

# THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES

Legal, Political and Philosophical Perspectives

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## International human rights and the challenge of legitimacy

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### 1. International human rights regimes: acceptance and resistance

International human rights regimes as they exist today are perplexing. On the one hand, international human rights emerged virtually out of the blue at the end of the Second World War (Mazower 2004) and had their political breakthrough in international affairs only by the mid 1970s (Moyn 2010). By now, they have become institutionalized as a set of elaborate international practices, almost universally recognized, if not always respected, by key international actors (Beitz 2009, chap.1–2). Virtually every state has ratified at least one of the United Nations' core international human rights instruments, and 80 per cent of states have ratified four or more. Regional human rights mechanisms claim a total membership of more than 150 states. In 65 countries, independent national human rights institutions monitor the state's human rights practices domestically. And not only states are implicated in this growing web of international human rights treaties: global governance institutions and multinational corporations increasingly find themselves being assessed in terms of their human rights impact in the countries with which they interact. Most notably, international human rights have inspired a vibrant international civil society. It monitors and holds to account governments, corporations and other organizations for their human rights practices, and mobilizes individuals and groups to appropriate the rights ascribed to them in international

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declarations and treaties. Growing numbers of new issues of global concern – migration, trade, investment, climate change, etc. – are being framed in the vocabulary of human rights (Donnelly 2007, p.289). Thus, judging by the avowed acceptance by this multitude of actors, the practices and institutions of international human rights would seem to enjoy, on average, a broad, strong legitimacy in the contemporary world.

And yet, on the other hand, international human rights practices increasingly face potentially disabling scepticism and critique, resentment and even resistance from many of the agents involved. Across the world, governments call into question the authority of the international institutions and instruments they themselves have agreed to create or join. Critics number not only illiberal, authoritarian regimes that explicitly and wholesale reject the idea of international human rights, but also those that openly declare their sympathy for that idea. Somewhat surprisingly, governments that pride themselves as promoters of human rights and democracy both at home and abroad, increasingly complain about international human rights regimes constraining their domestic democratic affairs. Paradoxically, then, one might say that on average, the relevant international actors almost universally accept – or even endorse and support – international human rights norms (cf. Donnelly 2007), while they increasingly dispute the international institutions and practices created for the interpretation, monitoring, mediation, adjudication, enforcement and implementation of those norms.

Of course, one should not be surprised that governments increasingly resist human rights norms and the international institutions created for their protection. The doctrines of human rights stir powerful opposition because they challenge powerful groups, institutions and practices, and '[n]o authority whose power is directly challenged by human rights advocacy is likely to concede to its legitimacy' (Ignatieff 2001, pp.68, 56). International human rights doctrines disrupt not just authoritarian governments, conservative religions or traditional family structures in allegedly backwards societies, but also democratic self-rule, welfare state regimes and entrenched constitutional and legal traditions – a fact that may just have begun to dawn on some governments of liberal democracies that have traditionally considered themselves worldwide champions of human rights.

Even so, normative challenges of established authority are not necessarily justified or legitimate *per se*. So what are we to make of this ostensible paradox? Are governments justified in their criticism and resistance towards international human rights norms and institutions? What grounds

the legitimacy of the continuously developing global architecture of international human rights law and the international courts and treaty bodies established by human rights conventions? Is there merit to the claims that international human rights courts and treaty bodies, by expanding their jurisdiction and engaging in dynamic, evolutive interpretation of their founding treaties, have outstepped the authority that states once delegated to them? When and how should a government or a domestic court defer to the judgments and decisions of international judicial institutions in the human rights area? Under which circumstances and in what ways may an international tribunal legitimately interfere in the laws, policies and decisions of a well-functioning sovereign democratic polity? What role should state consent play in a theory of legitimacy in the area of international human rights?

These are the topics that this volume addresses. It contributes to an increasingly lively research literature spanning the disciplines of law, philosophy, political science and international relations. This introductory chapter serves, first, to give some examples of the type of political controversies over international human rights regimes that motivate this volume; second, to place the volume in current academic debates about international human rights and about the legitimate authority of international institutions; and third, to outline the topics covered in the individual contributions.

### *1.1 International human rights regimes – universally contestable*

Across the globe, we find recent examples of political contestation and controversy over international human rights norms. In this section, we first give a general account of the myriad political decisions that face governments and other actors involved in international human rights regimes, and then give a more detailed account of prominent cases of contestation over human rights mechanisms in different regions of the world. These examples demonstrate that the legitimacy of international human rights regimes is a matter of global political importance.

First, the number of international human rights treaties continues to grow, with more states becoming parties to more treaties, subjecting 'more governments, organizations and individuals than ever before to the jurisdiction of international courts. Essentially every state in the world now participates in the human rights legal regime through membership in at least one core UN treaty' (Hafner-Burton 2012). Thus, virtually all governments and their citizens are to some extent implicated in difficult moral

and political dilemmas as they face choices of how to engage with international human rights regimes – choices which often involve significant yet subtle, unpredictable and long-term political consequences (cf. Cardenas 2010, p.33; Simmons 2009). Such choices include political decisions about whether the state should sign and ratify international treaties on human rights – that is, to promise to uphold the treaty's core principles or additionally to bind itself legally to comply with it. The choices also include decisions on whether and how the state should live up to its international treaty obligations, for instance in implementing human rights norms in domestic law, providing periodic reports to international human rights bodies or reacting to their decisions and criticism by altering rules and practices. A government may be required to change laws, to reform or eliminate repressive institutions or to create agencies or procedures to monitor compliance with international treaties, but also to correct persisting violations of international human rights norms, to hold past and present violators accountable and punishable for their mischief and to provide remedy or reparation to the victims.

However, international human rights regimes also structure the choices available to other types of actors: they give civil society organizations and transnational advocacy groups standards by which to evaluate the performance of state institutions. They provide additional resources for individuals and groups to seek justice before domestic courts or international supervisory organs and tribunals when they find that their rights have been violated or neglected by their governments. And when a government systematically fails to meet its human rights commitments towards its citizens, other international actors – for instance, other states, acting alone or in concert, or international organizations – may decide to take action and interfere, via diplomatic action, economic sanctions or even military intervention (Beitz 2009; Nickel 2006). Hence, all these political choices involve reflecting on the same fundamental question of legitimacy: why should the government of a sovereign state consider an international human rights regime to rightly influence or constrain its political discretion?

Thus, the legitimacy of international human rights regimes is a weighty matter confronting governments and many other agents all over the world. In recent years, we find particularly illuminating evidence of the politics of this matter in governments' increasing scepticism toward regional human rights mechanisms, which constitute important pillars in the international human rights regime. This form of politicization provides another example of the puzzles motivating this volume.

Traditionally considered an unparalleled success story and a model of regional human rights tribunals, the European Court of Human Rights (ECtHR) has recently raised intensified concern over its legitimacy and efficiency among governments, political parties and mass media commentary (see Bellamy, Føllesdal and Wheatley, respectively, in this volume). In part, this concern follows predictably after certain controversial judgments in cases brought before the court. However, that particular judgments are publicly debated is nothing new, and the potential to raise controversy lies in the very nature of a case being taken up by the ECtHR. 'Every now and then, the first reaction to a new judgment by national politicians has even been to announce that they would have a look to see if it would still be worthwhile to remain a Party to the Convention. Needless to say, such a threat has never been followed up' (Myjer 2012). Moreover, when particular judgments provoke academic and, occasionally, public debates about the legitimacy of the court, they tend to revolve around the same handful of controversial cases: *Lautsi v. Italy*, *Hirst v. UK*, *MSS v. Belgium and Greece*, etc. (Myjer 2012). Yet, those cases are hardly representative or typical of the Court's work: they provoke debate and contestation precisely because they are unusual and step on politically sensitive toes in the respondent states, but may also be essential in establishing the outer limits of the Court's competences. Michael O'Boyle (2011) argues that one reason the Court has been an easy target for populist politicians is that, like all courts, it tends not to answer back. More principally, some critics have seen dynamic or evolutive interpretation of the Convention as a way for the Court to expand its jurisdiction and authority; its supporters, by contrast, argue that this interpretive principle merely reflects an adjustment to changing social circumstances, usually anchored in a developing consensus among European states (Costa 2011; Dzehtsiarou 2011). Beyond such mediatized confrontation, support for the Court seems robust among almost all European states:

The system has been operating for years without being called into question by the High Contracting Parties. They ratified the Convention freely, presumably because they believed in what it stood for, and it is open to them at any stage to denounce it if they so desire. Far from seeking escape from their Convention obligations, the States are keen to observe and build upon the Convention *acquis* and to reform the system so that it can perform its tasks in a more efficient manner.

(O'Boyle 2011)

However, given this deeply rooted support for the European Court of Human Rights, one might argue that an equally troublesome challenge

to its legitimacy is that rather than transgressing its mandate, it manages too little. The Court has positioned itself as an attractive institution for European citizens to turn to in order to have their rights defended. Its success in this regard may ironically have become an obstacle to its efficiency. Observers are worried that the European system may be overburdened by its growing backlog of cases, resulting from a complex combination of factors: the geographical expansion of the Council of Europe (it now includes 47 countries and more than 800 million people), the Court's expansive interpretation of individual liberties, endemic human rights problems in many states and distrust of domestic judiciaries in others, et cetera (Helfer 2008). The Court has 139,500 pending cases (2012), out of which only a mere 5–10 per cent will eventually be deemed admissible. More than 65 per cent of the cases are brought against only six states: Russia, Turkey, Italy, Romania, Ukraine and Serbia. The docket crisis may erode the ECtHR's reputation insofar as it offers delayed and therefore possibly ineffectual, arbitrary or incomplete protection (Dzehtsiarou & Greene 2011). A series of High Level Conferences 'have been organized in order to secure the long-term effectiveness of the supervisory mechanism of the ECHR. The resulting ... declarations have proposed all kinds of measures to increase the effectiveness of the work done by the Court' (Myjer 2012). The measures considered – some of which have been implemented – include enhancing the Court's filtering capacity, attaching a cost, if only modest, for filing individual complaints, a new pilot judgment procedure to deal with repetitive complaints, but also, and perhaps most importantly, improving the national implementation and application of the Convention and reinforcing the dialogue between Strasbourg and national courts, for instance by means of an advisory opinion procedure (Helfer 2008; O'Boyle 2011).

In the Americas, the Inter-American Commission (IACHR) and Court (IACtHR) on Human Rights increasingly face criticism and resistance. The Inter-American system is the oldest and most established regional human rights mechanism outside of Europe. During the 1970s, it successfully used on-site visits and country reports to expose the human rights violations of military governments, and in the 1990s, it supported the restoration of democratic rule in Latin America (Goldman 2009). Like its European relative, it can investigate cases brought by individuals and issue judgments against states. The IACtHR has developed an innovative and creative jurisprudence, but it has also been criticized for exceeding its own mandate (Binder 2012; cf. Huneeus 2011) and neither the United States nor Canada is party to the American Convention on Human Rights.

Its authority, thus, cannot be taken for granted. For instance, the Bolivarian bloc has recently orchestrated an offensive against the Inter-American Court of Human Rights. The tribunal, based in Costa Rica, has heard a series of cases accusing Venezuela of rights abuses during Hugo Chávez's presidency (Anon 2012b; Anon 2012c). In 2012, the government of Venezuela denounced the American Convention, which means that once the withdrawal has taken effect after one year, complaints against Venezuela can no longer be brought before the IACtHR. President Chávez declared Venezuela would withdraw from the court 'out of dignity, and we accuse them before the world of being unfit to call themselves a human rights group' (Anon 2012c). The Supreme Court of Venezuela had previously recommended the government to denounce the American Convention on Human Rights, in a decision that declared a judgment of the IACtHR as non-executable (Binder 2012, p.326). The governments of Bolivia, Ecuador and Nicaragua have recently also expressed hostility toward the IACtHR, alternately calling for its elimination, linking it to the Monroe doctrine as a platform for US imperialism or condemning it as an inquisitor against member states (Picq 2012).

Brazil too, which nurtures an image as a rising power with a progressive agenda both at home and abroad, recently got into an altercation with the Inter-American system. President Dilma Rousseff previously 'strongly supported the IACHR request that Brazil create a Truth Commission to shed light on human rights violations that took place during the 1964–1985 military dictatorship' and generally 'stressed her country's engagement with the hemispheric human rights system' (Picq 2012). In 2011, however, the Inter-American Commission issued a precautionary measure requesting the Brazilian government to suspend the construction of the Belo Monte water power plant until the rights of the indigenous peoples in the area had been properly respected. Stirring controversy in Brazil for several decades, the Belo Monte hydroelectric dam on the Xingu River, a major tributary to the Amazon, is supposed to bring electricity and development to a neglected region, but the project has also raised complaints about forced evictions of impoverished, rural communities, and deterioration of water quality affecting downstream communities following the construction work. Brazil's Foreign Ministry responded by stating it was 'perplexed' by the Commission's 'unjustified' demands, adding that 'the massive construction complies with Brazilian regulations and is in accordance with an ongoing dialogue with the indigenous peoples of the Xingu River' (Anon 2011a; Anon 2011b). 'The request is absurd. It even threatens Brazilian sovereignty,' said Senator Flexa Ribeiro, president of the Senate



Sub-Committee charged with oversight of the dam project (Hayman 2011). President Rouseff decided to cut all relations with the human rights body: she ordered the Brazilian ambassador before the Organization of American States (OAS) to remain in Brasilia rather than return to Costa Rica, recalled Brazil's candidate to the IACHR and suspended payment of Brazil's annual contribution.

More generally, critics have been concerned that the IACHR is expanding its jurisdiction. Traditionally focused on civil and political rights, the Commission has lately 'fueled a wave of discontent' (Picq 2012) by extending its jurisdiction to collective rights, pertaining to education, femicide and indigenous groups, and the Court has required local judicial and bureaucratic institutions to provide extensive and sometimes idiosyncratic remedies to victims (Huneus 2011). Historically, though, the Inter-American system has coped with more severe crises of legitimacy, and it has successfully challenged regimes considerably more hostile to its authority (Goldman 2009). The system has helped many countries move from military rule and states of exception to democracy and the rule of law and supported domestic forces in holding the old regimes to account for their crimes. Democratic consolidation has brought to power political parties and movements that used to support the Inter-American system when it helped provide justice to the victims of oppression under authoritarian regimes. Now, those governments increasingly find themselves being taken to court for violations of human rights, which perhaps indicates that 'it is in the nature of power itself to resist and deny mechanisms of accountability' (Picq 2012).

In Africa, political controversy over international human rights institutions recently led to the effective dismantling of a sub-regional human rights court. In August 2012, leaders of the Southern African Development Community (SADC), a 15-member regional intergovernmental organization, resolved to renegotiate the protocol of the organization's tribunal so as to restrict its jurisdiction to advisory interpretation of the SADC Treaty only. Established in 1992, but inaugurated only in 2005, the SADC Tribunal's original mandate allowed the court to hear and decide on cases brought by individual citizens who felt their human rights had been violated by their government. However, most of the individual cases heard by the court involved allegations of human rights abuses in Zimbabwe. In 2008, in a landmark case brought by 79 farmers led by Mike Campbell, the court found the country's land reform programmes to be unconstitutional and discriminatory. The state had acquired the farms of white commercial farmers for redistribution to

the landless majority; the court ordered the government to pay compensation and restore the farmers' properties (Moyo 2009). Zimbabwe's president Robert Mugabe dismissed the court's ruling as 'nonsense', and the government argued that the Tribunal could not adjudicate over the land reform programme, because it was intended to redress historical injustices. Other governments were also concerned: 'We have created a monster that will devour us all', Tanzania's president Jakaya Kikwete reportedly commented to fellow SADC leaders (Anon 2012a). Rather than jointly taking action to enforce the ruling, SADC leaders responded by suspending the Tribunal's activities. This decision prompted an international campaign to preserve the Tribunal. In the suspension period, an independent study commissioned by the SADC concluded that the Tribunal has the status of international law and is supreme to national law. The SADC 2012 summit in Maputo, Mozambique, eventually agreed to restrict the Tribunal. Human rights advocates, lawyers and political analysts, including South Africa's prominent archbishop emeritus Desmond Tutu, lambasted the decision as a major setback for the rule of law, accountable government and individual rights, which would tarnish the region's international reputation. Critics also pointed out that limiting the Tribunal's mandate to inter-state disputes would make it superfluous, because most cases heard by the Tribunal had been brought by individuals, while member states usually resolve their disputes by diplomatic means. In short, they argued, the Tribunal could no longer be seen as a legitimate and effective institution (Bell 2012; Sasman 2012).

The vast and populous Asian region has long been considered a white spot in terms of regional international human rights institutions, but that may be changing (Baik 2012). Celebrating the fortieth anniversary of the Association of Southeast Asian Nations (ASEAN) in 2007, its ten members signed the ASEAN Charter, a constitution of the intergovernmental organization which included a commitment to establish a regional human rights body. The Charter strikes a compromise between, on the one hand, promoting solemn principles of democracy, human rights, fundamental freedoms and social justice, and, on the other hand, asserting traditional ASEAN principles of non-interference in the internal affairs of member states (Ciorciari 2012, p.711). The Charter thus seems not so much to have put an end to the clash of principles of the so-called Asian values debate, but rather institutionalized the value conflict. In 2009, the human rights body took shape as the ASEAN Intergovernmental Commission on Human Rights (AICHR). Half a year later, ASEAN inaugurated a second commission focusing more specifically on the rights of women and children (Ciorciari 2012).

ASEAN has been derided as a 'club of dictators', as its membership still includes authoritarian states and some of the world's most notorious human rights violators, in particular Burma (Ginbar 2010). Democratic states therefore voiced concern over the establishment of the AICHR. The parliament of Indonesia nearly vetoed the resolution, while the Philippines raised objections. Some human rights activists and civil society organizations in the region still cautiously welcomed the establishment of a regional human rights body, and government officials of member states suggested that while the Commission would lack sharp teeth, it would be endowed with a useful tongue (Ciorciari 2012, p.713). Critics still point to the Commission's many flaws: it has a mandate limited to promoting rather than protecting human rights; it lacks independence from governments, being composed of state representatives rather than independent experts and making its decisions by consensus; it has neither investigative powers nor an ability to receive complaints from victims or their advocates and act to address the issues they raise; and its channels for participation by civil society are selective, arbitrary and opaque (Ciorciari 2012; Ramcharan 2010). 'It wouldn't be surprising to see ASEAN's misfits use the group as an excuse to whitewash their own human-rights violations', one commenter prophesied (Anon 2009).

A case in point is the AICHR's recent drafting of an ASEAN Human Rights Declaration, adopted in November 2012. Since the process lacked transparency, publicity and civil society participation, critics feared that rather than reinforcing the work to promote and protect human rights in the region, the Declaration would be used by governments to lower standards below their existing commitments to international treaties (Robertson 2012). Some human rights activists even consider the Commission a step in the wrong direction, a threat to the citizens of the member states and worse than having no regional human rights instrument at all (Ginbar 2010; Ramcharan 2010). Others have argued that much of the criticism of the AICHR misses the mark: it is a commission within the ASEAN, an organization which has always been based on non-interference – and that principle has also served the community well, by preventing powerful members from dominating weaker members (cf. Ramcharan 2010). The flaws of the AICHR may perhaps be somewhat balanced by the region's emerging network of national human rights institutions and a dynamic web of civil society groups and think tanks, which some commentators think may provide additional channels for holding governments to their commitments in the human rights area (Ciorciari 2012; Durbach et al. 2009; Ramcharan 2010; Tan 2011).

As this brief exposé – by no means exhaustive – indicates, the legitimacy of international human rights regimes is an issue on the political agenda in many corners of the world. Regional mechanisms vary in their functions and powers, and they have come to life within differently integrated regional institutional biotopes, inhabited by states that vary widely in their domestic political, social and legal institutions. Moreover, public trust in the institutions may be interlinked to support for the regional cooperative regimes with which they are associated. For instance, apart from its own veritable problems, it seems plausible that the ECtHR also experiences spill-over from the concurrent crisis of the broader project of European integration, and its much debated legitimacy deficit, just as it may have benefited in the past from periods with more resolute political and popular support for expanding and consolidating the European Union. Likewise, the contestation over the Inter-American system may be seen against the backdrop of the waning political relevance in the hemisphere of its parent regime, the Organization of American States, which reflects the weakening ties between the United States and Latin America and coincides with the recent parallel establishment of the Union of South American Nations (UNASUR), a 12-member regional intergovernmental union modelled on the European Union (Hakim 2012). As international human rights regimes do not exist in a vacuum, their legitimacy may be thought of as a relative or comparative, not absolute, property: it emerges in the interplay between international institutions, the domestic institutions of states, and individuals and groups (cf. Dobson, this volume).

Still, for all the differences among these regional mechanisms, the criticism and challenges they face seem to revolve around strikingly similar issues: with what right can an international human rights institution exercise autonomous authority over the sovereign states that once created it? The proliferation of human rights mechanisms at both global and regional levels implies additional legitimacy challenges. Some warn that this process may lead to increasingly overlapping jurisdictions between human rights instruments at various levels, to increasing fragmentation and provincialism of human rights law and to a general lapse from what many deem to be at the core of the idea of international human rights: their universal validity and global reach. On the other hand, a state may be 'more likely to give greater powers to a regional organization of restricted membership, of which the other members are its friends and neighbours, than to a world-wide organ in which it (and its allies) play a proportionally smaller part' (A. H. Robertson, cited in Durbach et al. 2009, p.224). The question, thus, is whether such accommodation of international mechanisms to regional

circumstances comes at too high a cost. In reality, perhaps, the glass is neither half-full nor half-empty. Commitment to and compliance with international human rights norms is rarely uni-dimensional, but often complex, compromised, ambivalent and conditional, and therefore also often riddled with seeming paradoxes and contradictions. Under circumstances of deep disagreement, a legitimate institution, as it were, needs to strike a balance between what is desirable and what is feasible.

Partly in order to mitigate the downsides of increasing regional fragmentation of international human rights norms, partly also in response to similar problems of fragmentation, overlapping jurisdictions, weak enforcement and institutionalized politicization at the global level, academic commenters recommended a World Court of Human Rights (Goldberg 1965; Nowak 2007; Trechsel 2003). Considering the ECtHR as a model, some suggest that a world court of human rights might provide the independent, authoritative body needed to bring clarity and order to the increasingly dense patchwork of international human rights regimes, and to balance regional flaws and glitches in the protection of human rights (Ulfstein 2008). However, if it is ever created, such a global court in itself would give rise to similar issues of legitimate authority in a multi-level global human rights regime.

Furthermore, the addressees of international human rights norms are multiplying too, adding to the complexity of international human rights law and institutions. New types of corporate agents are increasingly held to account for their human rights performance, such as inter-governmental organizations, non-governmental organizations, multinational corporations, cities and other sub-state actors, and even separatist and insurgent groups. Such non-state agents might also increasingly seek to legitimate themselves as international actors by binding themselves to human rights norms. The European Union's accession to the ECHR is but one case in point (Jones 2012).

### *1.2 What sort of legitimacy problems does this criticism and resistance indicate?*

Does the multifarious criticism, scepticism and resistance against international human rights systems signal that they face an existential crisis? The fact that various political actors discuss and dispute the legitimacy of international human rights instruments might indicate a systemic failure that needs to be addressed in order to sustain the system's efficacy. If the growing authority of international institutions does not resonate with

legitimacy beliefs in the relevant communities, they will likely meet resistance (Zürn et al. 2012). As Ian Clark (2004, p.75) notes, 'we are most likely to ask questions about the legitimacy of a system only when things appear to be going wrong'. On the other hand, the fact that different actors question the authority of international human rights systems need not imply that those institutions are actually illegitimate or increasingly risk becoming so. To the contrary, their legitimacy as only indicated by the absence of resistance and criticism could be just as worrying, as such silence could indicate that subjects comply uncritically, or that the institutions are epiphenomenal to power and politically irrelevant, so that nobody cares to dispute their ostensive authority.

Indeed, one could argue that international human rights institutions should always be potentially disputable, disruptive and provoking to somebody – to some governments, for instance. Increased opposition and resistance to existing human rights regimes might even signal that they are increasingly doing their job. Why should this be appropriate? Because such conflicts are hard-wired into human rights both as a political and legal concept. If there were neat harmony of interests between national legislatures and international human rights courts, or between minority protection and majoritarian popular sovereignty, or between individual citizens and the authorities governing over them, we would hardly need international human rights treaties and tribunals in the first place.

Thus, the fact that governments criticize and challenge international human rights tribunals may say little about their legitimacy, for several reasons. First, scholars usually distinguish between subjective and objective, or descriptive and normative aspects of legitimacy, and the relationship between them is complex, both conceptually and empirically. The descriptive, subjective aspect of legitimacy refers to the attitudes and beliefs about rightful rule that members of a community hold. The normative or objective aspect of legitimacy refers to whether such beliefs are morally justified, that is, whether an institution ought to have the right to rule over its subjects. Of course, descriptive and normative accounts of legitimacy are interconnected: subjects often think they have good, justifiable reasons for regarding an authority as legitimate or illegitimate. And whether a subject is morally obligated and motivated to comply may depend on whether the agent has reason to believe that others will also endorse the norm, for instance because they regard it as legitimate, for whatever reason. The fact that some of those addressed by authority protest and critique surely does not necessarily imply that an institution is illegitimate in normative terms. On its own, general compliance

is insufficient for normative legitimacy, since agents may comply with unjust rules out of self-interest, fear of sanctions, lack of alternatives or unreflective habit. Yet compliance often requires that subjects believe that an authority is normatively legitimate. Perceived normative legitimacy may also bolster the problem-solving capacity of an institution, and the reverse is also true: if a treaty or an international organization fails to secure its objective to a certain minimum extent, it risks losing normative legitimacy: individuals and other actors may no longer regard themselves as bound to comply. Second, expressions of beliefs about legitimacy are usually complex. A government may sometimes vociferously dispute an international legal norm yet comply partially or wholly with its demands (Cardenas 2010), or pledge allegiance to international law while seeking to bend it to its own advantage (cf. Hurd, this volume). The way in which a government responds to the exercise of authority by an international human rights institution is always multi-faceted, addressed to a range of domestic and international publics, and it may involve a number of state agencies and non-state actors. Hence, such responses are always open for political interpretation and continued contestation.

Expressions of legitimacy may often be more difficult to gauge and measure than expressions of illegitimacy. A recent study of the ECtHR (Çalı et al. 2011) concluded that in spite of all the political and academic debate about the Court's alleged legitimacy deficit, it actually enjoys a high level of legitimacy credit among some of its key stakeholders. Over-all, domestic politicians, judges and lawyers strongly support this supra-national human rights body to actively intervene in states' internal decisions on rights protection, and while they may dispute detailed factors, their general assessments of the Court's performance are more positive. The same might be true of other international human rights treaties and bodies: states often commit to them sincerely, and seek to comply with their provisions willingly, because they believe in the values expressed in the treaties. Sometimes such beliefs may be misinformed, exaggerated self-flattery. Yet, governments, courts and other institutional actors of the state often genuinely engage in an honest dialogue about human rights with international treaty bodies, with other governments or with civil society organizations at home and abroad. But such cases may be less likely to make the headlines of international media, draw the attention of transnational civil society or provide angles for research papers.

These criticisms, challenges and contestations over international human rights systems are a key reason motivating this volume. But it would be premature to assume that such expressions of mistrust and disbelief

necessarily indicate deeper crises of legitimacy, in objective or normative terms. The volume presents several contributions to debates about the legitimacy of international human rights norms, treaties and organs. The aim is not just to present solutions to the perceived problems of the legitimacy of these international institutions, but also to explicate in detail what the problem, if any, really is.

## **2. Academic debates about international human rights and the concept of legitimacy**

As international human rights regimes increasingly seem to face challenges from the governments and other actors they seek to regulate, they have also spurred debates among scholars of law, philosophy, political science and international relations. This volume presents a selection of chapters which variously analyse the legitimacy of international human rights regimes from the perspectives of international, political and legal theory. We have selected the contributions bearing in mind that any discussion of the legitimacy of international human rights institutions must necessarily straddle disciplinary boundaries. It should address both normative concerns of what legitimate authority entails, and the empirical concerns of how to assess the legitimacy of authorities in the real world. It should be comprehensible to legal theory, political theory and international theory, since the very problem of the legitimacy of international human rights regimes may both arise and require answers across the conventional distinctions between those theoretical traditions. While much of political philosophy and democratic and constitutional theory traditionally has tended to regard its subject as an enclosed state in isolation, international human rights institutions pose a problem precisely because they seem anomalous, at face value, to such assumptions, not least because they straddle the boundary between international and national. Similarly, while theories of international relations and international legal theory traditionally regarded sovereign states as the most important, if not the only, agents in world politics, international human rights systems and their normative premises challenge such conceptions: even though sovereign states have created and consented to them, they claim authority over states, but also increasingly over individuals and non-state agents, and they grant individuals as well as certain other non-state actors a standing and independent agency in international affairs. As such, the issues this volume addresses are located at this nexus between theoretical traditions and conceptual boundaries.



Across all three disciplines, we find an increasing scholarly interest in recent years for studying *human rights* as international norms, treaties and institutions. In political science and international relations, empirical scholars equipped with increasingly sophisticated quantitative and qualitative toolboxes have recently produced a burgeoning literature seeking to understand whether and how international human rights norms impact on the behaviour of states and other actors (for overviews, see Hafner-Burton 2012; Simmons 2009, pt. I; Tsutsui et al. 2012). Research has revolved around what leads governments to participate in international legal regimes that seemingly constrain their political discretion over their citizens, the procedures by which such regimes make and craft decisions, whether they actually influence the rights behaviour of states, and the role of domestic and transnational institutions and agents in those processes. While this line of research is still in its infancy, its outcomes may provide important and sometimes provocative insights and arguments to normative analyses of international human rights regimes. Take, for instance, the finding in many studies that a state's support for particular international human rights treaties does not generally correlate with actual human rights protections in that state, and that the treaties' effects are highly conditioned on domestic politics and institutions. On the one hand, such factual findings may seem to render the political controversy surrounding international human rights norms ill-informed or misleading, exaggerating the political impact and judicial authority of international human rights treaties and treaty bodies generally. An established international court such as the European Court of Human Rights may have a significantly greater influence on its membership than global supervisory organs such as the Human Rights Committee or the Committee on the Rights of the Child. On the other hand, empirical research may also lead us to ask new, qualified questions about how to normatively evaluate the soft, subtle and conditioned influence international legal norms do have when they interact with domestic institutions of rule of law and democracy.

Political and moral philosophers have recently turned their attention to international human rights. One of the key apples of contention among philosophers concerns what a philosophical theory of human rights should do (for overviews, see Baynes 2009a, 2009b; Beitz 2009; Buchanan 2010; Ingram 2008; Valentini 2012b). The conventional approach to the philosophy of human rights has been to theorize 'a concept of human rights [as a kind of general moral rights] that can be understood without reference to the global legal-institutional phenomenon of human rights' (Buchanan 2010). In contrast to such approaches, however, philosophers

have recently sought to develop a political conception of human rights. On this approach, the philosopher's task is 'to provide a critical reconstruction of human rights as they are in the international legal doctrine and practice of human rights' (Buchanan 2010). The point is not to evaluate whether this real-existing human rights practice conforms to some philosophical moral theory of what human rights are (which human rights there are, how they are justified, and so on), 'but rather to clarify the understanding (or understandings) of human rights with respect to its own practice' (Baynes 2009a). However, as Allen Buchanan points out, whether one starts in the legal-institutional phenomenon of human rights or in a moral conception of individual rights, both approaches require, sooner or later, a critical reconstruction of the institutionalized practice of international human rights. Eventually, then, the political philosophy of human rights faces questions about how best to implement and institutionalize human rights in our contemporary world, whether human rights institutions like the ones existing today are reasonable, whether the authority they exercise is legitimately binding on their subjects, and how they ought to interface with national legal and political institutions, especially procedures of democratic self-government. Hence, questions of the legitimacy of international human rights regimes should be of greatest interest to this line of scholarship in political philosophy.

The concept of legitimacy in international affairs has recently generated substantial literatures across these three disciplines. Noting how an ever growing number of multilateral organizations, global governance institutions and international courts and tribunals exercise increasingly autonomous authority over the sovereign states that have created them and delegated power to them, scholars have addressed a broad range of empirical and normative concerns relating to the legitimacy of international institutions that lack the transparency, accountability and representation we appreciate in democratic rule (Clark 2004; Dahl 1999; Keohane 2003; Keohane et al. 2009). Moreover, global governance regimes increasingly regulate not just the external relations of states, but increasingly intrude into internal affairs, blurring the traditional distinction between international and domestic spheres of policy and law (Kumm 2004; Zürn 2004).

This volume contributes to literatures on international legitimacy by focusing on international human rights systems, which present a peculiar case for a number of reasons. First, as we noted above, the institutionalization of international human rights may present certain challenges to established conceptions in all three theoretical domains. For traditional

political and international theory, it seems to present a conceptual anomaly, which cannot so easily be explained or justified in terms of established concepts and principles. For instance, while democratic theory has long grappled with the issue of whether and how to constrain the majoritarian procedures of popular sovereignty in order to protect the interests of minorities and individuals, such constraints are typically revisable by democratic decisions by the people's representatives. But how could one combine international treaties and courts with normative democratic theory, given that such international entities serve this constraining function and yet are difficult, if not impossible, to revise, change, exit or supervise? Hence, international human rights norms compel theorists to reflect on standard assumptions about the state as a given unit of analysis.

Second, international human rights institutions are, arguably, qualitatively dissimilar to the sort of global governance institutions usually addressed in many studies of international institutional legitimacy, such as the World Trade Organization, the International Monetary Fund or various organs of the United Nations (e.g., see Breitmeier 2008; Coicaud 2001; Jönsson & Tallberg 2010; Koppell 2010). Empirically, the politicization of international human rights institutions apparently takes a different form than public contestation over other types of global governance institutions (cf. Zürn et al. 2012). While a broad range of civil society actors increasingly contest the growing authority of regional and global international institutions, the critics of human rights institutions are typically governments, as our previous examples indicate. Several scholars have pointed out that conventional rationalist-functionalist conceptions of international regimes, as institutionalized solutions to collective action problems that result from international anarchy, seem to be of little use for explaining why states create, delegate authority to and comply with international human rights systems (Moravcsik 2000; Simmons 2009). But if so, how should we instead think of international human rights systems and the authority they claim over states and other actors? And why does their peculiar authority trigger politicization?

Third, in academic debates about international legitimacy, respect for human rights is usually seen as an essential feature of normative legitimacy for political institutions. Indeed, on some philosophical accounts, this is a primary function of human rights: to provide a standard for inter-state toleration, to help decide when the international community should regard a state as a member entitled to sovereign non-interference (Nickel 2006). Similarly, many normative theorists suggest that respect for basic human rights provides an essential aspect of legitimacy for global

governance institutions which regulate states in areas such as economy, the environment or security issues. But how should we assess international institutions which justify their existence solely in terms of promoting and protecting human rights? In the case of international human rights regimes, an account of legitimacy anchored in human rights might seem self-referential, or at any rate indeterminate.

Fourth, democracy is probably the only concept that can match human rights as a widely accepted yet essentially contested standard for evaluating the legitimacy of political institutions. Indeed, we are so used to speaking and hearing of democracy and human rights in conjunction that we often regard them as more or less synonymous. More sophisticatedly, we may think of human rights and democracy as interrelated and co-original (Habermas 2001), as defined in terms of one another (Goodhart 2005), or as expressions of a common notion of autonomy (Gould 2004) or of equal status (Buchanan 2010; cf. Hessler, this volume). Empirically, research often finds human rights and democracy not only to be compatible in practice but also to be correlated – democracy becomes difficult to realize where human rights are not safeguarded, and where democracy is lacking, the respect for human rights is usually wanting or worse. However, the issues addressed in this volume demonstrate that international human rights institutions and political practices and principles in democratic states may just as often stand in tension or outright conflict with one another. Among the central legitimacy concerns about international human rights treaties is the normative relationship between democratic rule, human rights and legitimate authority. Human rights treaties give citizens opportunities to pursue their interests vis-à-vis their own governments, while we expect democratic government to represent the interests of the citizenry. In such conflicts, which interest or principle should prevail?

Some claim that the recent worry and flurry over legitimacy in international, political and legal theory might signal a certain conservatism, or a managerialist, technocratic notion of international politics. Martti Koskeniemi warns that this academic and political 'legitimacy talk' mainly serves ideological functions, to mask power and its abuse:

the very notion of legitimacy is ideological inasmuch as its apparent openness dissimulates a substantive void that blunts legal and political criticism and lets power redescribe itself as authority *on its own terms*. The more there is debate about 'legitimacy', the more there is pure noise, and the less we are able to hear whatever critiques 'law' or 'morality' might offer.

(Koskeniemi 2003, p.367, emphasis in original)

Taking such warnings seriously, this volume nevertheless assumes that there may be more to legitimacy talk than pure noise, and that it may serve other social purposes than the ideological masking of power. At the same time, we assume that the social functions of legitimacy should be taken into account. As Ian Hurd reminds us, the sociological tradition regards legitimacy as a device to mitigate the threat that inequalities pose to social order:

Legitimation is one source of reasons for individuals to accept the existing inequalities in society as appropriate (or natural, or defensible). It does not *eliminate* the inequalities; rather it *justifies* them and reduces their political salience. In this light legitimacy is always a conservative force that acts to defend favored values against revolution.

(Hurd 2008, p.203, emphasis in original)

From a normative perspective, Buchanan and Keohane (2006) suggest that the 'circumstances of legitimacy' – that is, the circumstances under which questions of legitimate political authority arise – are situations in some sense beyond justice and self-interest: if an institution is legitimate, actors ought to comply with it, or at least not to interfere with it, even though it is neither perfectly just nor in full accordance with their self-interest. One might, arguably, even regard the circumstances of legitimacy as distinctly non-ideal. A common approach in recent political philosophy is to sketch principles of justice in ideal theory for a perfectly just society – that is, under the idealizing assumptions that everyone would act on those principles, knowing that others do the same, and that social conditions are favourable to realizing justice. Non-ideal theory, by contrast, relaxes the assumption of strict compliance and aims to formulate lower-level principles and rules to guide political decision-making 'in circumstances – our own – in which there is only partial compliance with principles' (Sangiovanni 2009, p.221; cf. Farrelly 2007; Hjorthen 2011; Valentini 2012a). Adherents of the ideal theory approach argue that it takes logical priority to non-ideal theory, as it provides the only way to identify what is ultimately desirable and to know exactly which moral demands we fail meet in our less-than-perfect world (Jubb 2012). However, the ideal theory approach has been criticized for providing insufficient practical guidance, precisely because principles of justice designed for idealized circumstances of strict compliance seem to say little about what duties and obligations apply to us under less idealized circumstances of partial compliance. Especially, a sceptic may wonder what guidance strict compliance theory can provide for theorizing legitimacy, at least in so far as we conform to the standard definition of

legitimate authority as a tri-partite right to rule, to be obeyed by subjects, and to coerce those who fail to comply (Simmons 1999). Thus defined, legitimacy is a concept of non-ideal theory. In particular, the legitimacy of international human rights regimes may seem to be a topic squarely located in the domain of partial compliance theory, as the need for institutions to protect individuals and minorities from rights violations would appear to arise only if we assume that individuals, governments and other agents sometimes, or even often, do not act as they ought, whatever we take the appropriate principles to be. In the words of Kwame Anthony Appiah, 'many questions of justice only arise once people behave unjustly' (cited in Galston 2010).

### 3. Outline of the book

In the following chapters of this volume, a number of authors – philosophers, lawyers and political scientists – provide multi-faceted attempts to address the problems of legitimacy that international human rights regimes may entail.

In her chapter, Samantha Besson argues that before one can assess the institutional legitimacy problems involved in enforcing and specifying international human rights, one must first account for the legitimate authority of international human rights law as such. Yet this topic, she finds, has been oddly neglected in recent debates about the legitimacy of international law, perhaps because a common conventional view holds human rights as standards of legitimacy for the rest of the legal order. Setting out to cover this lacuna, Besson develops a revision of Joseph Raz's account of law's authority, where she focuses on law's ability for democratic coordination when people disagree on issues of common concern as a main justification of its authority. Applying this conception of the authority of law to human rights, Besson argues that they are both inherently moral-political and inherently legal: in a democratic polity, the law provides the best way of mutually recognizing the importance of the moral interests expressed as human rights. From this foundation, Besson analyses the legitimate authority of international human rights law through four issues, key to any autonomy-focused account of legal authority: its subjects, justification, the role of consent and sovereignty. Besson concludes that the legitimate authority of international human rights law is 'doubly piecemeal': first, following the Razian account, the justification of authority will vary depending on the circumstances and the subject's own reasons. Moreover, in the case of human rights law, such contextual variation is particularly

prevalent, because given their reciprocal legal sources in domestic and international law, the legitimate authorities of international human rights and that of corresponding domestic human rights are themselves reciprocal. 'If the forum of realization of moral-political rights and as a consequence the locus of human rights legalization are situated at the domestic level', Besson concludes, 'this is also where the legitimation of international human rights ought to be sought for and promoted'.

Steven Wheatley examines the function of international human rights bodies in world society, and specifically whether their normative statements should be regarded as providing content-independent reasons for state parties to comply. To what extent should we recognize the normative authority of these international bodies to regulate domestic societies on issues where there is substantial political disagreement? Wheatley addresses the puzzle that international human rights bodies have the authority to develop the scope and content of international human rights, but in doing so, they extend the obligations of state parties beyond the original treaty text. Like Besson, Wheatley draws on the work of Raz. Applied to international human rights bodies, Wheatley argues, Raz's conception of authority implies that such institutions could only claim a right to rule where they can demonstrate that the state parties of international human rights treaties would better conform to the reasons that already apply to them by following the institution's directives than by acting independently. On Raz's interventionist account of human rights, however, the function of international human rights is to establish under what conditions external actors legitimately can take an interest in the exercise of sovereign authority in domestic societies. But this account, Wheatley argues, falls short where international human rights bodies have constitutionalized by developing a coherent jurisprudence, becoming an autonomous legal system. Such cases, where international human rights bodies adopt normative statements about the content of human rights norms and constitutional norms about norms, result in a dilemma: an international human rights body would possess legitimate authority in so far as state parties would better conform to the reasons that apply to them by following the body's directives than by acting independently, yet in most cases, domestic institutions will be better placed to determine the substance of human rights, especially so in solid democracies. Hence, in Wheatley's view, international human rights bodies need to guarantee that the procedures by which human rights norms are given content in domestic settings are consistent with democratic ideals. Therefore, such bodies may serve to provide both procedural standards for democratic

political systems and to express the content of human rights treaties, consistent with a literal, logical approach to international legal norms and the 'overlapping consensus' among state parties. Democratic states may accept the authority of international human rights bodies, Wheatley concludes, as an expression of epistemic humility, as the political and legal institutions of a democratic society must admit the possibility that they have been mistaken.

Kristen Hessler explores a similar dilemma. The case she uses as a starting point for her chapter is the United Nations Human Rights Committee, which in 2006 noted concern over the United States' disenfranchisement of citizens convicted of a felony, recommending the USA to restore the right to vote to citizens who have served their sentences. If legitimate states have rights to a certain level of non-interference in their domestic affairs, Hessler asks, why should their governments consider such recommendations issued by international human rights treaty bodies as authoritative, especially as such bodies themselves do not satisfy criteria of legitimacy grounded in the values of democracy or consent? In order to resolve this puzzle, Hessler suggests, we must reconsider the conceptions of both human rights and normative legitimacy. On an institutional conception of human rights, human rights express principles of justice which apply to the structure of a society's social and political institutions (rather than ethical principles that apply directly to an agent's conduct). Hessler adopts an institutional conception according to which human rights serve, primarily if not exclusively, to secure the equal moral status of persons, and this notion of equality also, she argues, informs the most convincing accounts of political legitimacy. Now, unlike states, supranational human rights are not morally necessary to achieve justice among fellow citizens, and therefore, it is a category mistake to apply traditional conceptions of legitimacy to them. Instead, Hessler concludes, we should regard human rights treaty bodies as supranational institutions created to improve the human rights realization of states' social and political institutions – that is, as means for improving the legitimacy of states. 'To the extent that participation in international human rights regimes enables states to improve their own human rights records, such participation also improves their political legitimacy', Hessler writes and suggests that participation in international human rights regimes may improve the level of human rights protection even in states that meet standard thresholds of internal political legitimacy.

The puzzle that Başak Çalı addresses in her chapter is why domestic authorities – the judiciary, legislative or executive – should accept the interpretive authority of international human rights courts and quasi-judicial



bodies. Dismissing alternative conceptions of legitimacy, Çalı suggests an instrumentalist view where questions of legitimacy – who should defer to what interpretations and who should make decisions – depend on what practices promote human rights globally in the long run. Often, the problem of legitimacy is not just to decide whether an international human rights court should prevail over a democratic state. Such a view neglects, she argues, the distinct moral value of international interpretive authorities in a world order where many political communities need to coexist with one another, and where there are many different interpretive authorities. That moral value goes beyond the domestic benefits to individuals as citizens; in exercising interpretive authority, international human rights courts help foster a global human rights culture, a debate about common standards and the common understanding that individuals have entitlements regardless of where in the world they happen to live. Noting that the long list of human rights provisions in international law might open for political manoeuvring by states, Çalı considers whether the scope of rights that international courts can legitimately interpret should be limited to a set of basic rights, while leaving the interpretation of a more extensive set of rights to domestic authorities. Rejecting this solution, Çalı instead argues that international interpretive authorities should develop standards of interpretation that take the respect for domestic democratic processes into account. When domestic authorities disagree with the interpretive authority, they should do so in a spirit of reconciliation and improvement, rather than conflict, she concludes.

In his contribution, Ian Hurd disputes common wisdom in both normative and descriptive accounts of legitimacy: that legitimacy implies compliance. Hurd studies the debates in the United States under the Bush administration about compliance with key international treaties on torture. While the international legal rules prohibiting torture are widely accepted and rarely called into question, their ostensive legitimacy coexists with state policies that permit torture – a puzzle from the conventional assumption that widespread belief in the legitimacy of an international rule will cause agents to comply with that rule. Hurd notes that even those actors who sought to open for the use of practices outlawed by conventions, such as the Convention Against Torture, accepted the legitimacy of international law, yet argued that torture practices did not constitute a violation of US obligations under international law. Hence, Hurd argues that perceiving a rule as legitimate does not preclude agents from violating it; rather, it shapes how violations are framed in order to legitimate them. International law is one tool which political actors use in the 'legitimation

contest', as they fight over the meaning of compliance and, like any tool, it may be used for quite different purposes. Hence, this example demonstrates that international norms, institutions and law do not put an end to politics, but rather imply its continuation by other means.

In her chapter, Lynn Dobson seeks to offer a theory of the political legitimacy of international human rights institutions. Providing some clarifying conceptual distinctions, Dobson argues that political legitimacy must be distinguished from other types of normative justification, such as morality and justice, and pertains to the wielding of certain kinds of power by specific bodies. Specifically, legitimacy entails that a body has a right to rule over subjects who, in turn, are under a political obligation to it. On this view, it is not a capacity for coercion that makes legitimacy significant; rather, it raises a need for justification in situations where other reasons for action are insufficient to determine action. Here, Dobson makes two important claims about determining political legitimacy. First, political legitimacy is invoked comparatively, when credible candidates compete for authority in a domain that only admits one holder, and, second, attributions of legitimacy are always contextual, specifying which institution is legitimate for whom over what. Now, for international human rights institutions, this means that the question about their legitimacy boils down to the question: when should states, that believe their own institutions to be adequate to the task of applying human rights law, defer to the authority of international bodies? Here, Dobson suggests opening up the idea of pre-emptive power in legitimacy, so that both its scope and content may be variable and truncated. Consequently, an international institution's claim to legitimacy, Dobson concludes, 'would be less comprehensive and less hard-nosed than is the standard claim to legitimacy we are familiar with'. On this view of legitimacy, rather than telling states what to do, international human rights institutions hold states to account from deviations from such first-order commands.

The chapter by Johan Karlsson Schaffer explores whether international human rights institutions can be assessed by certain complex, hybrid standards of legitimacy that cosmopolitan theorists have suggested for global governance regimes. While such regulatory regimes may perhaps enjoy a *prima facie* justification in terms of the benefits they help states obtain, such a rationalist-functionalist view of institutions has difficulties making sense of international human rights institutions, which do not serve to solve collective action problems among states, but to regulate the internal relation between governments and their citizens. If we conceive of international human rights institutions in this way, they are justified to the

extent that they provide to individuals and groups certain benefits, such as the opportunity to assert their interests vis-à-vis their governments. If so, state consent may offer a standard of legitimacy more plausible and feasible than recognized by certain cosmopolitan authors, he concludes.

Richard Bellamy starts from a number of recent controversial decisions by the European Court of Human Rights, which, similarly to Hessler's empirical example, relate to the disenfranchisement of prisoners serving custodial sentences. Drawing on the debate about the case of *Hirst v. the United Kingdom* as an illustration, Bellamy examines from a normative perspective whether international courts may legitimately interfere with the legal and political decisions and processes of well-established democracies, given that such states may seem to possess greater democratic legitimacy than most international arrangements. Bellamy explores the issue from the theoretical vantage point of political constitutionalism, which emphasizes the constitutional qualities of actual processes of democratic self-government and thereby offers an alternative to the dominant legal constitutionalist understanding of the role of international human rights conventions. Just as political constitutionalism only rules out strong forms of judicial review, weak review by international human rights organs may also be considered legitimate from this theoretical perspective. An international human rights convention can be regarded as an extension of the domestic political constitutions of democratic states to the extent that it results from, and is regulated by, a voluntary and fair association among democratic states, where its competences remain under their equal control and are limited to weak, contestatory review, respecting a principle of subsidiarity in its judgments. Bellamy finds that while the European system falls short of some of these criteria, it could easily be adjusted to fulfil the political constitutionalist model's demands.

Similarly engaging with the authority of international human rights courts over well-functioning democracies, Andreas Føllesdal presents a partial democratic defence of the judicial review by the European Court of Human Rights. The chapter addresses some of the tensions between sovereignty, international human rights review and legitimacy, and brings these findings to bear on the proposals for reform of the ECtHR that would reduce its authority over national legislatures and judiciaries. The objectives of such review are not obvious, the causes of non-compliance are contested, as is the legality of dynamic treaty interpretation; all of which hamper efforts to assess proposed improvements. Føllesdal first presents some relevant aspects of the ECtHR and reviews some of the recent criticism against the ECtHR practice of judicial review to protect human rights

in 'well-functioning' democracies, in terms of various forms of legitimacy deficits. The chapter also presents some of the recent proposals for reform of the ECtHR. Subsequently, he lays out some reasons why such judicial review of majoritarian democratic decision-making may be defensible, also for well-functioning democracies, and responds to some of the criticisms, presenting a partial defence. Some standard objections are not well targeted against the practices of the ECtHR, Føllesdal argues, partly due to the division of responsibility between the Court and national public bodies, and the different roles of legislators and of judiciaries. His chapter concludes by considering some of the important remaining normative challenges, this partial defence notwithstanding.

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