

# The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory

*Andreas Follesdal\**

*The Article addresses some of the disagreement concerning the legitimacy of the international human rights judiciary. It lays out some aspects of a theory of legitimacy for the international human rights judiciary that seem relevant to addressing two challenges: First, it is difficult to justify the human rights judiciary by appeal to standard accounts of why states agree to subject themselves to treaties. What is the problem the international human rights judiciary is meant to help solve? Second, the human rights judiciary seems undemocratic and even antidemocratic when it overrules domestic, accountable legislatures. Such international judicial review is therefore sometimes thought to be normatively illegitimate, at least regarding democracies.*

“If men know not their duty, what is there that can force them to obey the law? An army, you will say. But what shall force the army?”<sup>1</sup>

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1 THOMAS HOBBS, BEHEMOTH OR THE LONG PARLIAMENT 29 (London: Cass 1681) (1668).

## INTRODUCTION

Are international and regional human rights courts and other treaty bodies normatively legitimate? If they are, what makes them so, and when? This Article addresses some of the disagreement concerning these issues, with regard to the international human rights judiciary in particular. The aim is also to sketch a general theoretical framework suitable to addressing several of the dilemmas, and to illustrate some of the contributions made by, and challenges facing, attempts to bring international political philosophy to bear on institutions and their design.

The international human rights judiciary includes regional bodies such as the European Court of Human Rights (ECtHR), which interprets and adjudicates the European Convention on Human Rights (ECHR),<sup>2</sup> and the Inter-American Court of Human Rights (IACHR) established under the Organization of American States (OAS).<sup>3</sup> It also includes the core treaty bodies set up to monitor states' compliance with such human rights treaties as they have subjected themselves to, including the United Nations Human Rights Committee (HRC) for the International Covenant on Civil and Political Rights,<sup>4</sup> the Committee on the Elimination of Discrimination against Women (CEDAW),<sup>5</sup> and the Committee on the Elimination of Racial Discrimination (CERD).<sup>6</sup>

The present Article focuses on the human rights judiciary, with particular attention to two central legitimacy challenges. First, it is difficult to justify the human rights judiciary by appeal to standard accounts of why states agree to subject themselves to treaties. What is the common problem which the international human rights judiciary is meant to help solve? Answers to this question are required in order to determine the effectiveness of these bodies,

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2 Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (as amended by Protocol 11 and Protocol 14) [hereinafter ECHR].

3 American Convention on Human Rights, 1144 U.N.T.S. 123, Nov. 22, 1969 (entered into force July 18, 1978).

4 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 66 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (entered into force Sept. 3, 1981).

6 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 47 (entered into force Jan. 4, 1969).

justify their authority over well-functioning democracies, and identify which design features should be adjusted. Second, it is necessary to consider charges that the human rights judiciary is undemocratic and even *antidemocratic* when it overrules domestic, accountable legislatures. Such undemocratic features are sometimes thought to render this human rights judiciary normatively illegitimate.

The Article lays out some aspects of a theory of legitimacy for the international human rights judiciary that seem relevant to addressing these puzzles. Part I considers why such concerns about legitimacy have become salient. Part II presents several different senses of “legitimacy” that are often conflated. Part III provides a sketch of an institutional normative theory concerning the legitimacy of the international judiciary in general. Part IV goes on to consider the two apparent legitimacy deficits of the human rights judiciary, both by showing how it does fit the standard case for an international judiciary in Part III, and furthermore by identifying three additional reasons for such institutions, even in democracies. Throughout I point to the significance of publicity and general compliance for the normative authority of the international judiciary. The last Part concludes.

## I. WHY WORRY ABOUT THE LEGITIMACY OF THE INTERNATIONAL HUMAN RIGHTS JUDICIARY?

By way of introduction, first some notes on the recent concerns about the legitimacy of the international judiciary. This attention may seem odd. Why should this judiciary not merit deference? Their *raison d’être* will often appeal to the objective of the relevant treaty, which states have consented to comply with. Standard functions of treaties are familiar from game theory: states join treaties to help address various collective action problems.<sup>7</sup> They may want a sufficiently independent third party to adjudicate conflicts peacefully; or to assure other actors of their long-term commitments to limit or pool their sovereignty on some issues in order to avoid prisoners’ dilemma or free-rider problems and instead achieve solutions each prefers. Such accounts have

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7 Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 345 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT’L AFF.* 405 (2006); cf. Clifford James Carrubba & Matthew Joseph Gabel, *Courts, Compliance, and the Quest for Legitimacy in International Law*, 14 *THEORETICAL INQUIRIES L.* 505 (2013).

been challenged in recent years.<sup>8</sup> One reason is that the international courts or treaty body decisions impose burdens and a sense of injustice on some parties, raising the question of “why comply?”<sup>9</sup>

The normative issues raised by the international human rights judiciary require systematic attention to the legitimacy of these bodies. To frame the issue, consider in contrast the standard case that normative theories of legitimacy have addressed, concerning the state. The central actors are citizens and governments. The challenge is to find reasoned answers when citizens ask whether a particular administration — including the legislative, executive and judicial branches — is normatively legitimate: Why and under what conditions should I, as a citizen, *obey* these public bodies? The general question is when and why the decisions of these public bodies should count as a (defeasible) reason for citizens to act differently than they otherwise would — where the reason is not simply the threat of sanctions or other forms of direct self-interest. Regarding the international human rights judiciary, we ask similarly: When and why should the decisions/views/recommendations of the international judiciary count as (defeasible) reasons for other actors to act differently than they otherwise would?

Note that the international judiciary’s action-guiding role is different from that of state institutions in at least four ways. First, the international judiciary utters not only decisions as do domestic courts, but also views or recommendations — of which some are legally binding and others are not. That is, proper deference to this judiciary may still allow other actors to set the views of the judiciary aside in light of other weighty considerations.

Second, the actors in the case of international courts are not primarily citizens. There are many kinds of members of the “compliance community.”<sup>10</sup> They may include — more or less directly — national courts and parliaments,

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8 Allen Buchanan & Russell Powell, *Survey Article: Constitutional Democracy and the Rule of International Law: Are they Compatible?*, 16 J. POL. PHIL. 326 (2008).

9 Michael Zürn, *Law and Compliance at Different Levels*, in LAW AND GOVERNANCE IN POSTNATIONAL EUROPE: COMPLIANCE BEYOND THE NATION-STATE 1, 1 (Michael Zürn & Christian Joerges eds., 2005). (“If the intrusions into the constituent units of a multilevel system are too strong and compliance works too well, then compliance crises may result, which involve an open, normatively-driven rejection of the regulation. This is especially true if social integration lags behind and a common public discourse is absent.”).

10 KAREN ALTER, *THE EUROPEAN COURT’S POLITICAL POWER* (2009); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 67 INT’L ORG. (forthcoming)

political parties, the executive and administration; and also civil society actors, business actors or the like seeking to influence such state bodies, or whose bargaining position shifts in the shadow of the international judiciary.<sup>11</sup> Other actors who may be affected are other international courts and treaty bodies, and other states who may consider retaliation or further collaboration.

Third, each of these actors may consider the human rights judiciary's utterances to have bearing on quite different kinds of actions and not just compliance. The central issue is not whether to simply "comply" with the international judiciary. If the human rights judiciary is legitimate, the obligations these bodies create are not necessarily that other bodies blindly obey unconditionally, but that they weightily take consideration of their judgments, views or recommendations. State organs or international bodies may hold that another interpretation of the treaty under discussion is better, but be affected nonetheless by their duty to defer to the treaty body. A domestic judiciary may decide to judge in conformity with the international tribunal, or to "pay it due regard." A parliament or administration may decide to reform or make laws or policies or policy platforms that conform to a judiciary view or ruling. Christian Tomuschat notes that even though the "views" of the Human Rights Committee in cases of individual complaints are nonbinding, states have an obligation to *examine them carefully*, and if they disagree they must present counter-arguments.<sup>12</sup> Civil society actors may use a judgment or a "view" as a political tool in support of changes. Some such effects also arise from national courts' rulings.

This brings us to a fourth difference: the international tribunals are international, rather than part of a domestic power structure. This has several implications, limiting the lessons that can be learned from the legitimacy discussions concerning domestic courts.<sup>13</sup> Most strikingly, domestic courts, while independent in some ways, are still embedded in a domestic "social basic structure" as one of a set of institutions.<sup>14</sup> Significant aspects of such domestic basic structures are in many states under democratic control, and checked by other state bodies. At the international level, however, while there

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- 11 Robert L. Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y J. 127 (2010).
- 12 CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 220 (2008).
- 13 *But see* Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 THEORETICAL INQUIRIES L. 437 (2013).
- 14 JOHN RAWLS, *The Basic Structure as Subject*, in POLITICAL LIBERALISM 257 (expanded ed. 2005).

arguably is a “global basic structure,”<sup>15</sup> there are no identifiable legislative or executive bodies that serve to check and balance the international judiciary — though there are “multi-level” checks and balances of contested significance.<sup>16</sup> This complexity adds to the challenges when exploring how the international judiciary can increase its normative legitimacy.

The human rights judiciary in particular has drawn criticism. One reason is that the general rationale for treaties as collective solutions to shared problems does not seem to fit human rights treaties. Human rights norms largely regulate governments’ treatment of their own citizens, which means they address a different kind of collective action problem (the “situation-structural side”<sup>17</sup>) than other sectors where mutual self-binding is deemed necessary to advance shared objectives. A second concern is one of the central roles of the human rights judiciary, which is to limit majoritarian democracy. Thus, several authors have criticized practices of *domestic* judicial review for being beyond democratic parliamentary control and hence illegitimate.<sup>18</sup> By extension, *international* courts and tribunals (ICTs) are even less subject to democratic accountability, hence even more suspect.

A theory of human rights should help us understand, assess and alleviate such and other tensions between national democracy and a robust international judiciary.<sup>19</sup> This concern is heightened due to courts’ “evolutive” or “dynamic” interpretation of treaties — human rights treaties in particular. Treaty bodies can hardly avoid novel interpretations if they are to ensure that the rights remain “practical and effective”<sup>20</sup> when circumstances change. But this practice makes them even more suspect from a democratic point of view: the treaty bodies surely “make law” when they interpret dynamically — yet they carry out this legislative task without democratic accountability. How, if at all, can such worries be addressed?

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15 Andreas Føllesdal, *The Distributive Justice of a Global Basic Structure: A Category Mistake?*, 10 POL. PHIL. & ECON. 46 (2011).

16 Andrew Moravcsik, *Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39 GOV’T & OPPOSITION 336 (2004).

17 Volker Rittberger & Michael Zurn, *Findings from the Study of ‘East-West Regimes,’* 26 COOPERATION & CONFLICT 165 (1991).

18 E.g., RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

19 Allen Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 LEGAL THEORY 39 (2008).

20 *Stafford v. United Kingdom*, 35 Eur. Ct. H.R. 1121 (2002).

## II. THE TAXONOMY OF “LEGITIMACY”

The increased attention to issues of legitimacy has made it abundantly clear that “legitimacy” is used in a variety of ways regarding the international judiciary.

*Normative* legitimacy concerns the nature of the various forms of *normative* “pull” or compliance-eliciting force that the concept “legitimacy” exerts with regard to the international judiciary.<sup>21</sup> That is: Why should the decisions or recommendations of the international judiciary count as (defeasible) reasons for other actors when they decide what to do? Such actors might be domestic courts, legislatures, administrations, civil society bodies, or other states. They defer to the international judiciary or not when they interpret treaties, shape new pieces of legislation, or urge reforms.<sup>22</sup>

Such *normative* legitimacy is related to, but should be distinguished from, *social legitimacy* and the concerns about a lack of it. Does the public, variously defined, regard the judiciary as worthy of support? That is, does the judiciary command general public belief that it has *rightful authority* or secure general *compliance*? For instance, do states generally defer to the judgments of a regional court? Such social support may also affect the normative legitimacy of such treaty bodies. That is, for a state that is considering whether to comply, others’ expressed attitudes may amount to a further reason to defer.

Some also challenge the legal legitimacy or *legality* of some international courts, or particular judgments. That is, does the court have the legal authority it claims over the relevant issues; are the judgments in accordance with the appropriate principles of legality, etc.? Such are some of the concerns raised about the international judiciary, e.g., how dynamically the judiciary may interpret treaties, or how deferential it must be to state sovereignty, with reference to the Vienna Convention on the Law of Treaties.<sup>23</sup>

Finally, several discussions about legitimacy are concerned with the *effectiveness* of treaties and their bodies: first of all, whether or not state parties actually defer in the relevant sense. An additional aspect is *causal effectiveness* on the ground: Do the treaty and the treaty body actually solve the problem they were created to address, or at least serve to promote their stated objectives, be it improving the human rights situation or securing environmental sustainability.<sup>24</sup>

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21 THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990).

22 Cf. Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479 (2013).

23 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

24 Oran R. Young & Marc A. Levy, *The Effectiveness of International Environmental Regimes*, in THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS 1 (Oran R. Young ed., 1999).

A central conceptual question is whether these various forms of “legitimacy” are related, and how. In particular, some note that a *weak* judiciary with no enforcement at its command requires higher perceived normative legitimacy. That is, *insofar* as a treaty requires “deep cooperation” — i.e., that “states depart from what they would have done in its absence”<sup>25</sup> — the treaty body must be able to influence actors’ reasons for action *without* the threat of sanctions. Some international courts and treaty bodies may threaten persistent violators with exclusion from important “club goods” — such as potential exclusion from the European Union. But many treaty bodies exercise “weak” power at most, i.e., without formal sanctions. A state that decides to heed the authority of such bodies *even against its other countervailing interests* must thus be *convinced* to comply, possibly by the perceived *normative legitimacy* of the authority.

Thus, some hold that the *normative legitimacy* of international human rights courts and treaty bodies is central if states are to recognize their authority and take their statements as independent reasons for compliance — be they observations, judgments, views, recommendations or general comments.<sup>26</sup> That is to assume certain causal relations: decisions by a judiciary that actors believe is normatively legitimate are more likely to have various forms of impact — that is, more social legitimacy — and this may in turn increase the normative legitimacy and the effectiveness of the international judiciary on the ground. And the opposite holds as well: if it turns out that general compliance with the treaty body fails to bring about the intended objective, normative legitimacy may suffer, and social legitimacy may unravel partly as an effect.

### III. ASPECTS OF A NORMATIVE THEORY OF LEGITIMACY FOR THE INTERNATIONAL JUDICIARY

I first lay out some elements of what is sometimes called an “institutional” political theory of human rights, in contrast to “natural” theories, before turning to the concepts of normative legitimacy, authority and content-independent reasons and returning to the interrelationship between the different concepts of legitimacy.

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25 George Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT’L ORG. 379, 384 (1996).

26 DANIEL BODANSKY, LEGITIMACY IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (2011); Steven Wheatley, *On the Legitimate Authority of International Human Rights Bodies*, in THE LEGITIMACY OF THE HUMAN RIGHTS JUDICIARY (Andreas Follesdal et al. eds., forthcoming 2013).



Charles R. Beitz, a prominent proponent of the former, suggests the difference thus: Natural rights theories of human rights regard them as moral constraints expressed, for example, in a state of nature, constraints that no political authority may trespass.<sup>27</sup> Institutional theories of human rights, on the other hand, typically hold that

[t]he central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community or those acting as its agents.<sup>28</sup>

An important difference for our purposes is that the *institutional* focus of these theories leads them to consider issues of legitimacy and authority, and in particular the long-term incentives and effects of institutions that are authorized to act against states that violate certain human rights.

On these accounts, a central function of human rights is *to delimit the domain of state sovereignty*, with implications for the actions of various actors: “[T]heir actual or anticipated violation is a (defeasible) reason for taking action against the violators in the international arena.”<sup>29</sup> That is, as long as a state respects human rights, it can claim that its sovereignty provides a reason for other states not to interfere. John Rawls’s account focused exclusively on interference in the form of international *military intervention*, while other theories also include a broader range of actions or expressions of concern.<sup>30</sup> Several of these institutional theories share features of importance here.

First, they are *institutional*: human rights are regarded as norms that primarily regulate coercive social institutions rather than individuals’ actions.<sup>31</sup> A critical issue is whether such institutionalized practices must be legally binding, possibly sanctioned, or merely socially embedded. The international human rights judiciary is presumably such an institution, but with a special twist: their main function is to regulate *other* institutions according to human rights standards, albeit with varying coercive power. They serve to limit states’ claims to sovereignty in the sense of immunity from concern and various forms of intervention by outsiders.

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27 CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 55 (2009).

28 *Id.* at 13.

29 Joseph Raz, *Human Rights Without Foundations*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 321 (Samantha Besson & John Tasioulas eds., 2010).

30 John Rawls, *Law of Peoples*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 41 (Stephen Shute & Susan Hurley eds., 1993).

31 THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2002).

Second, several of these institutional theories regard the human rights judiciary as an integral part of a broader *subject matter* which we may think of as the *global basic structure*: the rules and institutionalized practices as a whole which structure individuals' actions.<sup>32</sup> In our global basic structure states play prominent roles, with their own *domestic* basic structures. In addition, there are *regional* and *international* basic structures which include — in particular — *regional and international treaties and treaty bodies*. They are best assessed as serving important yet limited functions *within* the larger set of institutions, e.g., as corrective checks on democratic legislatures, or compensatory mechanisms for an overall unjust set of international rules.

Consider some salient features of such an institutional theory of the human rights judiciary, concerning legitimacy, authority and “content-independent reasons.” As indicated above, “normative legitimacy” is an action-guiding concept, which may be aimed at regulating quite different sorts of action by several different actors. A prevalent explication of the term is that it concerns an institution's moral right to attempt to regulate other actors' actions — be they citizens questioning their own government, or other states asking whether the sovereignty of a government that is violating human rights should be respected. In our case, then, the central questions are whether, when and why the international human rights judiciary is legitimate. It will be helpful to distinguish such questions of *legitimacy* from a related issue sometimes referred to as a question of *authority*: whether other agents have a moral obligation to take the institution's decisions — within certain bounds — as a (defeasible) reason for action.

Allen Buchanan holds that legitimacy is a matter of whether an institution is justified in wielding power.<sup>33</sup> Buchanan and Robert O. Keohane note that

[L]egitimacy requires not only that institutional agents are justified in carrying out their roles, but also that those to whom institutional rules are addressed have content-independent reasons to comply with them, and that those within the domain of the institution's operations have content-independent reasons to support the institution or at least to not interfere with its functioning.<sup>34</sup>

Their — typical — account of “content-independent” reason is that

[o]ne has a content-independent reason to comply with a rule if and only if one has a reason to comply regardless of any positive assessment

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32 Føllesdal, *supra* note 15.

33 ALLEN BUCHANAN, RECIPROCAL LEGITIMATION: REFRAMING THE PROBLEM OF INTERNATIONAL LEGITIMACY 7 (2011).

34 Buchanan & Keohane, *supra* note 7, at 411.

of the content of that rule. For example, I have a content-independent reason to comply with the rules of a club to which I belong if I have agreed to follow them and this reason is independent of whether I judge any particular rule to be a good or useful one.<sup>35</sup>

Such accounts of content independence are often drawn from H.L.A. Hart<sup>36</sup> and Joseph Raz.<sup>37</sup> Though they are called “content independent,” these accounts may limit the contents of the commands. If an otherwise legitimate authority — judicial or other — issues a *clearly* unjust decision, this does not obligate the subjects even though issued by an otherwise legitimate authority.

Normative concepts of legitimacy are now often expressed in terms of *justifiability among political equals*, for instance by appeals to hypothetical acceptance or consent. The legitimacy of a political order such as the state, or of the global basic structure, or of the human rights judiciary, is seen as an issue of whether the relevant affected parties *would have* or *could have* accepted it, under appropriate choice conditions. The question that arises is “whether the coercive exercise of political power could be reasonably accepted by citizens considered free and equal and who possess both a capacity for and a desire to enter into fair terms of cooperation.”<sup>38</sup> The normative standard of legitimacy for the “global basic structure” as a whole is, for instance, that it should be arranged so as to respect, protect and further the best interests of individuals globally.<sup>39</sup>

A central premise is the motivation of the parties whose acceptance matters. The assumption is that individuals act on a *duty of justice*. That is, they are committed “to support and comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves . . . predicated on the belief that others will do their part.”<sup>40</sup>

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35 *Id.*

36 H.L.A. HART, *ESSAYS ON BENTHAM : STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* (1982).

37 JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* (1994).

38 Sujit Choudhry, *Citizenship and Federations: Some Preliminary Reflections*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 377 (Kalypso Nicolaidis & Robert Howse eds., 2001).

39 Cf. SIMON CANEY, *JUSTICE BEYOND BORDERS* (2005); POGGE, *supra* note 31; RUTI G. TEITEL, *HUMANITY’S LAW* (2011).

40 JOHN RAWLS, *A THEORY OF JUSTICE* 115 (1971); *accord. id.* at 336.

This account of political obligation has several features familiar from “assurance games” in game theory.<sup>41</sup> On this account, the subjects are “contingent compliers.” They will comply and thereby abstain from some benefits to themselves, but only under certain conditions. For them to have a normative duty to obey commands — that is, for the institution to have normative *authority* — requires, firstly, that the authority should be normatively *legitimate*, and secondly, that citizens also have reason to trust in the future compliance of *other citizens and authorities* with such commands. Thus, if the institution is to have *authority* it is not enough that it is normatively legitimate: the subjects — or those otherwise supposed to heed it — must be assured of this, and be assured of general compliance.

This account may help us lay out some of the complex relations between social and normative concepts of legitimacy. Lack of general compliance may reduce or remove individuals’ moral obligation to comply; and inversely, general compliance — with normatively legitimate institutions — may bolster individuals’ moral obligation to do so. That a state regards a treaty as legitimate is often thought to increase the state’s compliance — though the empirical evidence for that seems lacking.<sup>42</sup> The account sketched above may explain why belief in normative legitimacy need not trigger a change in behavior. Belief that an institution is normatively legitimate alone is not enough to affect the behavior of contingent compliers: they must also have assurance that others share such a judgment *and* that they generally comply. Indeed, without such assurance, an otherwise normatively legitimate institution *may lack* authority in that it fails to trigger other actors’ moral obligation to obey or defer.

This account also fits with legitimacy understood as effective problem-solving. In general, treaties may be justified when they help resolve various collective action problems and thereby actually benefit individuals. This is what Raz describes as a “service conception.”<sup>43</sup> If an agent has a duty to subject their will to someone else, this is because the agent conforms better to reasons for action that apply to the agent anyway. For instance, coordination problems among several actors may give each of them reason to subject themselves to a coordinating body. This may be the reasoning for various treaty bodies established to secure compliance with rules that benefit all, but

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41 ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1992); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1991).

42 Ian Hurd, *Torture and the Politics of Legitimation in International Law*, in *THE LEGITIMACY OF THE HUMAN RIGHTS JUDICIARY*, *supra* note 26.

43 Joseph Raz, *The Problem of Authority: Revisiting the Service Concept*, 90 *MIN. L. REV.* 1003 (2006).

where each is tempted not to do their share. It may apply in the case of treaties to reduce tariffs, or to standardize certification, or other *bona fide* goods. In any individual case, the agent is not at liberty to second-guess the authority: its directives generally preempt the subjects' reasons.<sup>44</sup> When a treaty body protects such goods, it enjoys legitimacy and authority.

Consider, for instance, such justifications for the European Union. Hitherto out-of-reach objectives have ranged from peace — in the late 1940s and 1950s — to economic growth and a sustainable environment. The European Union suffers from the lack of such legitimacy when it fails to contribute to addressing the problems that the signatories to the various E.U. treaties had in mind. Other treaty bodies — of the European Union and others — typically address various collective action games. They may address prisoners' dilemmas where each party wants to free-ride on the compliant others.<sup>45</sup> Or a treaty body may be a precommitment arrangement. Such a body may be the result of a "battle of the sexes" game where all parties seek some collective decision, but agree to leave that decision to a sufficiently independent court or tribunal. Examples include the World Trade Organization (WTO) which commits parties to lower trade barriers, subjecting them to the WTO Appellate Body. In each case, establishing an authoritative treaty body can help the states achieve what they have reason to value.

Four remarks are relevant. First, this account brings out that even though such treaties *limit* sovereignty, they may at the same time *expand* the range of valuable options available to sovereign states. Treaties and their bodies may increase states' capacity to achieve public purposes<sup>46</sup> — we may think of this as the "worth" of sovereignty. Thus, several scholars note that in our multi-level world "sovereignty" has changed from being a constitutive feature of states into a set of bargaining chips by which states pool decision-making authority in various sectors.<sup>47</sup>

Second, the signatory states may envision that the problem addressed by the treaty, and the most appropriate solution given the circumstances, may change over time. They may therefore want to guide treaty body discretion in interpretation, so that the objectives are secured in the best way possible.

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44 *Id.* at 1016-20.

45 Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5 (1998).

46 Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009).

47 See, e.g., Robert O. Keohane, *Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society*, in WHOSE WORLD ORDER? UNEVEN GLOBALIZATION AND THE END OF THE COLD WAR 165, 175 (Hans-Henrik Holm & Georg Sorensen eds., 1995).

Thus the Vienna Convention on the Law of Treaties states that a treaty shall be interpreted “in the light of its object and purpose.”<sup>48</sup>

Third, note that the *ability* to solve such problems is not sufficient for a treaty to have legitimate authority. It remains to be argued why individuals or other actors should be bound by one particular such proposed treaty — why that authority can constitute a *sufficient reason* for action. Official ratification and acceptance of a treaty, by a sufficient number of signatory states, are important factors in establishing such authority.

Fourth, the legitimacy of such problem-solving institutions crucially depends on whether such treaties actually do contribute to their normatively permissible objectives. That is: do they actually benefit not only the interests of states, but ultimately the interests of individuals? I submit that suspicions that this was not the case were partly responsible for the “WTO protests” in Seattle 1999 against several aspects of WTO policies of economic globalization.<sup>49</sup>

#### IV. JUSTIFICATIONS FOR THE HUMAN RIGHTS JUDICIARY — AND ALSO FOR DEMOCRACIES

To explain or justify treaty bodies as solutions to collective action problems seems less appropriate with respect to the human rights judiciary. This is the first legitimacy challenge to the human rights judiciary. Many treaties and their bodies require general compliance in order to achieve their objective and hence to be normatively valued. But this general account does not obviously apply to human rights treaties: What is the nature of the “collective” problem, and why should the solution involve mutual self-binding and subjection to common authorities? If the human rights judiciary be regarded as the solution — and a good solution at that — what exactly is the collective action problem? Since the human rights judiciary does not seem to fit this general format, why accept such treaty bodies as normatively authoritative? And, in particular, why should generally human rights-compliant, well-functioning *democratic* states bind themselves thus? I submit that there are some collective action problems among states which the human rights judiciary helps address. In addition, the human rights regimes *also* address three other problems.

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48 Vienna Convention, *supra* note 23.

49 See, e.g., Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1870 (2002); Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in REGIME THEORY AND INTERNATIONAL RELATIONS 139 (Volker Rittberger ed., 1993).

There are at least two inter-state problems that international human rights regimes may help to solve. One is stated in the Preamble of the European Convention on Human Rights: The member states of the Council of Europe seek to maintain and further realize the common observance of human rights and fundamental freedoms, by taking first steps for the collective enforcement of some of the rights of the Universal Declaration.<sup>50</sup> A second collective action problem occurs within a quasi-federal order such as the European Union, where member states have agreed to become subject to majority decisions. They reduce the risk of abuse of such pooling of decisions by insisting that all member states are subject to human rights courts.<sup>51</sup>

In addition, I submit that there are at least three reasons for international judicial review of human rights, mainly concerning collective action problems not among states, but between the authorities of a state and its citizens. Some of these arguments hold even for well-functioning democracies, whose authorities largely comply with these legal human rights obligations anyway. This is not to say that these arguments support the present institutions and practices of the human rights judiciary in general, and the ECtHR in particular, but they indicate the kinds of arguments that may guide reforms. These arguments must be included when assessing the justifiability of the human rights judiciary.

The following brief sketch takes as a normative starting point that the “global basic structure” as a whole should be arranged so as to be trusted to respect, protect and further the best interests of individuals globally — e.g., in the form of human rights protection — *and* to promote public confidence that this is, in fact, the case. For our purposes we can bracket much of the disagreement about the substantive requirements of justice for the global basic structure; but note that we find evidence of such obligations at the European level in the abovementioned Preamble of the European Convention of Human Rights.

From this perspective, an international human rights judiciary may provide several benefits, even to fairly well-functioning democracies. In particular, democratic rule combined with constraints on legislatures in the form of *international judicial review of human rights* may provide important forms of such assurance.

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50 ECHR, *supra* note 2, Preamble.

51 Andreas Follesdal, *Justice, Stability and Toleration in a Federation of Well-Ordered Peoples*, in RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA? 299 (Rex Martin & David Reidy eds., 2006).

Consider a fairly standard gauge of democratic rule, agreed upon by a broad range of democratic theorists.<sup>52</sup> It is not intended as a complete definition, but rather as a statement about virtually all modern political systems that we would normally call “democratic.” “Democracy” is the name of institutionally established *procedures* that regulate competition for control over political authority on the basis of deliberation, with nearly all adult citizens being permitted to participate in an electoral mechanism where their expressed preferences over alternative candidates determine the outcome. Under certain favorable conditions, such procedures help ensure, and give the public assurance, that the government is responsive to the majority or to as many as possible — more reliably than nondemocratic procedures.

Essential to the case for democracy over alternative decision-making procedures is competitive elections. Their importance lies in making policies and elected officials responsive to the preferences of citizens.<sup>53</sup> In particular, an opposition must be able to contest the current leadership elites and policy *status quo*.<sup>54</sup> Active opposition parties and media scrutiny are crucial for fact finding, agenda setting and assessments of the effectiveness of policies. On this line of argument, the normative case for democratic rule is comparative: forms of democratic rule by means of competitive elections to choose policies and leaders are better than alternative constitutional arrangements for decision-making. The claim is that such democratic accountability mechanisms ensure that the decisions can be trusted to be more responsive to the best interests of the citizenry than via other collective decision-making arrangements.

But mistakes occur even under the best procedures, and international review of such decisions serves as a valuable safety mechanism. This is one main line of response to those who challenge practices of judicial review — be they by domestic or international courts — as undemocratic. Consider the worry: Even when the human rights judiciary works as it should in stopping a legislative act, some will regret what they see as a loss to the *democratic* quality of the decision, since a majority decision has been overturned. Some regard these losses as high — and question the likely gains.<sup>55</sup>

On the other hand, I submit that some such limitations on the scope of legislatures’ authority, and bodies entrusted to uphold such limitations, are

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52 Details are elaborated in Andreas Føllesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533 (2006).

53 G. BINGHAM POWELL, *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* (2000).

54 *E.g.*, ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971).

55 *E.g.*, BELLAMY, *supra* note 18.



not necessarily *nondemocratic*. First, of course, the treaty that establishes the treaty body has been ratified by the states — in a democratic manner where required — so that the international human rights judiciary enjoys delegated power in a democratic way. Furthermore, minority protections of some kind, with authority placed outside the legislature itself, may be a component of any set of workable majoritarian democratic institutions worthy of respect. All institutions must have a specified scope of authority, and a legislature which is corrected when it oversteps its authority is not necessarily overruled in a *nondemocratic* way. Which bodies may be best placed and authorized in what ways to provide such benefits remains an open question. I submit that the human rights judiciary helps alleviate several such risks, *inter alia* the prerequisites for well-functioning democratic procedures such as freedom of speech, free and fair elections, etc.

Other risks are those that minorities tend to face under majority rule. The majority may exploit its powers, intentionally and knowingly or not, in ways that harm the minority unduly. An added reason for some minorities to be concerned is that they may require unusual arrangements to secure the same needs as the surrounding majority. Such arrangements may include special protections, exemptions or support to maintain aspects of their own culture — “special needs” with regard to freedom of religion, education and language, diet or other central components of what makes their lives go well in their eyes. A minority may also have special preferences which will lose out in all majoritarian decisions; though each of them on its own may be minor, the cumulative effect is deleterious. Minorities may thus fear that they will be harmed even by apparently innocuous majoritarian decisions. Standard mechanisms in a democracy that ensure responsiveness to the electorate will not work for such groups. For instance, a small minority may never get attention from political parties that seek votes. The majority can offer some, but not many, good reasons why they can be trusted to vote according to their sense of justice, even on such “minor” issues. In general, a well-functioning *domestic judiciary* should protect minorities against such standard threats.

#### **A. The Human Rights Judiciary Can Correct the (Few) Human Rights Violations That Can Be Expected Even When Democracies Work Well**

The first reason why the human rights judiciary may be justifiable and hence normatively legitimate is that a well-functioning *international* human rights judiciary provides further protection of vulnerable domestic groups. This is partly because the domestic judiciary may not be sufficiently independent of the government. Furthermore, national judges are steeped in the domestic culture, often drawn from cultural majorities. There is thus a risk that they may

fail to notice or give sufficient weight to the untoward effects of decisions on various minority groups: there is a real risk that they do not fully grasp the impact of such decisions. Furthermore, while national judges may be skilled in the domestic legislation and know the domestic institutions, they are not especially trained in comparative social science, to discern whether there are alternative policies and legislation that can secure the same — laudable — objectives without violating some human rights.

A judiciary composed largely of foreign members will be less likely to suffer from such biases. For instance, it can press for reasoned argument when a state holds that it is justified in setting some human rights aside due to the “exigencies of the situation.”<sup>56</sup> In such case, the international human rights judiciary can help check whether the state is indeed correct, that it has no options available that avoid human rights violations. The international judiciary may thus serve to monitor the limits on decisions states can make within their borders. This safeguard reduces the reasonable fear that those in power will ignore their sense of justice with untoward effects on those who do not side with the majority vote.

Social science research suggests that human rights treaties — and hence their bodies — do indeed provide such protections under certain conditions. For instance, Beth Simmons notes regarding the effect of human rights treaty ratification:

Even the most politically sensitive human rights treaties have positive effects on torture and repression for the significant number of countries that are neither stable democracies nor stable autocracies. International law matters most where domestic institutions raise the expected value of mobilization, that is, where domestic groups have the motive and the means to demand the protection of their rights as reflected in ratified treaties.<sup>57</sup>

Note that these findings mainly concern the impact of ratification rather than that of adjudication. Furthermore, we should note that the treaties and their bodies only play a *limited* role within well-functioning democracies, where we can expect the governments to take due care, and where the domestic judiciary often performs scrupulous human rights judicial review. But there are still two justifications for the international human rights judiciary that also hold for democracies.

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56 *E.g.*, ICCPR, *supra* note 4, art. 4; ECHR, *supra* note 2, art. 15.

57 SIMMONS, *supra* note 10, at 17.

## **B. The Duty to Promote Just Institutions in Other States**

A second reason to value the human rights judiciary is based on citizens' and hence their governments' duty to promote a more just global basic structure — including more human rights-respecting states. For instance, when a well-functioning democracy agrees to subject itself to a human rights court, this may promote similar subjection *by other states* whose citizens stand to benefit from such review. This is because ratification by some states adds pressure on other states to also ratify — states whose ratification *does* make a difference to citizens. Simmons notes that “[t]he single strongest motive for ratification in the absence of a strong value commitment is the preference that nearly all governments have to avoid the social and political pressures of remaining aloof from a multilateral agreement to which most of their peers have already committed themselves.”<sup>58</sup>

One consequence of this impact of the human rights judiciary is that any assessment of the human rights judiciary cannot be restricted to intra-state effects, but must also consider the impact in less democratic states that form part of the present global structure. This seems an appropriate response to some generally well-functioning democracies who claim that the human rights judiciary at best provides few benefits to the domestic population. The benefits to citizens of other states cannot be overlooked, and they help legitimize the international human rights judiciary.

## **C. Assurance that the Domestic Institutions Are Sufficiently Legitimate so that Their Commands Should Count as Reasons for Action**

A third reason for having a human rights judiciary is that such bodies that are independent of the domestic government may provide citizens much-needed assurance about others' compliance — including that of their government. Such a mechanism helps convince “contingent compliers” that the government will continue to respect human rights, and that these citizens thus have an obligation to obey. This is an implication of the role of human rights, as Raz noted: The human rights judiciary serves to delineate the limits of national governments' *authority* over citizens.<sup>59</sup> It may thus help bestow legitimacy on states by providing assurance *when appropriate* that these actors are pursuing normatively just policies. These governments thus have the right to rule and are themselves authorities that create obligations for yet others.

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58 *Id.* at 13.

59 Raz, *supra* note 29, at 328.

Recall that compared to other modes of governance, democratic arrangements not only have better mechanisms to ensure that authorities govern fairly and effectively, but also help provide public assurance that such is the case.<sup>60</sup> Party contestation and media scrutiny help align the interests of the subjects with those of their rulers, and contribute to making the institutions trustworthy.<sup>61</sup> I submit that judicial review to protect human rights provides another trust-building measure. With such review, those who fear that they will regularly be outvoted can be somewhat more certain that the majority will not subject them to undue domination, the risks of unfortunate deliberations, or incompetence. This safeguard reduces the risk that those in power will ignore their sense of justice, with untoward effects on minorities. This legitimizing role of the human rights judiciary for governments that merit compliance is one reason to support it — and hence contributes to the normative legitimacy of the human rights judiciary itself.

For example, consider that in 2011, of the 955 applications against the United Kingdom that the ECtHR decided, the government was found to have violated the ECHR in only eight cases<sup>62</sup> — and the government usually takes steps to correct those violations that the ECtHR finds. Since the very large majority of cases show the government to be in compliance with its obligations under the ECHR even when alleged victims think otherwise, the ECtHR serves to assure the citizens that this particular government generally merits compliance.

Note that this assurance is — and indeed must be — conditional. Insofar as a government fails to comply with the human rights judiciary, this assurance-building role fails. In such cases, the ECtHR signals to citizens that their government perhaps does *not* merit obedience. If the ECtHR could not be expected to find against human rights-violating states, it would no longer provide any valuable assurance to citizens of compliant states. One implication of this argument is that we must assess the human rights judiciary, and reform

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60 Philip Pettit, *Democracy: Electoral and Contestatory*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 105 (Ian Shapiro & Stephen Macedo eds., 2000); Adam Przeworski et al., *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY'S VALUE* 23 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999); Ian Shapiro, *The State of Democratic Theory*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 235 (Ira Katznelson & Helen Milner eds., 2001).

61 Cécile Fabre, *A Philosophical Argument for a Bill of Rights*, 30 *BRIT. J. POL. SCI.* 77, 83 (2000).

62 Nicolas Bratza, *Britain Should Be Defending European Justice, not Attacking It*, *INDEPENDENT*, Jan. 24, 2012, <http://www.independent.co.uk/opinion/commentators/nicolas-bratza-britain-should-be-defending-european-justice-not-attacking-it-6293689.html>.

proposals concerning it, not only by whether they enhance compliance with human rights within states, but whether they also provide public assurance thereof.

At least two aspects of these arguments are relevant for this discussion of legitimacy. First, the main reason why treaties have such effects on the ground is *not* due to international enforcement, but domestic, often democratic mechanisms. Such treaties — and arguably their bodies — contribute to shifting the domestic political agenda; they empower grassroots movements, and allow victims of some human rights violations to go to an international court to defend their interests. The legal force and amount of sanctions available to the treaty bodies may therefore not be so significant for their effects on the ground. Second, note that the first and third reasons for valuing the human rights judiciary seem to hold regardless of whether *all other* states accept its authority. Thus worries about partial compliance among the signatory states need not count against such bodies.

## CONCLUSION

This Article has sought to respond to two challenges concerning the legitimacy deficit of the international human rights judiciary. First, the “standard” case for treaty bodies as parts of the solution to coordination problems among states *does* also apply to some extent to the human rights judiciary. And there are other reasons, in addition to the standard case, that indicate how *in principle* the international human rights judiciary may be normatively justified — and hence legitimate — even to citizens of fairly well-functioning democratic states.

To conclude, I insist that this sketch of a justification of the human rights judiciary should not be taken to imply that the ECtHR or any other part of the human rights judiciary is currently legitimate. These bodies may well have to be modified to enhance their justifiable functions. Such modifications may encompass the substantive norms of the relevant convention, how the judges are selected and their mode of work, or finally the decisions rendered — including such practices as the “margin of appreciation” that the ECtHR grants states, or the nature of remedies imposed by the Inter-American Court of Human Rights.<sup>63</sup> I submit that such assessments and proposals must be comparative, holistic and institutionalist. The salient question is not simply how things would have turned out in the absence of these institutions. Instead, we should compare the current human rights judiciary with the best alternative

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63 Andreas Follesdal, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, 40 J. SOC. PHIL. 595 (2009).

institutions that might compose a global basic structure. I venture that in order to move toward a more legitimate global basic structure we should not utterly reject the present international human rights judiciary, but rather identify areas for reform so as to make it more legitimate.