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What is an International Norm? How is it Created and Why Does it Matter?

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International debates often center around the concept of "international norms." The liberal global order is sometimes described as being based on "rules" and "norms." But what exactly is meant by these terms is not always obvious. They are used in reference to both binding obligations enshrined in international treaties and commitments adopted through non-binding political agreements. Sometimes they are even applied to the opinions of international committees and experts who only have an advisory role.

How is each of these types of norms formed? What is its legal or political weight? And why do they matter in practice? These are the questions this Definition seeks to answer.

Some treaties are the result of decades of negotiations.

1. BINDING INTERNATIONAL LAW

Binding international norms are formed in two ways, through treaties and through custom.[1]

Treaties are considered binding based on the consent of the sovereign States who negotiate, often painstakingly, such treaties and then ratify them. Some treaties are the result of decades of negotiations. The reason for the meticulousness of such negotiations is precisely the binding character of the treaties and the seriousness that the States Parties ascribe to the obligations they undertake through a treaty. The interpretation of the obligations of States under a treaty must

be based on the plain meaning of the text of the treaty at the time the treaty was negotiated and adopted.[2]

Treaties can be both bilateral or multilateral, depending on whether they regulate the conduct of two States between themselves or more than two States. There are hundreds of treaties that are currently in place on a range of subjects from trade, to consular relations, the interpretation of treaties, the law of war, family law, border disputes, and human rights, just to name a few.

A second, but more difficult, way to discern binding international norms is through custom or customary international law.

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Obligations that arise through customary international law, like those enshrined in international treaties, are binding on States even though they were never expressly agreed by States through a negotiation and in writing. Though not all scholars believe a consent theory of law underlies customary international law, the assent of States to the binding character of these norms is nevertheless presumed based on their conduct.

Two elements must be proved in order for a custom to be considered binding international law. First, the near-universal and uniform conduct of States. This is known as the practice requirement. Second, the understanding that this conduct is required as a matter of law. This is known as the *opinio juris* requirement. Evidence must be presented of both these elements in order for a binding customary norm to be said to exist.

Questions about the existence of customary international law arise most often in international disputes about borders, the law of the sea, the law of consular relations, and other areas of international law where States interact with each other directly, and where the right to proportionate reprisals and the principle of reciprocity are immediately relevant.

Evaluating the conduct of States in the context of international organizations is more complex, since the right to proportionate reprisals and the principle of reciprocity are not always directly applicable and international organizations function on the basis of finding consensus through non-binding agreements. It is equally difficult to apply in the context of human rights law, which orders the conduct of States towards their own citizens as opposed to other States. Nonetheless there are those who want customary international law to be able to emerge both

through the conduct of States in the context of international organizations as well as human rights practice.

The International Law Commission, a body which provides the United Nations' General Assembly legal advice, and one of the most respected authorities on international law, has recently decided that the conduct of States in relation to international organizations, including during the adoption of UN resolutions, can be considered evidence of customary international law.[3] While this opinion is not law, it will likely be very influential among international lawyers. This raises the stakes in every interaction of States through international organizations, since action or inaction by a State, in any given case, can be used against a State to press an obligation upon her without her consent.

Some law and economics scholars in the United States question the legal validity of international law altogether, either through treaties or custom, based on the absence of enforcement mechanisms for international law other than the consent of States.[4] In the opinion of these scholars, international law is just part of an elaborate political power game, and human rights law is considered purely hortatory. This academic speculation is not the dominant view in international law scholarship and ignores the very real impact of international agreements on the conduct of States even in the absence of direct enforcement mechanisms, including in countries in Europe and Latin America that have turned the pronouncements of regional human rights courts into binding precedents for all their courts. Moreover, even when sovereign States ignore their obligations under international treaties, systematically or occasionally, they usually prefer to be seen as law-abiding and deny their misdeeds.

The UN General Assembly negotiates and adopts more than 350 such agreements every year.

2. INTERNATIONAL POLITICAL AGREEMENTS

Most of the agreements that sovereign States adopt each year are not treaties, but political agreements. These are not binding on States and are considered mere political commitments—much like the promises politicians make in the course of elections. They can be negotiated and adopted by governments bilaterally or through international organizations like the United Nations. The UN General Assembly negotiates and adopts more than 350 such agreements every year. They usually take the form of resolutions, but they can have many other formats, and may take the name of declaration, accord, deal, etc.

Because they are not binding, States will often adopt international political agreements even though they may contain commitments they may not feel entirely comfortable with and which they would never accept in a binding treaty.

Conservatives often look down on UN social policy as a waste of taxpayer resources. But conservatives dismiss the importance of UN social policy debates at their own peril.

Many conservative scholars and commentators, especially in English-speaking countries and those influenced by the Common Law tradition, consider the political agreements worked out in the context of international organizations to be unimportant because they are non-binding. In particular, conservatives often look down on UN social policy as a waste of taxpayer resources.[5] But conservatives dismiss the importance of UN social policy debates at their own peril. Roughly, 14% of the total $45 billion comprising the annual UN budget pays for UN efforts to negotiate and promote UN agreements around the world, and report on their implementation.[6]

Economic globalization in recent decades has been accompanied by an equally strong transnational integration of social norms. The United Nations and other international organizations have been at the center of this process. And the hundreds of non-binding resolutions adopted through international organizations each year, and the United Nations in particular, have played an essential role in this normative integration. UN agreements, the UN development apparatus, and the UN human rights system more broadly has a real impact on academia, civil society, legal systems and both directly and indirectly on the conduct of States.

So why do the norms enshrined in UN resolutions matter?

Firstly, UN resolutions always have programmatic implications for the work of the entire UN system. It is grossly misleading to say that the resolutions of international organizations are not binding. They are indeed binding, if not on governments then on the international organizations themselves. Every resolution of an international organization has programmatic implications. Agencies and the secretariats of the international organization must abide by the norms enshrined in the resolutions that govern their activities.

The United Nations has an annual budget of over $45 billion.[7] The way each of those dollars is spent is governed by UN resolutions and all the programs of the myriad of agencies and entities that make up the UN system is governed by UN resolutions.[8] While the UN budget is relatively modest compared to the annual budget of the governments of developed countries, one must consider that most of the

activities of the UN system are directed towards countries that struggle to maintain a fiscal system at all, and where even modest financial contributions can have the greatest impact.

Secondly, UN policy has significant influence on how nations understand their international obligations. UN resolutions are often the blueprint for domestic legislative initiatives. And, as was noted above, they can be used as evidence of customary international law.

Thirdly, even aside from direct programmatic impacts or legal considerations, the indirect implications of UN policy on all foreign assistance spending and foreign aid policy more broadly are far reaching. UN agreements are the baseline of international cooperation and global assistance programming, including programming from wealthy countries. And considering that all global aid is roughly $160 billion, the UN system's $60 billion is always going to have some influence on how all other foreign assistance programming is designed.[9]

For example, looking at the U.S., every appropriation for U.S. foreign assistance is conditioned in some way by UN agreements, whether through political or bureaucratic channels. U.S. legislators periodically update U.S. foreign aid law to align it with UN policy. Under the Obama Administration, all U.S. Agency for International Development (USAID) policies and guidelines on gender, health, and any social policy issues were carefully aligned to reflect UN agreements and international consensus. This remains the case to this day.[10]

Nearly half of the UN budget is spent on normative and programmatic activities for development that have political buy-in from most countries in the world.

In sum, most of USAID's work on the ground is directly and indirectly guided by UN programs and normative guidance. The fact is, nearly half of the UN budget is spent on normative and programmatic activities for development that have political buy-in from most countries in the world. As much as Americans take pride in being global aid leaders, in many cases USAID inevitably defaults to consensual UN agreements as a baseline when negotiating individual aid packages with countries, including through the Bretton Woods Institutions and direct aid mechanisms.

3. NORMATIVE OVERREACH BY INTERNATIONAL BUREAUCRATS, EXPERTS, AND COMMITTEES: THE CASE OF ABORTION

Regardless of what sovereign States agree in treaties and political agreements, these are then implemented and

interpreted by a multiplicity of actors within international organizations. It is these bureaucrats, experts, and committees who have an outsized say in how international agreements are implemented by the UN system, even though their opinions are neither binding nor persuasive from a legal standpoint.

The opinions, reports, and briefs prepared by the UN secretariat, experts, and committees have no legal weight unless they are accepted and adopted by sovereign States. Though scholars disagree on exactly how much authority should be recognized to each normative mandate of the multilateral system, all serious legal scholars agree that the opinions of international experts and bodies cannot modify the obligations of States under international law, nor the political commitments States undertake internationally through other international agreements.[11]

International law is silent on abortion. It isn't mentioned in a single UN human rights treaty.

Often States make it easier for bureaucrats, experts, and committees to overreach and advance partisan political agendas instead of maintaining a neutral stance on controversial issues. Since international agreements necessarily have to bridge the positions of many countries, they will often be phrased in vague and overbroad language that is open to misinterpretation. At the United Nations this is sometimes called "constructive ambiguity." Ambiguity in UN agreements allows all countries to sign agreements because the agreement is open to multiple interpretations. This happens in both the case of treaties and political agreements, though it is a more pronounced problem in political agreements. But it is that very ambiguity which allows the UN system to overreach.

The ongoing debate over the issue of abortion illustrates some of the challenges to the sovereignty of States and international law from the international bureaucrats, experts and committees who play fast and loose with the obligations of States under international law.

International law is silent on abortion. It isn't mentioned in a single UN human rights treaty. And no UN treaty can be fairly interpreted as including a human right to abortion.[12] Nevertheless, in 1994 UN member States included abortion in UN policy under the rubric of "sexual and reproductive health" at the International Conference on Population and Development held in Cairo.[13] But this was only done with several important caveats that cast abortion in a negative light, prohibited international interference in internal debates about abortion laws, prohibited the promotion of abortion in UN family planning programming, and committed countries to help

women avoid abortion.[14]

This is the norm governing the UN system on the issue of abortion to this day. While it is not binding on States, it is binding on the UN system. It was reaffirmed in the 2030 Development Agenda[15] as well as a political declaration adopted by the United Nations in 2019 to mark the 25th anniversary of the 1994 Cairo conference.[16] Sadly, the UN system ignores this entirely and lawlessly promotes abortion.

UN bureaucrats, experts, and committees routinely take the position that countries must make abortion legal as human rights imperative, even instructing sovereign States to remove reservations to treaties. They do this in concert with international abortion advocates like the Center for Reproductive Rights and the International Planned Parenthood Federation as part of a deliberate strategy to subvert human rights law.[17] And they don't just bend the plain meaning of human rights treaties and UN political agreements, they also unilaterally expand the powers and role of the secretariat and UN committees.[18] These opinions are then routinely repeated by UN agencies in their own reports and manuals.[19]

Socially progressive groups and delegations, like those that promote abortion, also promote the notion that human rights are not a firm set of binding norms adopted through treaty, evolving global human rights standards and norms.

Socially progressive groups and delegations, like those that promote abortion, also promote the notion that human rights are not a firm set of binding norms adopted through treaty ratifications, but a looser network of evolving global human rights standards and norms. They view all international agreements as "living instruments." This realist approach to norms blurs the lines between binding treaties and mere political agreements, and elevates the opinions of UN experts, so that they are considered normative for the UN system.

Most States ignore the non-binding opinions and reports, but that is not always the case. Colombia's Supreme Court became the first to recognize a human right to abortion based on the non-binding opinions of a UN committee of experts. Since, then, lower courts in Argentina, Mexico, and Peru have agreed. At the same time, several high courts, including those of Mexico, Chile, and Peru have not given these opinions any weight, and they continue to maintain the legality of laws that protect the unborn child from abortion.[20]

Endnotes

1 Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

2 Ibid., Article 31 addressed general norms of interpretation of treaties.

3 International Law Commission, Draft conclusions on identification of customary international law, with commentaries (2018), U.N. Doc. A/73/10, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

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5 See Brett D. Schaefer, "America, we pay way too much for the United Nations", Fox News (June 16, 2015), available at: https://www.foxnews.com/opinion/america-we-pay-way-too-much-for-the-united-nations, and "Nikki Haley has a lot more work to do to if she really wants to cut the UN's budget", Fox News (January 26, 2018), available at: https://www.foxnews.com/opinion/nikki-haley-has-a-lot-more-work-to-do-to-if-she-really-wants-to-cut-the-uns-budget.

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7 Ibid.

8 UN System Chart, available at: https://www.un.org/en/pdfs/18-00159e_un_system_chart_17x11_4c_en_web.pdf.

9 Organisation for Economic Co-operation and Development (OECD) Data, available at: http://www.oecd.org/dac/stats/idsonline.htm.

10 USAID, ADS Chapter 205 Integrating Gender Equality and Female Empowerment in USAID's Program Cycle, available at: https://www.usaid.gov/sites/default/files/documents/1870/205.pdf

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14 Ibid., Paragraph 8.25.

15 UN General Assembly Resolution, Transforming our world: the 2030 Agenda for

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