that bind states. For example, should human rights law or the law of the sea really bind the World Intellectual Property Organization (WIPO)? The purposes for which states established WIPO have nothing to do with either. WIPO's objectives are "to promote the protection of intellectual property throughout the world through cooperation among States" and to facilitate implementation of certain international agreements related to the protection of

[205] Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35, 61-65 (2005); David J. Bederman, *Souls of International Organizations*, 36 VA J. INT'L L. 275, 374.

[206] Reparation for Injuries, 1949 I.C.J. Rep. at 179.

[207] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 226, para. 25 (July 8).

intellectual property.[208] To achieve these objectives, WIPO is authorized to "encourage the conclusion of international agreements designed to promote the protection of intellectual property" and to "assemble and disseminate information concerning the protection of intellectual property."[209]

Perhaps only those international law norms that relate to the content of the WIPO Convention should bind WIPO. To put it more generally, perhaps IOs' international law obligations should parallel their limited authorities. Thus, a small slice of general international law would bind WIPO; a different (but also small) slice of international law would bind the Inter-American Tropical Tuna Commission. Given its broader purposes and the broader range of its authorities, a larger slice would bind the United Nations.

But reviewing the explicit authorities enumerated in an IO's charter is not an especially good way to understand the scope of the IO's activities.[210] Two common approaches to interpreting IO charters both validate and perpetuate expansive charter interpretations. The first is the implied powers doctrine. IOs have not only the powers their charters confer explicitly, but also "those powers which, though not expressly provided in the Charter, are conferred upon [them] by necessary implication as being essential to the performance of [their] duties."[211] Separately, IO practice informs the interpretation of IO charters;[212] consideration of practice tends to expand the range of permissible IO activity.[213] The possibility that IO activities might expand—including in ways that their member states do not necessarily foresee—suggests that IOs'

[208] 1967 WIPO Convention, art. 3.

[209] *Id*. art. 4.

[210] ALVAREZ, *supra* note 16.

[211] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 182 (Apr. 11).

[212] IO charters are usually treaties, and the VCLT, which sets out the method for interpreting treaties, including IO charters, indicates that the subsequent practice of the parties is relevant to interpreting them. *See* VCLT art. 31(3)(b).

[213] *See, e.g.*, ALVAREZ, *supra* note 16, at 124 (describing how subsequent practice led to an interpretation of the Charter that expanded the General Assembly's authority to assess UN members for certain kinds of organizational expenses); *see also* Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289 (2013).

international law obligations must extend at least somewhat beyond those that touch on the powers their charters formally confer.

Consider WIPO again. As the "principal purveyor of technical assistance on [intellectual property] issues," WIPO can both facilitate and undermine individuals' access to medicine.[214] For that reason, WIPO's actions or omissions may affect the extent to which individuals enjoy a (human) right to health.[215] The point is not that WIPO clearly has obligations in connection with the right to health, but that human rights law is not categorically irrelevant to WIPO's work. Indeed, since IOs' activities can grow in unanticipated ways, it is difficult to assert with confidence that any particular subset of general international law is wholly irrelevant to any given IO. To put it another way, it is difficult to see why powers *explicitly* conferred should be subject to international legal constraints while powers *implicitly* conferred are not.

Even so, some rules of international law might seem completely irrelevant to some IOs. Is there really reason to consider WIPO bound by, say, the law of the sea? I think so, because there is always a possibility that IOs will engage in *ultra vires* conduct. Imagine that overzealous WIPO officials started patrolling the territorial seas of coastal states that, in their view, were too lax in enforcing laws protecting intellectual property. If another state undertook such actions without the consent of the coastal state, that state would have violated the law of the sea.[216] Should WIPO really be able to evade international responsibility on the ground that its action was lawless even under its own charter?

When it comes to states, the probability that a state will (or won't) violate a particular norm does not affect whether that norm binds that state. The law of the sea

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[214] Ruth L. Okediji, *The Role of WIPO in Access to Medicines*, in BALANCING WEALTH AND HEALTH (Rochelle C. Dreyfuss & César Rodríguez-Garavito, eds. 2014).

[215] ICESCR art. 12(1) ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

[216] Under the UN Convention on the Law of the Sea, coastal states exercise sovereignty over their territorial seas, subject to the right of ships of all states to enjoy the right of innocent passage through the territorial seas. Patrolling in this way would not qualify as innocent passage. UN Convention on the Law of the Sea arts. 2, 17-19. Virtually all states view these provisions as reflecting customary international law. *See* Raul (Pete) Pedrozo, *Is It Time for the United States to Join the Law of the Sea Convention?*, 41 J. MAR. L. & COM. 151, 156 (2010); Marian Nash Leich, *Limits of the Territorial Sea*, 83 AM. J. INT'L L. 349 (1989).

binds landlocked states as well as those with long coastlines. Limits on the use of force bind states with small or nonexistent militaries. The principle of speciality does mean that particular IOs might be especially unlikely to contravene some general international law rules. But the principle of speciality does not render violations impossible. For that reason, it does not justify limiting IOs' international obligations to match their limited authorities.

As members of the international community, then, when IOs emerge, they are bound by *jus cogens* and by general international law as a default matter, just as new states are. Over time, IOs, like states, will be bound by new general international law rules as they coalesce, except to the extent that individual IOs have and exercise the authorities to contract around those default norms.[217]

2. Treaties

Nothing in the principle of speciality suggests that IOs are differently situated from states when it comes to treaty obligations. To the extent that IOs are states' peers and in a horizontal relationship with them on the international plane, the *pacta tertiis* rule would seem to apply to IOs as well. The ILC agrees. In its commentary to the draft article that extended the *pacta tertiis* rule to IOs, the ILC explained: "The principle which the Vienna Convention lays down is only the expression of one of the fundamental consequences of consensuality. It has been adapted without difficulty to treaties to which one or more international organizations are parties."[218]

If anything, binding IOs to treaty obligations without their consent would undermine the principle of speciality, which emphasizes that states create IOs to pursue specific goals by investing them with specific authorities. It is not entirely clear exactly which treaties would bind IOs—or how—if the *pacta tertiis* rule did not apply to IOs. But any

[217] Provided they have the relevant authorities, it seems that IOs would also be able to avoid being bound by new customary international law norms by persistently objecting to those norms to the same extent that states can.

[218] Draft articles on the law of treaties between States and international organizations or between international organizations, with commentaries, Yearbook of the International Law Commission, 1982, vol. II, Part II, at 42.

new treaty obligations would either expand or contract IOs' authorities through methods not contemplated in their charters. Moreover, the actors who could bind IOs to treaties without their consent would be empowered at the expense of others, again in ways that would bypass decision-making procedures set out in IO charters. Suppose, for example, that the Committee on Economic, Social, and Cultural Rights could pronounce the IMF bound by the ICESCR—or that a handful of the IMF's member states could do so. Whether good or bad, the consequences would be significant. And they would not be the product of decisions made pursuant to the IMF's Articles of Agreement.

All that said, there is one exception to the general rule that treaties do not bind states without their consent and it would seem to apply to IOs as well. New states may succeed to the treaty obligations of their predecessors in some circumstances. As new members of the international community, successor states "inherit" certain rights and duties from their "parent states," "not by virtue of consent but as a concomitant of status."[219] IOs too can inherit rights and obligations from other IOs.[220] And a number of commentators have argued that IOs might, by virtue of functional succession, become bound by the obligations of their member states. Some scholars have suggested that functional succession will bind IOs in a limited set of cases.[221] Others have made or endorsed the argument in a more general way, without specifying when it would or would not apply.[222]

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[219] FRANCK, *supra* note 165, at 191.

[220] International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128, 136 (July 11) (concluding that the United Nations is "legally qualified" to exercise supervisory functions related to the administration of non-independent territories assigned to the League of Nations even though those supervisory functions were "neither expressly transferred to the United Nations nor expressly assumed by that organization).

[221] Halberstam and Stein explain that an IO "may, at times, find itself indirectly bound by the legal obligations of its Members. The principal idea here is one of functional legal succession. . . . , [which] roughly holds that when an international organization exercises the powers formerly belonging to a State or group of States in the context of a particular international legal regime, then such international organization succeeds that group of States not only in their rights but also in their obligations under that international legal regime." Halberstam and Stein, *supra* note 43, at 22-23. They specify that they find functional succession arguments unconvincing with respect to positive international obligations that require taking action where the IO's member states retain some powers to implement those international obligations. *Id*. at 48 & n. 140.

[222] SCHERMERS & BLOKKER, *supra* note 12, at 995 § 1574; Reinisch, *supra* note 6, at 137 ("One promising road—particularly in light of the transfer of 'governance' tasks to international organizations—appears to

I agree that IOs can functionally succeed to the international obligations of another state or states. But succession represents only a tiny exception to the general rule that IOs cannot be bound by conventional treaty obligations without their consent. That's because the concept of succession depends on the complete replacement or displacement of one entity by another. Questions of succession arise when new states arise from previously existing states—for example, when a state becomes independent of another state of which it had formed a part, a single state disaggregates into two or more new states, or formerly separate states unify into a single state. Each of these situations involves the "*definitive replacement* of one state by another in respect of sovereignty over a given territory."[223]

In other words, functional succession requires more than IOs being peers in the international legal system that exist alongside states. It requires an IO to replace or displace a state.[224] Such replacement or displacement is quite rare, implying that functional succession will be quite rare, too. But it can happen. Take, for example, the European Union and its predecessor, the European Community. The European Court of Justice's 1972 opinion in *International Fruit Company NV v. Produktschap voor Groenten en Fruit* held that the EC had succeeded to its member states' obligations pursuant to the General Agreement on Tariffs and Trade (GATT).[225] Before reaching this conclusion, however, the ECJ found evidence of a complete transfer of authority from the member states to the EC with respect to trade policy. The ECJ observed that the

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be a discussion of something like a 'functional' treaty succession by international organizations to the position of their member states."); Mégret & Hoffmann, *supra* note 52, at 318.

[223] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 621 (6th ed. 2003) (emphasis added); Vienna Convention on the Succession of States in respect of Treaties, art. 2(b) ("'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory").

[224] This view is in accord with Halberstam and Stein with respect to positive obligations. *See* Halberstam & Stein, *supra* note 43, at 48 n. 140 ("We are less convinced by the application of functional succession in the absence of exclusive [European] Community powers when the question surrounds a positive international command to take action—as opposed to a negative prohibition against certain forms of action. As long as the EC has not by treaty or secondary legislation displaced Member States' ability to comply with the international obligation, the EC has not substituted itself for the Member States in that arena.").

[225] Joined Cases 21-24/72, International Fruit Company NV v. Produktschap voor Groenten en Fruit, [1972] ECR 1219.

Community is now wholly responsible for setting trade policy for its member states, that the GATT's other contracting parties "recognize[]" this "transfer of powers" to the Community, and that the Community has participated in negotiations and has entered into related trade agreements in its own name.[226] Under these circumstances, the ECJ concluded that the relevant GATT provisions bound the Community, not just its member states.[227] The completeness of the transfer in *International Fruit* made the analogy to state succession appropriate.

Still, examples of this kind are very unusual. An IO can properly succeed to a state's obligations only if the IO makes final decisions about the policy that will govern regarding particular matters (like trade) or in a particular territory. But IOs almost never exercise that degree of control. Most IOs are in the business of making recommendations. When IOs create new international obligations, the IO's member states almost always retain the discretion to accept or reject them. The authorities of the EU and its predecessors and certain decisions of the United Nations Security Council are significant exceptions.[228] Even in these cases where IOs can bind their member states to new international obligations, individual states usually retain authority over whether and how they will implement those new obligations. Unless the IO has the final authority to set policy, functional succession arguments are inapposite.

Even in those rare circumstances where an IO does replace or displace a state, the state's treaty obligations will not *necessarily* bind the IO. Successor states are not always, or even almost always, bound by their predecessors' treaty obligations.[229] Indeed, the law of state succession is unsettled and fraught with tension. On the one hand, reliance values favor the new state's succeeding to the former state's treaty

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[226] *Id*. paras. 14-17.

[227] *Id*. para. 18.

[228] Other examples are few and far between, and usually involve narrow and technocratic issues. For example, the International Civil Aviation Organization (ICAO) can adopt rules of air navigation that apply over the high seas that bind all parties to the Chicago Convention; states do not have the option to opt out of these rules. Convention on International Civil Aviation, art. 12. *See also* Guzman, *supra* note 16, at 1013-17 (discussing other similar examples).

[229] Gerhard Hafner & Gregor Novak, *State Succession in Respect of Treaties*, in THE OXFORD GUIDE TO TREATIES (Duncan Hollis, ed. 2012) at 396, 396 ("The law and practice of State succession is highly contextual, with the outcome of each case strongly influenced by the relevant political situation. As a result, there is no single rule for all cases of treaty succession.").

obligations. On the other hand, concerns about sovereignty and consent favor a clean slate.[230] The 1978 Convention on the Succession of States in Respect of Treaties sets out rules that vary by context.[231] But fewer than two dozen states are parties, and many of its provisions remain controversial.[232] In short, even when IOs do displace or replace a state, there is no clear categorical rule of state succession that supports the conclusion that IOs are bound by all of a state's treaty obligations.

Consider, for example, the United Nations' recent experience in territorial administration. From 1999 to 2008, the United Nations partially displaced Serbia and Montenegro and exercised all governmental authority—legislative, executive, and judicial—in Kosovo.[233] The United Nations thus temporarily functioned as a surrogate state, and "assume[d] the classical functions of a state in the place of domestic authorities."[234] It was never clear whether the human rights treaty obligations of Serbia and Montenegro bound the UN administration in Kosovo, which was known as UNMIK.[235] The UN Human Rights Committee, the supervisory body for the International Covenant on Civil and Political Rights (ICCPR), thought that UNMIK was so bound.[236] UNMIK itself, however, rejected this view.[237] So too did the Venice

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[230] *See generally* Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275, 280-84 (1993).

[231] Convention on Succession of States in Respect of Treaties, adopted Aug. 23, 1978, 1946 U.N.T.S. 3. See, e.g., art. 11 (providing that succession does not affect boundaries established by treaty); *compare id.* Part III (addressing newly independent states—that is, former colonies) *with id.* Part IV (addressing "uniting and separation of states").

[232] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en; BROWNLIE, *supra* note 223, at 633; Hafner & Novak, *supra* note 229, at 400 ("[T]he applicable international law has remained rather vague, primarily because State practice itself has been and remains largely inconsistent.").

[233] UNSC Res. 1244 para. 10 (June 10, 1999); UNMIK/REG/1999/1 Sec. 1 para. 1 (July 25, 1999).

[234] CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION 494 (2008).

[235] *Id*. at 492-96.

[236] Drawing on previous work concluding that the ICCPR categorically binds successor states, the Human Rights Committee took the position that UNMIK was "bound to respect and to ensure to all individuals within the territory of Kosovo and subject to their jurisdiction the rights recognized in the Covenant." *See* General Comment No. 26, General comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev. 1 (Dec. 8, 1997), para. 4; Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (14 Aug. 2006), para. 4.

Commission.[238] In other words, treaty norms might sometimes bind IOs by functional succession. But examples of an IO succeeding a state are few and far between, and even where it occurs there are unsettled questions about which treaty norms would bind the succeeding IO.

In the final analysis, then, the IOs-as-peers view—properly understood—leads to the conclusion that IOs are bound by *jus cogens* and by general international law as a default matter. And, with possible rare exceptions when IOs succeed or displace states in the performance of governmental functions, treaties do not bind IOs without their consent.

IV. IOs' OWN VIEWS

Up to this point, this article has ignored IOs' own views on the question of which rules of international law bind them. So too have most scholars writing about IO obligations. Whether IOs' views are relevant depends on the theoretical perspective one takes. If IOs are treated simply as vehicles through which states act, IOs' views shouldn't much matter. But IOs' own views do count if they are the peers of states and full-status members of the international community. The very existence of such a community depends in part on its members sharing the conviction that they are part of a community that is governed by certain rules.[239] IOs' views about the content of those rules should be of interest.

In addition to their theoretical significance, IOs' own views about their legal obligations matter for practical reasons. Formal mechanisms for adjudicating and

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[237] Report Submitted by the United Nations Interim Administration in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo Since June 1999, UN Doc. CCPR/C/UNK/1 (Mar. 13, 2006), paras. 123-24.

[238] European Commission for Democracy Through Law, Opinion on Human Rights in Kosovo (2004), para. 78, *available at* http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282004%29033-e. The Venice Commission is an advisory body to the Council of Europe composed of inde-pendent experts, in connection with the European Convention on Human Rights.

[239] *See supra* note 166 and accompanying text.

enforcing IOs' international obligations are few and far between.[240] IOs are simply more likely to comply with obligations that they themselves accept as binding.[241]

A number of IOs revealed their views about which international law rules bind them as the ILC sought to codify and develop the international law rules that apply specifically to IOs. The first ILC effort culminated in the VCLT-IO, which was adopted in 1986. The second resulted in the Draft Articles on the Responsibility of International Organizations, which the ILC adopted in 2011. Not every IO participated in these debates; even those that did participate never offered a fully developed theory about the scope of their obligations. Strikingly, however, the participating IOs' comments reflect broad areas of consensus. The IOs that weighed in indicated that *jus cogens* rules bind them, as does general international law except to the extent that their charters, as *lex specialis*, contract around it. At the same time, IOs consistently took the position that that they are *not* bound by treaties without their consent. In other words, IOs' own views closely track the theoretical conclusions sketched above—and hence offer further support for those conclusions.

A. IOs and the Binding Effect of Treaties on Treaties

The ILC formally took up the topic of treaties to which IOs are parties shortly after the VCLT was adopted in 1969.[242] The ILC's work provided IOs with an opportunity to describe both their practice and their understanding of which international law norms bind them. Three points are especially important. First, a number of IOs expressed the view that they were already bound by those parts of treaty law that constituted customary international law or general principles. Second, these IOs indicated that customary international law norms that developed in the future would also bind them.

[240] Daugirdas, *supra* note 78.

[241] *Cf.* Tomuschat, *supra* note 110, at 362 (making this point with respect to states); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 762 (2001) (same).

[242] *See* UN General Assembly Resolution 2501 (XXIV), para. 5 (Nov. 12, 1969); Yearbook of the International Law Commission, 1971, vol. II, Part One, pages 347-48.

Third, IOs categorically rejected the possibility that treaties could bind them without their consent.

In drafting articles on IO treaties, the ILC did not seek to reinvent the wheel. Instead, the ILC started with the VCLT and considered, on an article-by-article basis, whether differences between states and IOs required any changes.[243] After provisionally adopting draft articles, the ILC in 1979 transmitted them to IOs for their comments.[244] In their comments, participating IOs emphasized the degree to which the VCLT both shaped their practice with respect to treaties and described the law applicable to IOs. But the IOs maintained that not all the rules developed for states could carry over automatically to IOs.[245] Where those rules did not directly translate, IOs invoked their own practice for ascertaining and developing the relevant rules.

Consider, for example, the comments that the International Labor Organization submitted in 1980:

> A preliminary question concerns the extent to which the articles innovate, or are merely declaratory of existing custom or practice. There would seem to be little doubt that—since conventional arrangements falling outside the internal law of organizations have had to draw on existing principles of international law—major rules of treaty law, such as the principle of *pacta sunt servanda* [treaties are to be obeyed] or the rules concerning the interpretation of treaties, have long been applied by those concerned.[246]

Not only did the ILO report that its own practice conformed to the major rules in the VCLT, but the ILO suggested that these rules already bound IOs.[247]

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[243] 1973 Yearbook of the International Law Commission, vol. II, at 77 paras. 9-12.

[244] 1979 Yearbook of the International Law Commission, vol. II(2), at 138 para. 84.

[245] For example, article 7 of the VCLT, captioned "full powers," identifies those persons who can represent states for the purpose of adopting, authenticating, and consenting to treaties. Because those persons hold titles that IO officials don't share (e.g., head of state, head of government, minister of foreign affairs), these rules needed to be adapted to apply to IOs.

[246] Yearbook of the International Law Commission, 1981, Vol. II(2) at 199.

[247] Yearbook of the Int'l Law Commission, 1981, Vol. II(2) at 199 ("[T]he main rules of treaty law are binding on the organizations irrespective of the terms of the convention [that might ultimately be negotiated on IO treaties].").

Other IOs likewise indicated that they applied the VCLT in practice and considered themselves bound by at least some aspects of it. For example, the United Nations explained that "the method following in the United Nations practice has been to apply in principle the established international legal rules concerning treaties between States, and to modify these rules only so far as necessary in view of the special requirements of the United Nations.[248] The International Atomic Energy Agency stated that "[i]n the day-to-day legal practice of the IAEA, resort is frequently had to the [VCLT], which is treated as a 'handy manual' of the law affecting the Agency's treaties with states and other organizations and other treaties of interest to it to which only States are parties."[249] The European Economic Community wrote that "the spirit, if not the letter, of most of the rules established in the Vienna Convention on the Law of Treaties applies fully to both types of treaties; in other words, treaties concluded between States and treaties to which one or more international organizations are contracting parties."[250]

After formally adopting the draft articles on IO treaties on July 1, 1982, the ILC recommended that the General Assembly start the process of embedding them into a treaty. But some IOs were nervous. Like the draft articles that formed the basis for the VCLT, the draft articles on IO treaties blended codification and progressive development. IOs voiced serious concerns about how the ILC's draft articles—especially those that reflected progressive development rather than existing customary international law—might come to bind them.

The United Nations and other IOs that are specialized agencies of the United Nations[251] coordinated their views through the Administrative Committee on

[248] Yearbook of the Int'l Law Commission, 1981, Vol. II(2) at 199.

[249] Yearbook of the Int'l Law Commission, 1982, Vol. II(2) at 137

[250] *Id*. at 145.

[251] The term "specialized agency" is somewhat misleading. The 19 specialized agencies are not subordinate units of the United Nations; rather, they are independent IOs with their own charters, members, and budgets—although they do coordinate their work with the United Nations pursuant to articles 57 & 63 of the UN Charter. The specialized agencies include, among others, the Food and Agriculture Organization, the World Health Organization, the International Civil Aviation Organization, and the World Bank.

Coordination (ACC).[252] In November 1982, the ACC submitted to the General Assembly a statement identifying several "legally sound" ways that a treaty based on the ILC's draft articles might bind IOs.[253] First, IOs and states could become parties to the treaty on the same footing. Second, IOs might formally adopt, accept, or consent to a treaty to which only states would be parties.[254] Notably, both of these methods made some form of express IO consent a prerequisite for binding IOs. The final option, the ACC said, was "quite different." The General Assembly could adopt the articles "not as an international convention destined to create legal obligations for the parties thereto, but as a standard of reference for action destined to harden into customary international law."[255] The ACC reported that a number of IOs expressed a preference for this last approach.[256]

The next month, the General Assembly concluded that it would proceed with a convention without reaching a decision about the method by which the convention would bind IOs.[257] In the same resolution, the General Assembly invited comments from a number of IOs, including the specialized agencies, the IAEA, the GATT, and a number of regional organizations including the Organization of American States, the Organization of African Unity, and the Islamic Conference.[258]

Over the next year, some of these IOs submitted comments reflecting their commitment to the view that they could not be bound by treaty obligations without their consent.[259] The United Nations, for example, said that "[i]t is, of course, clear that . . . an inter-organizational conference could not bind its participants without their consent, that is, that no agreement could be imposed on any organization merely by reason of its

[252] ECOSOC Res. 13 (III), Sept. 21, 1946. The ACC was composed of the UN Secretary General and the heads of the specialized agencies. In 2001, ECOSOC renamed the ACC the United Nations System Chief Executives Board for Coordination.

[253] UN Doc. A/C.6/37/L.12 (Nov. 18, 1982) (attaching the text of a decision 1982/17, adopted by the Administrative Committee on Co-ordination when it met on November 1-3, 1982). The four routes identified by the ACC tracked those identified by the ILO in its submissions to the ILC in 1980. Yearbook of the Int'l Law Commission, 1981, Vol. II(2) at 199.

[254] *Id*.

[255] *Id*.

[256] *Id*.

[257] UNGA Res. 37/112, para. 5. (Dec. 16, 1982).

[258] *Id*. para. 3.

[259] UN Doc. A/38/45 at 18-27 (Sept. 15, 1983); UN Doc. A/38/45.Add.1 at 16-45 (Oct. 20, 1983).

participation in the conference."[260] The International Telecommunications Union said that the creation of obligations and rights for IOs through a convention "simply and beyond any doubt necessitates such express consent to that convention."[261]

When the ACC met in 1983, it adopted a new statement reflecting the input of the legal advisers of the participating organizations. Like the ACC's first statement, it emphasized the indispensable role of IO consent: "The Legal Advisers considered it essential, and ACC concurs, that no international organization be bound without its explicit consent by a convention incorporating the draft articles."[262]

Ultimately, the General Assembly decided that IOs would be able to sign the VCLT-IO and formally become parties to the convention. To date, 17 IOs have done so, including the United Nations.[263] But the VCLT-IO won't enter into force unless and until 35 states become parties to the treaty[264]—and only 31 have done so to date.[265]

Although holding to the view that treaty obligations cannot bind them without their consent, some IOs that declined to sign the VCLT-IO believe that key provisions of the VCLT and VCLT-IO nonetheless bind them as customary international law. For example, none of the international financial institutions have signed the VCLT-IO.[266] The World Bank, for example, worried that the treaty's provisions on invalidity, termination, and suspension of treaties were ill-suited for the kinds of long-term financial agreements the Bank regularly concluded.[267] But, as a former General Counsel of the World Bank pointed out, these concerns "have not precluded . . . the application, in the Bank's practice, of some of [the VCLT-IO's] provisions reflecting customary

[260] UN Doc. A/38/145/Add.1

[261] *Id*. at 37.

[262] UN Doc. A/C.6/38/4 (Oct. 27, 1983) at 4 para. 11.

[263] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en.

[264] VCLT-IO, *supra* note 10, arts. 82-85.

[265] *See supra* note 11.

[266] *See* UN Doc. A/C.6/38/4 para. 17 (describing some of the problems perceived by the IFIs).

[267] *See* UN Doc. A/38/145/Add.1

international law."[268] Indeed, one of his predecessors emphasized that the legal opinions presented to the World Bank's executive directors by the Bank's General Counsel provide a "*legal* interpretation" of the Bank's charter—and "[s]uch interpretation is subject to general rules of international law developed through centuries of state practice, judicial precedents, and scholarly works," including in particular the provisions of the VCLT that govern treaty interpretation.[269]

B. IO Charters as *Lex Specialis*

In 2000, the ILC undertook another project to adapt rules formulated for states to IOs. After adopting a set of Draft Articles on State Responsibility, the ILC turned to the task of producing a counterpart set of articles on IO responsibility. Both sets of articles address the "secondary rules" associated with violations of international law.[270] That is, they address issues like when conduct can be attributed to states or IOs, defenses that render otherwise-unlawful conduct permissible, and the consequences of violations of international law. Neither set of articles seeks to define the content of the "primary rules" that bind states or IOs, the breach of which may give rise to responsibility.[271] Even so, the topic came up as the ILC developed the IO responsibility articles—especially in relation to the article addressing the role of *lex specialis*.

In their comments, participating IOs generally agreed that *jus cogens* norms bind them. IOs also embraced the view that their charters constitute *lex specialis*—and, as explained below, this view only makes sense against a background presumption that general international law governs, *except to the extent that states have contracted around it*. Their views, in other words, are predicated on a belief that general international law norms bind IOs as a default matter.

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[268] Roberto Dañino, Secretary General of ICSID and Senior Vice President and General Counsel of the World Bank, Why Treaties Matter, Opening Remarks, First Annual Conference "Interpretation Under the Vienna Convention on the Law of Treaties—25 Years On," at 9 (Jan. 17, 2006), *available at* http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817203/WhyTreatiesMatterLondon011706.pdf.

[269] IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD 68 (1991).

[270] Draft Articles on the responsibility of international organizations, with commentaries, at 2 para (3).

[271] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, at 31 note (1); IO Responsibility Articles at 2 note (3).

The subject of IOs' obligations under *jus cogens* and customary international law usually arose indirectly as the ILC developed the draft articles. Some IOs, for example, considered whether an IO could ever incur international responsibility for conduct that was consistent with its charter. The IMF addressed this issue on more occasions, and in greater depth, than other IOs. Indeed, when other IOs eventually weighed in, they seemed to be following the IMF's lead. In 2005, the IMF wrote:

> To suggest that acts authorized by and consistent with an organization's charter are wrongful suggests that the organization's charter is itself contrary to some higher international obligations. We can accept this only in cases involving breaches of peremptory norms of international law, but we find no support for such a proposition with regard to ordinary norms of international law.[272]

In other comments, the IMF explicitly framed the argument in terms of *lex specialis*:

> [W]hen an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a 'peremptory norm' (*jus cogens*) or arises from a specific obligation that has been incurred by the organization in the course of its activities (e.g., by entering into a separate treaty with another subject of international law). However, vis-à-vis all other norms of international law, both the charter and the internal rules of the organization would be *lex specialis* as far as the organization's responsibility is concerned and, accordingly, cannot be overridden by *lex generalis*, which would include the provisions of the draft articles.[273]

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[272] UN Doc. A/CN.4/556 at 23; *see also id.* at 38-39 ("It should also be recognized that the rules of an organization are *lex specialis* as between the organization and its members and agents and among its members. It is therefore not possible to suggest . . . that in some cases (other than involving obligations of a peremptory nature) general international obligations might prevail over the rules of an organization. Such a suggestion ignores the international agreements between the organization's members regarding the exclusive application of the laws governing their relations and it suggests that *lex generalis* prevails over *lex specialis*."

[273] UN Doc. A/CN.4/582 at 5.

In 2011, several other IOs submitted comments that echoed the IMF's position. They include the Organization for Economic Cooperation and Development, which said:

> The responsibility of an IO can only be challenged when an act is clearly in breach of its constituent instruments, internal rules and procedures, or if in accordance with them, is in breach of peremptory norms.[274]

The Organization for Security and Cooperation in Europe weighed in along similar lines:

> With the exception of the presence of a peremptory norm of general international law, the *lex specialis* rule is key to resolving potentially conflicting characterization of any act of an international organization as 'wrongful or not' under general international law vis-à-vis the internal law of the said IO.[275]

So too did the World Bank:

> Again, as the internal law of the organization is, as a rule, the most significant component (when not the whole) of *lex specialis*, will not a special rule prevail over all international obligations other than those deriving from *jus cogens*? We cannot think of any dispositive (as opposed to peremptory) norm that would constitute an exception, precisely because, on any matter that is not governed by a peremptory norm, a general obligation is qualified and superseded by special law, this being the very purpose of special law.[276]

And, finally, the International Labor Organization:

> [T]he relationship between member states and the organization . . . should be analyzed in the light of the internal legal system of each organization, as created by the constituent instrument and developed further by the organization's internal rules and practice. These rules represent *lex specialis* and the relationship between the member State and the international organization should

[274] UN Doc. A/CN.4/637 at 40.

[275] *Id*. at 40-41.

[276] *Id*. at 41.

> not be subject to rules of general international law for the issues regulated by the internal rules.[277]

Taken together, these comments suggest that charter obligations exhaust all of an IO's international obligations vis-à-vis their member states, with the exception of *jus cogens* norms. Does this imply that IOs believe they are unbound by customary international law or general principles?

I don't think so. When states create *lex specialis*, they are not necessarily rejecting general international law. Sometimes *lex specialis* and general international law point in the same direction: the *lex specialis* is "an elaboration, updating, or a technical specification" of the general international law norm.[278] Even when states do intend for *lex specialis* to diverge from otherwise applicable general international law, general international law norms persist in the background. Those norms fill gaps and influence the interpretation of the treaty's terms.[279] Indeed, treaties that create *lex specialis* are presumed to be consistent with general international law except to the extent that they contract around it.[280]

Because of this presumption, states need not explicitly incorporate general international law into IO charters. Those norms are already implicit in IO charters. As such, it is perfectly correct to say both that (with the exception of *jus cogens*) IOs' international obligations are coterminous with their charter obligations and that general international law binds IOs except to the extent that their charters provide to the

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[277] *Id*. at 38-39.

[278] Koskenniemi, *supra* note 116, at para. 56.

[279] *See, e.g.*, Iran-US Claims Tribunal in Amoco International Finance Corporation v. Iran ("As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provision."); Oil Platforms (Iran v. U.S.) 2003 I.C.J. Rep. 161 (Nov. 6) (general law concerning the use of force was applied to give meaning to a wide standard of "necessity" in the relevant *lex specialis*).

[280] *See supra* notes 126 and accompanying text.

contrary. In other words, when it comes to IOs' interactions with their member states, general international law binds IOs as a default matter.

The view that IO charters constitute *lex specialis* also supports the conclusion that general international law binds IOs in their interactions with non-member states. Indeed, the IMF and the ILO both specify that their charters constitute *lex specialis* that governs *between themselves and their member states*.[281] That's consistent with the view, explored above, that IO charters can't displace or replace customary international law or general principles with respect to non-member states.

V. CONCLUSION

Even with few judicial forums available to adjudicate claims that IOs have violated an international legal obligation, advocates often couch their arguments about IOs in terms of legal obligations. They do so, at least in part, because those legal arguments are thought to have special force. One reason is that IOs and their member states have especially strong reasons to preserve their reputations for being law-abiding.[282] The conclusion that an IO has an international obligation to take (or refrain from taking) a particular action will generally carry more weight within state and IO bureaucracies than the claim that, for policy reasons, it would be desirable for the IO to do so.[283] Secondly, when outsiders to an IO challenge IO action—and potentially threaten an IO's reputation for complying with international law—those challenges will have greater force, and will be more likely to provoke a response from the IO, if they are based on robust legal arguments.

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[281] *See* IMF comments, UN Doc. A/CN.4/556 at 38 ("[T]he rules of an organization are *lex specialis as between the organization and its members and agents and among its members*.") (emphasis added); ILO comments, UN Doc. A/CN.4/637 at 38-39 ("[T]he relationship *between member states and the organization* . . . should be analyzed in the light of the internal legal system of each organization, as created by the constituent instrument and developed further by the organization's internal rules and practice. These rules represent *lex specialis* and *the relationship between the member State and the international organization* should not be subject to rules of general international law for the issues regulated by the internal rules.") (emphasis added).

[282] Daugirdas, *supra* note 78.

[283] ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY (1995) (in bureaucracies, the fact that something is legally required is usually reason enough to do it).

Yet not every step that it might be desirable for IOs to take can credibly be characterized as a legal obligation. This article provides a framework for distinguishing the credible claims from those that are untenable. In short, I argue that IOs are not categorically more or less bound by international law than states are. *Jus cogens* norms bind IOs. Customary international law and general principles do too—but only as a default matter. Treaties do not bind IOs without their consent. Significantly, this framework does not require embracing any particular view about the true nature of IOs, nor does it depend on the sorts of functions that IOs perform. Equally significantly, the framework is consistent with the practice and views of IOs themselves, suggesting that the framework is workable rather than merely aspirational.

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