1 Human Rights Protection in International Organizations: An Introduction

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How do international organizations (IOs) react to complaints about the violation of human rights when they exercise authority over individuals? We can show empirically that, in recent years, IOs have progressively introduced provisions for the protection of human rights. They have committed themselves to fundamental legal principles associated with the rule of law. What is more, some of them have introduced specific policies to prevent human rights violations and even complaints procedures enabling affected individuals to call them to account for violating their rights. These measures can be interpreted as a response to the increased capacity of IOs to exercise authority and to delimit the freedom of states and individuals. To the extent that these capacities are used in a way that violates fundamental rights, IOs face disapproval. They need to respond to their critics for reasons of legitimation. In spite, therefore, of an overall detrimental political constellation after 9/11 and the rise of powers which re-emphasize national sovereignty, this combination of factors has had the effect of a further legalization of global governance.

In this introduction, we identify the development of institutional provisions by IOs for the protection of human rights as a new theme for most explanatory accounts of international institutions. We start in Section 1 with a presentation of our argument in a nutshell. We argue in Section 2 that the normative functionalism inscribed into most International Law (IL) debates does not account for the struggles over this institutional development and the significant variation in the quality of the institutional changes among IOs. We also argue that the expectations regarding the introduction of human rights protection provisions in IOs that can be derived from International Relations (IR) theories are not sufficient to explain their rise. Against this background, we build on existing approaches and develop the *authority–legitimation mechanism* (ALM) in detail in Section 3, and show, in Section 4, that the empirical test of our analysis has proven the explanatory value of the mechanism. In Section 5 we specify the ways in which our use of the concept of causal mechanisms

differs from others and identify the more concrete pathways through which the ALM unfolds. In Section 6 we move on to the comparative mode of our design and discuss the conditions under which the causal pathways are triggered and can be effective. Finally, in Section 7 we briefly look ahead to the other chapters in this book.

1 The Argument in a Nutshell

'Sex charges haunt UN forces. In places like Congo and Kosovo, peacekeepers have been accused of abusing the people they're protecting.' This is the title of an article published in the *Christian Science Monitor* (Jordan 2004). The article describes the state of affairs vividly:

> The Masazh (Massage) Night Dancing Bar is said to be one of the 200 clubs in Kosovo notorious for prostitution and illegally trafficked foreign women. It was also alleged to be among the favorite spots for United Nations staff and Kosovo Protection Force (KFOR) peacekeepers looking for cheap thrills in recent years ... But the problem goes beyond Kosovo and sex trafficking. Wherever the UN has established operations in recent years, various violations of women seem to follow:
> - A prostitution ring in Bosnia involved peacekeepers, while Canadian troops there were accused of beatings, rape, and sexually abusing a handicapped girl.
> - Local UN staff in West Africa reportedly withheld aid, such as bags of flour, from refugees in exchange for sexual favors.
> - Jordanian peacekeepers in East Timor were accused of rape.
> - Italian troops in Somalia and Bulgarian troops in Cambodia were accused of sexual abuses.
> - ... Moroccan and Uruguayan peacekeepers in Congo were accused of luring teenage girls into their camp with offers of food for sex. The girls then fed the banana and cake remuneration to their infants, whom media reported had been born as a result of multiple rapes by militiamen.

Despite such reports, Kofi Annan, then Secretary-General of the United Nations (UN), defended the vast majority of UN personnel as decent and well-meaning. Indeed, those accused represented just a fraction of the 62,000-plus military personnel and civilian police serving in 2004 in 16 UN peacekeeping missions around the globe. Yet, the problem goes deeper than just misconduct on the part of a minority of UN personnel. It is not only UN *personnel* that violate human rights during peacekeeping activities, a number of UN *policies* arguably have done so as well (Verdirame 2011). In fact, comprehensive trade sanctions that hurt innocent people in targeted countries and the blacklisting of individuals without due process have violated human rights too. In addition, other IOs besides the UN have likewise been accused of violating human rights. North Atlantic Treaty Organization (NATO) personnel have been

charged with sexual exploitation and the illegal detention of prisoners. The European Union (EU)'s blacklisting practices have also been criticized. Furthermore, international financial institutions have received negative attention for infringing subsistence rights and aggravating poverty, for example in an article in *The Guardian* on the World Bank (Brittain and Watkins 1994):

> In Kenya, a succession of bank-financed livestock schemes have displaced Masai pastoralists, driving thousands into destitution. World Bank forestry projects in Guinea, Ghana and Ivory Coast have accelerated the deforestation of West Africa – with grave implications for agriculture, touching the key problem of escalating food shortages – and destroyed the livelihood of forest dwellers while benefiting only middle-class entrepreneurs ... In Zimbabwe, for instance, per capita spending on health has fallen by a third since 1990 and 'user fees' have been imposed on health care provision. The objective, as in other countries, has been to reduce the budget deficit through a regressive system of taxation. The result: a sharp downturn in women's attendance at ante-natal care centres, and an increase in infant and maternal mortality rates among the poorest people.

To put it in the words of an established international lawyer, '[i]t is evident that international organisations have for many years acted in ways that impact very negatively on human rights in a range of their activities, from peace-keeping and refugee action, to economic assistance' (McCorquodale 2009: 142). In fact, today IOs not only formulate normative standards based on individual rights and the rule of law, but are also capable of violating these standards themselves. This is the result of a long and quite remarkable development in IL that can be sketched in four steps.[1] Originally, IOs were seen as mere instruments of states, without legal personality and interacting only with governments. They were founded by states from the second half of the nineteenth century onwards in order to serve them and help them avoid conflicts with each other. The second step was taken after World War II: it was only in 1949 that the International Court of Justice (ICJ) acknowledged the UN as a legal entity in a report about the reparation for injuries suffered in the UN's service.[2] International organizations thus became a subject of IL. With the shift from coordination to cooperation law, a third conceptual step was taken: IOs were now increasingly seen as serving the common good of the international community. For many, the Law of the Sea Conference, with the establishment of the common heritage of mankind, was crucial for this step. As part of this move, analysts also attributed political agency to IOs (Barnett and Finnemore 2004). A final step was

[1] These four steps roughly follow the four conceptions of international courts distinguished by Armin von Bogdandy and Ingo Venzke (2014).
[2] See Inis L. Claude's 'Swords into Plowshares' (1964), a *locus classicus* of this view of IOs.

taken when IOs assumed a role in the protection of individual rights and increasingly interacted with, and provided access for, non-state actors, especially civil society organizations (CSOs) (Tallberg et al. 2013). Now IOs also have a society.

As a result of these developments, IOs exercise authority over a society that consists of both states and non-state actors, including individuals. Some international norms and rules compel national governments to take measures even when they have not agreed to do so, and these measures often affect individuals indirectly. General economic sanctions, for instance, not only affect the government of a country, but, at the same time, affect many individuals and the society as a whole. In some cases, decisions made by international institutions even target individuals directly, such as those taken by the UN Security Council (SC) Al-Qaida and Taliban Sanctions Committee, or by transitional administrations. Both types of activities – those that bind states, thus affecting private actors only indirectly, and those that affect individuals directly – are indications that international institutions have public authority.

If IOs now increasingly exercise public authority, take decisions and implement them independently or at least lay down strict conditions for their implementation, violations of human rights that then occur are no longer attributable to states alone, but also to the IOs themselves. The story of the development of IOs, nevertheless does not end with their reaching the status of public authorities and acquiring the capacity to violate human rights. Public authority of this sort requires legitimacy. Those who exercise public authority, and thus reduce the autonomy of others, need to legitimate themselves. Public authorities often justify the decrease in individual autonomy with an increase in common goods – and so do IOs. While it is always contested which norms should be pursued by public authorities and how the common good is served, it is quite evident that compliance with the standards that are promoted by a public authority are a minimal requirement for attaining legitimacy. Double standards undermine legitimacy.

It follows that, especially for those that purport to promote the protection of human rights, any violation of human rights by IOs undermines their credibility and thus their very authority. Moreover, rule of law is based on the idea that the authors of the law are bound by the law as well (Tamanaha 2004). The violation of human rights by IOs, therefore, also undermines any activities they undertake to promote the rule of law. When IOs request rule of law standards within nation states, they are expected to be in compliance with these standards as well.

International organizations have responded to this predicament. The last ten years have seen a debate that has pointed up the applicability

of rule of law prescriptions to IOs. This is nicely illustrated by comparing a statement made by the president of the UNSC in 2006 with one made in 2010. In a meeting of the UNSC held in 2006, the president stated that the 'Security Council attaches vital importance to promoting peace and the rule of law, including respect for human rights, as an indisputable element of lasting peace'.[3] Four years later, the respective opening of the paragraph reads as follows: 'The Security Council expresses its commitment to ensure that all UN efforts to restore peace and security themselves respect and promote the rule of law.' This indicates a remarkable shift from promoting human rights and the rule of law to promoting and *respecting* the rule of law and human rights. Subsequently, in 2012, the 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' recognized that 'the rule of law applies to all states equally, and to international organizations, including the United Nations and its principal organs'.[4] To use the words of a recognized international lawyer, '[t]oday, there is arguably no international body that questions the relevance of human rights norms to its activities' (von Bogdandy 2013: 298, our translation).

More concretely, IOs have attached provisions for the protection of individual rights to specific policies. They have established prevention provisions to ensure that they do not violate human rights in the first place, and they have provided avenues for complaint for those affected when violations do, nevertheless, occur. These provisions are not always consistently implemented, but their very introduction is already a noteworthy development. For instance, a number of provisions have been developed by the UN in an effort to guarantee that human rights are protected within the framework of peacekeeping missions. Between 2003 and 2009, the UN established procedures to prevent peacekeepers and other actors involved in UN missions from sexually exploiting women and children. To begin with, the UN has forbidden every form of sexual exploitation in the context of peacekeeping in explicit codes of conduct (UN Secretary-General 2003). In addition, compulsory training modules were created for peacekeepers to enhance their awareness of the new regulatory regime. Finally, bodies to receive complaints from victims were established both in the UN Secretariat and in individual missions. The UN has also given itself rules regarding behaviour towards prisoners in peacekeeping operations. In the late 1990s, the UN Secretary-General published a bulletin stating that prisoners were to be treated in accordance

[3] See UN Doc. S/PRST/2006/28.
[4] UN Doc. A/67/L.1 (19 September 2012), adopted as UN Doc.A/RES/67/1 (24 September 2012).

with the Geneva Conventions and customary IL (UN Secretary-General 1999). In parallel, an ombudsperson and later the Human Rights Advisory Panel were established in the mission in Kosovo.

United Nations' peacekeeping is not an isolated case. In addition, the African Union (AU), the EU, the Food and Agriculture Organization of the UN (FAO), the International Criminal Court (ICC), the United Nations Development Programme (UNDP), the UN Refugee Agency (UNHCR), the UN Educational, Scientific and Cultural Organization (UNESCO) and the World Bank have all attached broad provisions for the protection of human rights, including both prevention and complaints mechanisms, to their policies. Furthermore, the Council of Europe, the International Labour Organization (ILO), the International Monetary Fund (IMF), NATO, the Organisation for Economic Co-operation and Development (OECD), the Organization for Security and Co-operation in Europe (OSCE), the Southern African Development Community (SADC) and the World Health Organisation (WHO) have now established at least either prevention measures or complaints procedures in an effort to avoid human rights violations. Of the 20 IOs with the highest name recognition,[5] only five have failed to launch any provisions for the protection of human rights: the Association of Southeast Asian Nations (ASEAN), the International Atomic Energy Agency (IAEA), the North American Free Trade Agreement (NAFTA), the Shanghai Cooperation Organization (SCO) and the World Trade Organization (WTO). It may well be that the smaller IOs outside the top 20 will, in future, be at least as active in establishing these institutional devices. As a representative of a small IO put it in an informal conversation, there are some things a small IO needs to have by now, in the area of human rights protection, before it is accepted as a member of the family. It seems, therefore, justified to talk about a trend towards an institutionalized standard of human rights protection that 'applies to all States equally, and to international organizations, including the United Nations and its principal organs', to use the words of Ban Ki-moon.[6]

These provisions for the protection of human rights vary greatly, however, from one IO to the next. While some have established quite comprehensive provisions, others have carried out reforms that are not much more than window dressing. This variance is due largely to differences in political opportunities to initiate change, such as the vulnerability of an IO, the presence of actors demanding change, and the resources and coalition

[5] Name recognition is measured as Google Scholar counts (retrieved 9 May 2012). While this is admittedly a rough measure, it indicates the relative relevance of IOs in public debates.
[6] UN Doc. A/67/L.1 § 2 (19 September 2012), adopted as UN Doc. A/RES/67/1 (24 September 2012).

partners that these actors have at their disposal – to highly contingent factors, in other words. In order to account for this variation, we aim to identify the more detailed causal pathways through which the further legalization of international authority became possible. We identify four, each of which is closely associated with specific actors, external to the central decision-makers in the IO, who act as drivers of the process. The pathways are: legislative institution-building, judicial institution-building, like-minded institution-building and anticipatory institution-building. Moreover, we generate hypotheses about the conditions under which these pathways are chosen and have proven to be effective. In doing so, we combine the logic of process tracing with the logic of comparative research in a unique way. First, we develop and test a causal mechanism – the ALM – via process tracing, not just in one case, but by analysing ten cases. Second, we use the ten cases to unwrap the ALM by taking the notion of equifinality seriously and to identify different pathways via which the causal mechanism can work. Third, we move to a comparative logic in order to generate hypotheses about the conditions and effects of different causal pathways.

2 The Applicability of Human Rights Standards to IOs – the IL and IR Perspectives

These developments are reflected in analyses in IL. In an analysis of legal issues relating to human rights violations by the UN, Guglielmo Verdirame (2011) offers a comprehensive answer to the doctrinal questions involved. These include: Is the UN bound by international human rights law? What legal consequences follow from the breach by the UN of a rule of international human rights law? How can its obligations be enforced and compliance with them improved? What we lack, however, is an explanatory account of the real developments that took place.

A number of theoretical debates in IL have taken up the challenge indirectly. The concept of *global administrative law* (GAL) is based on the insight that much of what IOs do can be characterized as administrative action, and that such action is itself being increasingly regulated by administrative-law-type principles – in particular those relating to participation and transparency, as well as to accountability and review (see Kingsbury et al. 2005). The preventive measures and complaints procedures to protect human rights are seen as part of an emerging GAL, a sort of internal constitutionalization of IOs (von Bernstorff 2008: 1960; see also Klabbers 2004). Similarly, the notion of the *international rule of law* is based on the idea that there is a transfer of governance principles from the national to the international level (see, e.g., Bodansky 1999). Along the same line, Harold Koh (2006) has stressed the importance of interaction,

interpretation and internalization, and has argued in favour of a theory of *transnational legal process* in which principles that have governed domestic affairs move into the transnational sphere. Those who speak about the *constitutionalization* of IL explicitly point to human rights, the rule of law and democracy as the normative anchors for the handling of legal conflicts between the national and international levels (Dunoff and Trachtman 2009; Kumm 2009). Ruti Teitel (2011: 216) even observes the rise of *humanity's law*, consisting of the law of war, the international human rights law and international criminal justice, in order to explain the shifting emphasis of IL from serving the interests of states to protecting individuals from political authorities (see also Slaughter 2013).

All these interpretations are important contributions to legal theory. The picture they draw has no ambition to reproduce the real world in a detailed and encompassing way. Rather, they reconstruct real-world developments in normative and legal terms in order to provide guidance for legal practice. From this perspective, the importance of individual rights has grown enormously as far as IOs are concerned, for two reasons. On the one hand, the role of individual rights in legal practice and theory has been heightened significantly in recent decades. On the other, IOs increasingly implement policies that affect individuals – which puts them in a position to violate human rights. It is hardly surprising, therefore, that IOs have developed provisions for the protection of those rights.

Of course, these authors are not naive. They are very much aware of the contestations and resistance that any shift in the interpretation of IL may provoke. Teitel (2011: 11), for instance, points out that '[t]he relationship between this new, altered legal order and the subsisting traditional order of interstate relations, embodied by sources such as the UN Charter's rules on use of force, remains tense and unresolved'. Nonetheless, legal theories tend to see the development whereby IOs have progressively introduced provisions for the protection of human rights as part and parcel of a broader process. In this view, IOs, in general, commit themselves to fundamental legal principles such as the protection of human rights and the rule of law and also introduce accountability procedures enabling affected individuals to call them to account for violating their rights. These institutional developments are seen as necessary because the general recognition of human rights has rendered state sovereignty conditional and the desirable empowerment of IOs has created increased duties of accountability. So far, so good. Yet, to *explain* specific institutional choices as part of a broader movement towards humanity's law and the international rule of law seems to assume a special kind of functional logic: things happen because they are normatively desirable. In this sense, these accounts implicitly follow, to some extent, a logic that may be labelled 'normative functionalism'.

A theory of normative functionalism does not suffice as an explanatory account from the perspective of IR theory. There are too many phenomena to be explained, such as two world wars, ethnic cleansing and despotic leaders terrorizing their own populations, all of them squarely contradicting the notion of history as normatively progressive. Even if, in a specific case, the normative need for institutional reforms were to translate directly into the provision of such reforms, we would be mainly interested in the specific circumstances that made this (exceptional) development possible. Even if one utilizes legal theories as a building block in order to explain the observed institutional changes – which, of course, is not their original purpose – an explanatory approach also needs to take into account variance within the trend: Why have some IOs established quite extensive provisions to protect individual rights, while these reforms did not happen in other IOs? Why are some reforms not much more than window dressing? The quality of the protection provided for human rights varies greatly from one IO to the next. This shows that the causal link between the normative necessity to legitimate political authority and the establishment of provisions to protect human rights may exist at the general level, yet the specific outcome may depend largely on differences in the availability of resources and political opportunities, and hence on normatively highly contingent factors. In this book, we want to explain both how the general mechanism generating more IO accountability towards individuals works and how we can account for the variance among IOs. The objective is to explain this development, not to give a legal interpretation of it. In the final chapter, we will, however, briefly return to the question of to what extent the IO devices to protect human rights that we have analysed can be seen as a development towards the international rule of law and constitutionalization.

The timing of the depicted developments at first sight runs counter to some theoretical expectations in IR. Most of the institutional devices to protect human rights in the practice of IOs were introduced in the last 15 years. Theories that focus on major powers and their interests[7] would expect a weakening of international institutions after 2001 rather than the further legalization of their practice. All the major powers seemed to have had priorities other than the internationalization of the rule of law over the last 15 years. After 9/11, the Bush administration effectively changed the orientation of United States (US) foreign policy. In the 1990s, the Clinton administration aimed at a strengthening of IOs inasmuch as they

[7] This group includes analyses which see international order and international institutions as a function of major powers and their distributional interests (see Gilpin 1987; Keohane 1980; Krasner 1991) or as an expression of the social purpose of major powers (see, e.g., Hurrell 2007; Reus-Smit 1999; Ruggie 1986).

were considered useful for fostering the agenda of democratization and the diffusion of the rule of law. So, while the US was very careful to maintain a special status with special rights, it pushed the agenda of legalization of international affairs. This changed quite dramatically in the next decade. The United States sidelined IOs in favour of coalitions of the willing and put national security first. While the Obama administration made some cosmetic correction to this course, it did not change it fundamentally.[8] At the same time, the enthusiasm about the fall of the Berlin wall, a democratization of Europe as a whole and the historical victory of freedom and democracy faded. Right-wing populism in Western Europe and ethnic fights in Eastern Europe led the European powers and people to retreat from the unconditional support for multilateral institutions. Even the EU gets more and more politicized (de Wilde and Zürn 2012). While some of the European states remain, at least rhetorically, defenders of multilateralism, their willingness to lead this process and commit resources to it has decreased. The Doha round trade negotiations have shown this clearly.

Most importantly, the idea of a power transition in favour of rising powers contradicts further legalization of the international order. Jim O'Neill coined the term 'BRIC' (for Brazil, Russia, India and China) in an article published in 2001 (O'Neill 2001). Subsequently, some of the big countries of the former Southern World and the former Communist World joined a loose alliance to challenge Western domination in international institutions. The major theme that seems to provide cohesion in this diverse group is a re-emphasis on sovereignty and the norm of non-intervention (Zürn and Stephen 2010). In most instances, these states see themselves as defenders of a state-dominated world order against an individual-rights-based worldview with its international institutions, which, in their view, are just a new form of Western domination and imperialism. This programme is squarely directed against humanity's law and global constitutionalism. Even if liberal international institutions were able to integrate the rising powers (Ikenberry 2011), they still could not possibly be expected to deepen legalization. Against this background, the rise in provisions for the protection of human rights appears somewhat surprising.

Four IR theories nevertheless provide building blocks for an explanation of the rise in provisions for the protection of human rights among IOs in the last 20 years. According to *rational institutionalism*, legalization and other forms of institutional change in IOs are to be traced back primarily to the interests of IO member states. On a general level, states are

[8] See Simmons (2009: ch. 2) for a concise account of the international human rights regime after World War II.