

Legitimacy, global governance and human rights institutions: Inverting the puzzle

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Introduction

In this chapter, I draw on recent scholarship on the alleged legitimacy deficits in global governance institutions, seeking to engage the notions of legitimacy this literature suggests with the intriguing case of international human rights institutions. First, I seek to reconstruct how this literature presents a view of the problem of legitimacy in global governance that is based on a particular notion of international institutions, a notion that both explains and justifies global governance institutions in terms of the collective goods they help states obtain. The puzzle of legitimacy, on this view, lies in offering citizens valid reasons to obey, support or abstain from interfering with global governance institutions – reasons that include certain procedural, epistemic and substantive elements, which together comprise a complex, hybrid standard of legitimacy.

Second, I explore to what extent this view of legitimacy problems in global governance institutions can be applied for analyzing corresponding legitimacy problems in international human rights institutions. Drawing on recent liberal international scholarship, I explore the ways in which international human rights institutions constitute a different kind of political entity than typical global governance institutions. Uniquely, international human rights institutions do not help states obtain any joint benefits, but regulate the internal relation between a government and individuals under its jurisdiction, and, to the extent that they are effective, chiefly rely on domestic mechanisms of enforcement. This crucial difference between

the two kinds of international institutions, in turn, changes the legitimacy puzzle involved. In the human rights area, the problem of legitimacy rarely entails offering citizens reasons why they should accept to bear the costs of international cooperation in light of the benefits it provides for states. Rather, the issue is why governments should accept their obligations under international human rights law, in light of the benefits human rights treaties provide for citizens. In the third section, I draw out the implications of this analysis for finding such reasons. While the complex, hybrid standards of legitimacy suggested for global governance institutions seem difficult to transpose to international human rights institutions, the discarded notion of state consent provides an essential component of legitimacy for the human rights area. Finally, I discuss whether the notion of international institutions discussed in the chapter may have implications beyond the human rights area.

Global governance institutions and problems of legitimacy

Over the past decade or two, scholars from various fields – in international law, political philosophy, international relations, European studies, etc – have produced a burgeoning literature on the legitimacy of the institutions of global governance. Most, if not all, seem to agree that there is an expanding gap between, on the one hand, the number, the scope and the power of international institutions, and, on the other hand, the justification of their right to govern, which cannot merely, or at all, be based on the consent of the states that have created them and delegated authority to them. And while some doubt that this gap could be overcome, most seem to think of it as one of the most urgent contemporary global political matters. In short, a broad international academic literature seems to agree that we're witnessing an impending legitimacy crisis in global governance.¹

However, before one can start asking any normative questions about international institutions, such as what, if any, normative conceptions of legitimacy or accountability apply to them, and if so, in what way, one must first settle the more fundamental ontological question: What are they? Answering that question might entail accounting for how international institutions emerge, why states, or possibly other actors, create them, how they change and in what ways they impact on other societal actors, structures and processes.² In particular, to explicate the political impact of international institutions – the power, authority or influence they possibly exercise over other agents – seems crucial if we wish to assess whether they are also

¹ Clark 2004; Zürn 2004; Scholte 2004; Keohane; Held 2006; Bexell, Tallberg, och Uhlin 2010.

² Duffield 2007.

legitimate, either normatively and objectively or in the eyes of the agents over which they exert their influence, but it may also determine which standards or notions of legitimacy we think apply to them.³

Only too often, however, normative studies of legitimacy in global governance seem just to postulate that certain international institutions exercise increasingly autonomous, unaccountable power, and then proceed to discuss what they see as the more important matter of controlling that power in various ways. This is somewhat surprising, given that empirically oriented international relations scholars have spent a great deal of the past decades debating precisely what international institutions are and how they matter.⁴ Are they merely epiphenomenal to power or do they exert an independent influence on international politics? And if they do, how? By setting the rules of the game, helping states solve coordination and collective action problems, or rather by defining the roles of the play, constituting identities and interests? Any normative theory about international institutions must take a stand on such empirical or ontological issues, if not else just to specify the object to which its normative analysis and prescriptions apply.

On the other hand, international relations debates about institutions hardly exhaust the matter either, since those debates still seem to express an idealist bias: Whether rationalists or constructivists, scholars who agree that institutions do exert an independent influence mostly seem to regard that influence, explicitly or implicitly, as benign. Institutions provide governments with joint benefits they could not otherwise obtain, or the socialize states to civilizing, liberal norms and identities. Interestingly, when other sub-disciplines of political science have turned their attention to institutions in the past decades, they have assessed the influence of institutions more skeptically.⁵ Sociological and historical institutionalism teaches us that institutions often take on a life of their own, and create constraints and opportunities neither intended nor anticipated by those who created them – an insight that only rarely informs normative studies of international institutions.⁶

In this chapter, I shall draw on a particular body of scholarship that has addressed problems of legitimacy in global governance. We may call it *cosmopolitan functionalism*, for it combines the idea that international institutions can be explained and justified in terms of the benefits they help states obtain – a functionalist argument – with a commitment to liberal cosmopolitanism; the idea that human beings are equally the ultimate units of moral concern for everyone (though

³ Reus-Smit 2007.

⁴ Simmons och Martin 2002; Martin och Simmons 1998.

⁵ March 1989; Peters 2005; Aspinwall och Schneider 2000; Jacobson 2000.

⁶ Barnett och Finnemore 1999; Simmons och Martin 2002; Zürn m.fl. 2007.

it is rather functionalism than cosmopolitanism that interests me here). The recently burgeoning literature on cosmopolitanism and global justice often appeals to functionalism in justifying a cosmopolitan political order: Transcending the borders of sovereign states, many pressing contemporary societal problems call for functional, multi-level and multi-sited global governance institutions.⁷ As another characteristic trait, cosmopolitan functionalism rejects state consent, global democracy and global justice as normative conceptions of international institutional legitimacy, and instead suggests that a proper standard of legitimacy for global governance must be complex, taking into account both procedural, epistemic and substantive elements.

When theorists within this family approach the subject matter of the legitimacy of global governance institutions, they usually have multilateral organizations in mind, such as the IMF, the WTO, the World Bank, the ICC, or the UN and its various organs – formalized institutional bodies with an acronym and an address. In this literature, a key reason for focusing on such institutions is the political power or authority they supposedly exercise, a type of authority that distinguishes them from other political entities, most notably states. Akin to states, global governance institutions issue rules and claim the authority to sanction those who fail to comply with those rules.⁸ By the rules they set, institutions may constrain the choices facing societies and impact on many persons' fundamental interests, which makes them distinctly political institutions.⁹ In contrast to states, however, global governance institutions have a restricted remit rather than comprehensive authority; they do not claim a Weberian monopoly of violence, and they rely, importantly, on the consent of states that delegate authority to them.¹⁰

What justifies the existence of such institutions? Institutional cosmopolitans usually point to three kinds of instrumental justifications for international institutions: They provide joint benefits, prevent abuses of power and promote global justice. The first set of arguments, which reflects neoliberal institutionalist theories of international cooperation, focuses on the short-term and fairly concrete benefits international institutions provide by helping states overcome

⁷ Held 2006; Kuper 2006; Pogge 2002.

⁸ Buchanan och Keohane 2006.

⁹ Caney 2009.

¹⁰ Simon Caney (2009) further suggests that international institutions differ from states in that they "are likely to have a more culturally heterogeneous population than any state". However, given that international institutions do not claim any territorial authority, it seems hard to think of them as being populated. Moreover, while the policies and decisions of global governance institutions may have political influence on individual persons, they rarely claim authority over individuals in a way analogous to the direct authority states claim over their citizens.

collective action and coordination problems that result from the anarchical condition of the international system, and enable states, as self-interested as they are, to construct regulatory frameworks and establish mutually beneficial welfare-enhancing cooperation that cannot otherwise be obtained. Typical examples of such cooperation are regulatory regimes that promote free trade, regulate financial markets, or curb border-transgressing environmental degradation. Another set of arguments, drawing, perhaps, on federal-republican international theory, suggests that in an international system characterized by immense power asymmetries, international institutions play an important constraining role, as a system of checks and balances on sovereign states, preventing powerful states from abusing their power and protecting weak powers from domination.¹¹ In that sense, international institutions, built on strategic restraint, by which the great powers make concessions to the weak in exchange of compliance, may advance a nascent liberal, constitutional order. A third set of arguments, which mirrors idealist or transnationalist theories of international relations which assume cooperation among states to result from a harmony of interests, suggests that global governance institutions serve a greater purpose of the common good, such as promoting world peace or global justice. Global governance institutions will eventually play an important part in a functional division of labour in the pursuit of global justice and in developing a cosmopolitan political order, this argument suggests, and they may help to ensure that otherwise unwilling states comply with cosmopolitan aims and principles. That is, not only would institutions ameliorate an anarchic system of sovereign states; institutions may potentially, in the long run, contribute to its fundamental transformation into something qualitatively different.¹²

While not necessarily mutually coherent, these three sets of arguments – joint benefits, checks and balances, and global justice – supposedly answer the question why international institutions exist in two related but distinct ways. First, they offer *normative justifications* of international institutions: Global governance institutions may hold a *prima facie* presumption of normative justification, or legitimacy, to the extent that they fulfill certain functions and promote certain ends. Hence, these justifications are instrumental, as they do not seek to justify international institutions in terms of some innate quality or inherently fair procedures, but in terms of the outcomes they help bring about. Second, however, these arguments may also read as *functional explanations* of why international institutions exist: The agents of world politics create international institutions in order to solve collaboration and coordination problems in the provision of certain collective goods, such as a clean environment, world peace or international

¹¹ Deudney 2007; Ikenberry 2001.

¹² Jacobson 2000.

order. As explanatory accounts of international institutions, then, these arguments are consistent with a rationalist-functionalist account of institutions.

To the extent that one explains or justifies international institutions in terms of the collective goods they provide, however, one also needs to clarify who constitutes the collective that may enjoy the good: *Cui bono*? While some of these collective goods are pure public goods – in the sense that anyone, and not just the contracting states, could enjoy world peace – others are less purely public, as the contracting states are the primary or only direct beneficiaries, and may not automatically translate into a collective good for the populations of those states. Moreover, even if a good or service is strictly and wholly public in consumption, it remains private in production; even when everyone can enjoy the good, someone must pay the price of providing it.¹³ Thus, any institution may have profound influences on the distribution of economic and political success and failure within a community.¹⁴ Distinguishing between beneficiaries and benefactors is important in order to understand why global governance institutions, in spite of the benefits that explain and justify their existence, may lead to important legitimacy problems.

International institutional legitimacy: Problems and solutions

If we justify and explain international institutions in terms of helping states solve problems of collaborative action in the provision of public goods, they might seem not to entail any serious problem of legitimacy, for who could reasonably object to institutions that provide joint benefits, restraints on power, and global justice and peace? The problem is that in order for global governance institutions to provide those goods efficiently, people must perceive institutions to be legitimate. In recent years, this literature points out, people – typically, the citizens of Western, liberal democracies or an emerging global civil society – have increasingly started to question and dispute the power or authority exercised by these institutions. In terms of *descriptive* or *subjective legitimacy*, many people increasingly seem to believe that these institutions, or the broader political order that they comprise, do not live up to their normative expectations of a decent political order, and, as people act on such beliefs, international institutions will increasingly have difficulties to provide the public goods because of which they exist. Further, these beliefs about a lack of legitimacy may be correct. In *normative* or *objective* terms, international institutions fail to meet the appropriate standards of legitimacy.¹⁵

¹³ Filippov, Ordeshook, och Shvetsova 2004, 51.

¹⁴ Bohman 1999.

¹⁵ Zürn 2004.

Thus, the problem of legitimacy in global governance involves three sets of entities: International institutions, states, and citizens. We may call this the *authority relation*, which is the object of legitimacy – the thing that may need normative justification and social acceptance. International institutions exist because they help states obtain certain collective goods they cannot otherwise obtain, but in order to do so efficiently, citizens must perceive the institutions to be legitimate. For states, who are the primary beneficiaries of the collective goods an institution provides, to be able to obtain those goods may seem sufficient justification, in line with their rational self-interest. Legitimacy crises arise when citizens distrust international institutions to the extent that they can no longer provide the collective goods for which they were set up. The puzzle lies in offering individuals reasons, short of justice and self-interest, to accept the authority of international institutions even though they are far from just and even though individuals are not necessarily their net beneficiaries.¹⁶ And the fact that institutions provide one class of agents (states) with certain joint gains may seem an insufficient reason for another class of agents (individuals) to accept the authority of that institution, and to bear the costs, directly or indirectly, of providing those benefits.¹⁷

The question then is: Under what circumstances should citizens obey, support or at least abstain from interfering with international institutions? In other words, what criteria should international institutions fulfill in order to be legitimate? Cosmopolitan functionalist contributions to the literature on legitimacy in global governance tend to share a few commonalities: Rejecting theories that point to global democracy, global justice or state consent as conditions of legitimacy, they instead present theories of normative legitimacy which bring in a diverse set of elements into complex or hybrid standards or principles according to which international institutional legitimacy can be objectively assessed. Thus, for instance, Allen Buchanan & Robert Keohane present a *complex standard* of legitimacy, whereby a global governance institution is legitimate – and thus deserves that those who are subject to it treat the rules that it issues as worthy of compliance, regardless of the content of those rules – to the extent that it (a) enjoys the on-going consent of democratic states; (b) meets certain substantive criteria, such as not violating basic human rights and actually meeting the objectives in terms of which it justifies its existence; and (c) provides outside epistemic agents, such as NGOs, opportunities to engage in monitoring what it does and to participate in revising its goals and procedures.¹⁸ Simon Caney presents a shorter but similar *hybrid standard*, which combines a

¹⁶ Buchanan och Keohane 2006.

¹⁷ Peter 2010; Waldron 1987.

¹⁸ Buchanan och Keohane 2006.

substantive and a procedural component: “international institutions should be designed so that (i) persons’ most fundamental rights are upheld ... and, then, (ii) over and above that they provide a fair political framework in which to determine which principles of justice should be adopted to regulate the global economy.”¹⁹ And Matthias Kumm, suggests that while international law, which he understands as a form of global governance, holds a *prima facie* legitimacy in virtue of the public goods it promotes, that formal principle of legality must be weighed against a jurisdictional principle of subsidiarity, a procedural principle of adequate participation and accountability, and a substantive principle of achieving outcomes that do not violate fundamental rights and are reasonable.

Apparently, these conceptions of international institutional legitimacy share a number of commonalities. First, they suggest that legitimacy results from fulfilling not a single value or property, but a mixture of procedural, epistemic and substantive components. While the conceptions may differ slightly in their weighting of these elements, their common key *substantive* concern is that an international institution cannot be legitimate if it violates basic human rights, assuming that such rights provide a standard for minimal moral acceptability to which most people would agree, while the *procedural* components call for channels through which a range of actors – democratic states and non-governmental organizations – can express their consent, monitor and hold to account.

So what are these standards supposed to do? One might understand them as operationalizations of normative concepts of legitimacy for empirical research. Hence, we could, presumably, apply the standards to real existing international institutions in order to compare their legitimacy, perhaps quantifying and ranking them according to a legitimacy index. We would face certain epistemic problems of reliability and validity, such as how to weight the components and how to quantify from qualitative observations. For instance, when assessing whether an institution fulfills the criterion of ongoing consent of democratic states, should the consent of India and Iceland count the same, or rather in proportion to their population? And where along the continuum between a simple majority and full consensus would the criterion be fulfilled? Determining such issues is difficult, but manageable, as for any empirical study of the kind.²⁰ Such an index might be useful, for instance for testing whether international institutions that score high on the normative legitimacy index also meet higher social acceptability among states or other key groups.

¹⁹ Caney 2009.

²⁰ For an example of such an approach to the related concept of accountability, see Kovach, Neligan, och Burall 2003.

However, another way to understand these normative standards of legitimacy rather sees them as providing guidance for political action. As individuals, policy-makers or citizens, we ought to take these principles to heart and act on them by giving our support to institutions that fulfill the standards, while working to reform those that fall short. The complex, hybrid standards are part of a theory about the conditions under which citizens of Western, liberal democracies have a moral duty to obey international law in their exercise of constitutional government, or suggest principles that policy-makers of such states should adhere to when designing or reforming international institutions in order to improve their legitimacy. I believe these authors themselves understand these standards primarily to be action guiding in this sense – or perhaps they would dispute the distinction between a standard for empirical research and one for political action.²¹ Taking the standards to guide individual action, however, leads to epistemic and practical problems considerably more difficult to surmount.

First, to the extent that the standards are intended to help individual citizens or policy-makers decide what to do, the more complex and unclear the standard, the more difficult it will be to act upon. For instance, judging whether an institution deserves our obedience, support or non-interference may require that we gather information about whether democratic states express consent for the institution on an ongoing basis, about the extent to which the institution impacts on fundamental human rights and about whether the institution allows external agents to participate in revising its objectives and procedures. While such epistemic problems in assessing the standard may be manageable within a scientific study, many individuals will find it difficult to gather and assess such information. Such epistemic difficulties may not seem to undermine the normative validity of a conception of legitimacy, but they reduce its potential to guide political action.

Second, even if citizens could reliably gain the knowledge about international institutions they would need, how are they supposed to act upon that knowledge so as to conform to the demands of legitimacy? Put differently, what does it mean for citizens, in Kumm's words, to obey or disobey international law when they collectively exercise constitutional government? How can citizens fulfill their duty, on Buchanan & Keohane's view, to support or at least not interfere with legitimate global governance institutions? Citizens in modern, democratic states mainly participate in constitutional government by electing representatives. It seems hard to tell what it means for citizens to obey international law or to support international institutions when they cast their vote for a party or a candidate. Any person's individual impact on global

²¹ Sangiovanni 2009.

governance is so attenuated, and may be offset by a range of other pertinent, salient concerns, so as to be practically meaningless, most of the time. Moreover, requiring of citizens to obey international law or to support international institutions seems a category mistake, since they are not subjects of international authority in the way that the states they inhabit and the governments they elect may be. A government, by contrast, seems a more plausible candidate for holding a duty to obey international law in its collective exercise of constitutional government.

Thus, taken together, for both epistemic and practical reasons, these complex, hybrid standards seem insufficient to guide the political action of individuals or citizens in a way that would justify the use of terms like duties and obedience to describe their relation to authoritative global governance institutions. As normative demands, the standards fall short of the ‘ought implies can’ requirement. Of course, the standards could still fulfill other important purposes, such as offering an operationalization of normative legitimacy for empirical research, perhaps forming part of an explanatory theory of social legitimacy, hypothesizing that the more institutions approach these objective criteria, the less societal resistance and critique they’ll face from the pertinent political actors.

Still, while these standards may be difficult to act upon, the important point is that taking them to guide action for citizens, rather than just to operationalize a normative concept of legitimacy for empirical research, also underscores how this literature understands the legitimacy problem of global governance institutions: The problem entails giving citizens reasons to accept the authority of international institutions, even though the benefits such institutions provide are mainly enjoyed by states. In order to solve this impending legitimacy crisis, cosmopolitan functionalism suggests combining procedural, epistemic and substantive elements into a complex, hybrid standard of legitimacy, which may then be used to assess whether citizens should obey, support or abstain from interfering with institutions that live up to such complex measures. Now, in the next section, I shall explore how we need to modify this understanding of international institutions and of the problems and solutions of their legitimacy in order to make sense of the peculiar case of international human rights institutions.

Why international human rights treaties are different

The previous section concerned the literature about global governance institutions, their legitimacy problems and a specific type of normative standards addressed to those problems. In this section, I turn to the particular instance of international human rights institutions, the

problems of legitimacy they might entail and what solutions, in turn, are available. Could we transpose the literature on legitimacy in global governance to the case of international human rights institutions? I shall argue that the peculiar nature of international human rights institutions recasts the problem of legitimacy in ways that have important repercussions for how to assess and address their legitimacy in normative terms. Recall that the normative global governance literature both explains and justifies international institutions in terms of providing states with benefits and collective goods they cannot otherwise obtain. Both in normative and explanatory terms, such an account seems difficult to apply to international human rights institutions, a fact which has consequences for how we should evaluate the legitimacy of such institutions.

What is so special about international human rights treaties? A number of international relations scholars have noted how international human rights regimes present something of an anomaly for mainstream theories of international relations. International human rights law and the mechanisms for its enforcement diverge in important respects from other kinds of international institutions that seek to regulate interactions among states. Detailing how international human rights institutions differ from other international regulatory regimes or global governance institutions will help us understand better the problem of their legitimacy, which in turn will help us better grasp solutions to that problem. Thus, this section serves to present an idea about how international human rights institutions have an impact on politics, what sort of difference they make, and what kind of authority they hold over whom. That idea will then serve as the basis for an argument about how to understand the problem of their legitimacy. Moreover, this exercise may also help us determine the proper domain and boundaries of cosmopolitan functionalism as a general approach to international institutional legitimacy.

Some scholars have sought to analyze international human rights regimes as yet another case of global governance – a regime similar in kind to those regulating other issues areas.²² However, in terms of both means and ends, they differ from most forms of institutionalized international cooperation, as Andrew Moravcsik points out:

“Unlike international institutions governing trade, monetary, environmental, or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities. In contrast to most international

²² Donnelly 1986; Nickel 2002; Montgomery 1999.

regimes, moreover, human rights regimes are not generally enforced by interstate action. Although most arrangements formally empower governments to challenge one another, such challenges almost never occur. The distinctiveness of such regimes lies instead in their empowerment of individual citizens to bring suit to challenge the domestic activities of their own government.”²³

Hence, international human rights regimes constitute a special case of international institutions because they seek to constrain government behaviour towards citizens, rather than inter-state behaviour. Furthermore, unlike other regimes, international human rights regimes do not necessarily represent any mutual gain for contracting states.²⁴

These peculiar aspects of international human rights regimes are frequently misunderstood. Beth Simmons suggests that international relations scholars have been overly pessimistic about the political impact for international human rights treaties because they have been looking in the wrong direction: “outward at interstate relations rather than inward at state-society relations.”²⁵ Evaluating existing accounts that seek to explain compliance international human rights treaties as a matter of inter-state politics, Simmons argues that the realist skeptics are mostly correct and that rationalist-functionalist theories largely miss the mark. Realists are accurate in their claim that governments are unlikely to comply with international human rights treaties unless it is in their interest to do so. Moreover, the family of rationalist-functionalist theories, analyzing international institutions in terms of self-enforcing agreements and credible commitment, “is simply an uncomfortable fit for explaining human rights compliance.”²⁶ Simmons points to at least three ways in which such theories have difficulties explaining why states comply with international human rights treaties: In the human rights area, there are no *joint benefits*, since a state can generally realize the level of rights protection it desires without the cooperation of other states, there is no *reciprocal enforcement*, as a government is unlikely to alter its own rights practices in order to reciprocate for abuses elsewhere, and there are no significant *reputational costs*, since, compared to other areas, it is hard to identify consequences of a bad reputation with respect to human rights treaty compliance.

And yet, international human rights treaties do have a political impact – it just occurs in another political domain than where international relations scholars have been prone to look: In the domestic realm. Scholars providing such second-level explanations argue that international

²³ Moravcsik 2000.

²⁴ Landman 2005.

²⁵ Simmons 2009, ###.

²⁶ Ibid., 123.

human rights treaties have important effects on domestic politics, by empowering individuals and groups domestically and, correspondingly, by restricting the political discretion of governments.

What domestic factors can account for the fact that states willingly restrict their sovereignty by binding themselves by international human rights treaties? In his case study of the European human rights system, Andrew Moravcsik argues that governments commit to international human rights institutions, with independent jurisdiction and private access, just as they commit to independent domestic institutions, as “self-interested means of ‘locking in’ particular preferred policies – at home and abroad – in the face of political uncertainty.”²⁷ This tactic is particularly useful for newly established democracies, for which the benefits of stabilizing the domestic political status quo against anti-democratic threats outweigh the sovereignty costs of membership. Hence, by alienating sovereignty to an independent international authority and restricting its domestic political discretion through binding itself to an international human rights treaty, a government may seek to preserve its favored domestic policies and insulating itself from the actions of future governments.

International human rights treaties imply not only constraints on domestic political discretion, however, but also opportunities for political action, by allowing individuals and groups new means by which to pursue their interests vis-à-vis their governments. Simmons suggests three mechanisms by which international human rights treaties may have an impact on domestic policies and in turn on human rights practices: Treaties may *effect elite-initiated agendas*, by raising questions of ratification and implementation, and thus insert topics into domestic politics that would not otherwise have been there. Further, treaties may *support litigation*, by rights claimants and lawyers, especially where treaties have the status of law and where courts are relatively independent from political power. Finally, treaties may *spark mobilization* by providing crucial political, legal and social resources to individuals and groups whose goal is to hold governments to their promises. Whether such mechanisms are effective depends crucially on the institutional features of the domestic political and legal system, and on the nature of the human right in question, and changes are often subtle: “They involve changes that give relatively weak political actors important tangible and intangible resources that raise the political costs governments pay for foot-dragging or for noncompliance.”²⁸

Summarising her argument, Simmons suggests that international human rights treaties constitute a unique class of international agreements:

²⁷ Moravcsik 2000; cf. Moravcsik 1995.

²⁸ Simmons 2009, ##.

“International human rights treaties have a singularly unusual property: They are negotiated internationally but create stakeholders almost exclusively domestically. In the human rights area, intergovernmental agreements are designed to give individuals rights largely to be guaranteed and respected by their governments. Treaties of this kind have a potentially dramatic impact on the relationship between citizens and their own government, creating a huge pool of potential beneficiaries if the treaty is given effect. ... By sharp contrast, international human rights treaties engage practically no important interests among states *in their mutual relationships with each other*. Most of these agreements simply do not have the capacity to alter international politics in important and predictable ways. The same is not true of politics at home.”²⁹

Now, if international human rights institutions have their effects on politics not by promoting mutual benefits in inter-state politics, but by restricting governmental discretion and enabling individuals and groups to pursue their interests vis-à-vis their government, what sort of normative problems of legitimacy follow? Notably, these second-level theories are not explicitly normative, but as ontological and explanatory accounts of what international human rights institutions are and why they make a difference to politics, they describe a relation between states, persons and international institutions that may need a special kind of legitimation and justification – that is, an authority relation that a normative theory of legitimacy may seek to justify.

The legitimacy puzzle of international human rights institutions

If legitimacy is about justifying the exercise of power, any theory of legitimacy must offer an account of who exercises power over whom, to whom justification may be owed. That is, before we can justify an institution’s exercise of power, we must specify what its political impact is, and over whom.

To the extent that international human rights institutions are dissimilar to global governance institutions in general, since they cannot meaningfully be construed in terms of mutual advantages and reciprocal enforcement in the external relations among states, but rather have their prime political effects in altering the internal relation between a government and its citizens, then they comprise an altogether different legitimacy puzzle as well. First, while global governance institutions may claim *prima facie* legitimacy in terms of providing states with certain collective goods or joint benefits, international human rights institutions would rather

²⁹ Ibid., 125f.

claim a baseline justification in terms of providing certain advantages to individuals and groups. Second, the costs of providing such advantages fall not on citizens, but on governments, who relinquish domestic political discretion to an independent international treaty body and commit to norms and policies that may be turned against them or their future successors.

Thus, compared to global governance institutions, international human rights institutions invert the legitimacy puzzle. In the area of human rights, the problem of legitimacy is rarely to give citizens content-independent reasons to accept the authority of international human rights courts or to show that individuals-qua-citizens have a duty to obey international human rights law when they participate in politics. Rather, the problem of legitimacy is to offer such reasons to states – to governments, parliaments, courts, the police, and other institutional agents of the state who are supposed to commit to and comply with the norms of international human rights treaties. As in global governance, there is a triangular authority relation that may need legitimization, but it points in another direction. Here, the question of legitimacy is not, as in global governance, why individuals should comply, in spite of tangible net costs, with rules or institutions which provide states with certain net benefits they could not otherwise obtain, but rather why governments should comply with human rights norms in spite of the tangible costs (and usually meager benefits) they impose on states, assuming that they hold a *prima facie* claim to legitimacy in light of the benefits they provide to individuals and groups.

Like the three sets of arguments offered to justify and explain global governance institutions, a similar array of functional and instrumental arguments suggest themselves for human rights institutions. They may improve the human rights behaviour of states by offering alternative channels and practical tools by which individuals and groups can seek to pursue their interests, in addition to the channels and tools already offered by state and civil society institutions.

Rehabilitating state consent

Now, if the legitimacy puzzle of international human rights institutions involves offering states or governments reasons to carry the costs they entail, the benefits those institutions provide for individuals will seem insufficient reasons, just as joint benefits for states may seem insufficient reasons for individuals to accept the authority of global governance institutions. So in terms of what could the authority of international human rights institutions over states be justified? Here, I shall argue that the legitimacy problems of international human rights institutions seem to require different standards of legitimacy than the corresponding problems of global governance institutions.

Many normative theorists of international institutional legitimacy reject state consent: The notion that international law or institutions derive their legitimacy from the fact that states have consented to them, critics claim, represents an outdated, or even immoral, conception of legitimacy that is neither sufficient nor necessary for an international institution to command our obedience, support or non-interference as citizens. However, given that international human rights institutions turn the problem of legitimacy on its head, state consent may in fact offer a basic component of their legitimacy. As the puzzle now is why states (not citizens) should accept the authority of international human rights institutions, although they have little to gain from it, the fact that states actually and voluntarily have ratified human right treaties seems to provide one compelling reason (if not the only one) for why they should also comply. Applied to the peculiar case of international human rights institutions, moreover, state consent seems to withstand at least some of the standard criticism.

For instance, both Buchanan & Keohane and Caney attempt a *reductio* against state consent, arguing that this notion of legitimacy presupposes that legitimacy can be delegated, so that global governance institutions inherit their legitimacy from legitimate states consenting to them.³⁰ However, their objection goes, many states do not have any legitimacy to pass down the line, because they mistreat their own citizens (and foreigners) and because they lack procedures guaranteeing democratic accountability. Thus, illegitimate states cannot transfer any legitimacy to international institutions. This might seem a plausible objection, given the way we construct the legitimacy puzzle for global governance institutions. The fact that an oppressive government has consented to a global governance institution should have little significance for citizens, subjects of that government or another, who ponder whether or not to give the institution their support.

But in the context of international human rights treaties, dismissing state consent on these grounds would have the equally absurd implication of absolving oppressive, non-democratic governments of their human rights obligations. Consider a state such as Eritrea, which has ratified or acceded to a range of key international human rights conventions, including the ICCPR, the ICESCR, the CRC and the ACHPR. Eritrea's government is blatantly non-democratic, having refused to implement a democratic constitution ratified in 1997, and it persistently violates even the most basic human rights of the vast majority of its citizens (and thus also the terms of those treaties) by jailing political opponents, independent journalists and believers of minority religions, and by keeping its population just on the brink of starvation.

³⁰ Buchanan och Keohane 2006; Caney 2009.

Should these established facts of oppression and tyranny imply that Eritrea's government couldn't be held to the international human rights treaties it has ratified? In the human rights area, the *reductio* objection to state consent ironically seems to serve to relieve oppressive governments of their international human rights commitments and obligations toward their own populations: Illegitimate regimes cannot be bound by human rights conventions, since they cannot legitimately make international treaties.

In the human rights field, state consent seems crucial for pragmatic reasons, offering a useful resource for justifying why governments should accept to be held to human rights standards: Because they have consented to them. We should not underestimate how useful state consent is in this regard. Buchanan & Keohane suggest that "those who take human rights seriously" cannot accept "the fiction that all states – regardless of whether they respect the basic rights of their own citizens – are moral agents worthy of respect". Unpacking this double-barreled claim, one could regard states as *moral agents* without thinking them *worthy of respect* regardless of what they do, for instance, regardless of how they treat their own citizens. And even if states' moral agency might be shrugged off as a fiction (or states' corporate agency more generally, following the dominant instrumentalist methodological individualism in mainstream international theory), it might still be a fiction useful precisely to those who take human rights seriously.³¹ Indeed, much of the work done by the international human rights community and transnational advocacy networks, which engage in naming and shaming governments that fail to live up to their international human rights commitments, seems to rest on the assumption that states, or governments representing them, are moral agents, who deserve blame or praise depending on whether they respect the basic rights of their own citizens and others subject to their authority.³² Likewise, the assumption that governments could and should be held to their commitments is a key precondition for international human rights to have domestic impact – in changing elite agendas of executives and legislatures, in supporting litigation by rights claimants and lawyers, and in sparking mobilization by individuals and groups with a stake in compliance: "Key here is the legitimating function of an explicit public commitment to a global standard. That commitment is used strategically by demandeurs to improve the rights in which they have an interest."³³

Hence, in the human rights area, state consent may offer a necessary component of legitimacy. While we might also think of other reasons suggesting why governments should

³¹ Wendt 2004.

³² Risse, Ropp, och Sikkink 1999.

³³ Simmons 2009.

accept their human rights obligations – because it is the morally right thing to do or because it might be in their self-interest to do so – such reasons are not content-independent reasons of legitimacy. Moreover, alternative standards such as the ongoing consent of *democratic* states, proposed by Buchanan & Keohane as a necessary element of legitimacy in global governance institutions, seems to offer little added weight in the case of international human rights institutions. Certainly, democratic governments have been the most avid supporters of international human rights treaties, ratifying optional protocols that expose them to even further scrutiny by allowing individuals to file complaints about violations to international authoritative bodies, but that enthusiasm in itself offers no additional reason why states should regard themselves as legitimately bound by those treaties, especially not for non-democratic states. Additionally, for individuals and groups who seek to hold governments to their international human rights commitments, the democratic credentials of the government seems to offer little extra leverage. And as an action-guiding notion of legitimacy, state consent offers a simpler measure than democratic state consent, by avoiding some of the weighting and threshold problems and by being premised on the idea that sovereign states are formally equal. While states and other agents may often dispute the interpretation of human rights treaties, treaties have become the preferred format of international agreement precisely because they are a superior tool sovereign states employ to sharpen the focus on particular accepted and proscribed behaviours: “Treaties constrain governments because they help define the size of the *expectations gap* when governments fail to live up to their provisions.”³⁴ Hence, the notion of state consent, indicated through ratification of a human rights treaty, provides a clearer and therefore also more feasible, action-guiding criterion of legitimacy than the hazier notion that an international institution requires the *ongoing* consent of democratic states in order to be legitimate.

If state consent provides a necessary element of legitimacy of international human rights institutions, what else is needed? The complex, hybrid standards comprise procedural, epistemic and substantive elements that supposedly add to the legitimacy of global governance institutions. Similarly, an epistemic component may improve the acceptability of international human rights institutions to states. Allen Buchanan argues that international human rights institutions perform crucial epistemic functions that may contribute to their legitimacy, such as assessing relevant empirical information when specifying and applying human rights norms and when formulating new norms in specialized conventions.³⁵ Moreover, institutions may help to resolve conflicts of interpretation, and thus help states (and groups and individuals) determine what

³⁴ Ibid.

³⁵ Buchanan 2008.

respect for human rights requires. In the particular case of international human rights institutions, such epistemic mechanisms may suggest further reasons for states to accept that form of international authority, providing a safeguard against the suspicion of parochialism and bias in the continuously developing exercise of that authority. In order to secure that function, drawing on information provided by independent experts or third parties may be useful. Hence, an epistemic element may belong on a standard of legitimacy in the human rights area, but with states as the subjects of legitimacy, it serves a different purpose than in the case of global governance institutions.

Finally, the substantive elements emphasized in cosmopolitan functionalist standard suggest that in order to hold legitimate authority over citizens, a global governance institution should not violate generally accepted basic human rights and meet the goals in terms of which it justifies its existence. Would that element also have a place in offering states reasons to accept the authority of international human rights institutions as legitimate? The substantive elements express a concern that citizens should regard a global governance institution as legitimate only if it actually contributes to realize the sort of short and long term values in terms of which cosmopolitan functionalists may both justify and explain its existence – such as joint benefits, checks and balances and global peace or justice. Even as an institution may at times fail to fulfill those values, it should openly demonstrate that it strives towards the goals and have procedural mechanisms that increase the likelihood that it realizes its goals relatively efficiently and effectively, although assessing the performance of global governance institutions is an inherently difficult task.³⁶ It seems uncontroversial that citizens should not accept a duty to obey, support or abstain from interfering with an institution that violates basic human rights, or that repeatedly fails to solve the inter-state problems for which it was created. In the case of human rights institutions, however, the subjects of legitimacy are not citizens, but states, and their political impact occur at a different level than global governance institutions. What sort of outcomes might constitute valid reasons for states to regard an international human rights institution as illegitimate? The notion of minimal moral acceptability has no clear analogy in the case of human rights institutions. States sometimes justify flouting their human rights obligations in terms of threats to sovereignty (or popular sovereignty), but international human rights treaties rarely have such existential effects. Generally, international human rights law is not just consistent with but premised on state sovereignty.³⁷ Treaties may constrain the domestic political discretion of governments by inserting issues on elite agendas, by offering lawyers new

³⁶ Lipson 2010; Gutner och Thompson 2010; Weaver 2010.

³⁷ Cf. Nagano 2006.

tools, and by providing resources for social groups to mobilize, but such effects are subtle and never spell the end of sovereignty. However, if a particular international human rights institution were to persistently fail to contribute to improving the human rights situation within the contracting states generally or if it would stray too far from the core values of the treaty, such negative outcomes may provide valid reasons for states to dispute the authority of the institution.

Hence, in the human rights area, the problem of legitimacy entails justifying the authority of international human rights institutions over states, in light of the benefits they provide for individuals and groups within states. If we construe the problem in this way, state consent may not only withstand some of the objections raised against it, but it may offer a necessary element of legitimacy. Of course, this is not to say that state consent is a sufficient criterion of legitimacy in the human rights area, nor to suggest that it is generally a necessary condition for the legitimacy of global governance institutions, but rather that we should not underestimate the usefulness of this notion of legitimacy. Moreover, if we think of states as the primary subjects of legitimacy – that is, as the agents to whom legitimation is owed – in the human rights area, epistemic and substantive elements of legitimacy may well have their place, but for different reasons than in the case of global governance institutions.

Conclusion

I have emphasized that human rights institutions are inherently different than global governance institutions because they entail a different – indeed inverse – relation of authority. Turned upside down, the problem is not why citizens should accept the authority of institutions that help states obtain certain collective goods, but rather why states should accept the authority of international institutions that help individuals secure their rights and interests vis-à-vis their governments. I believe these two differently structured legitimacy problems also mirror political debates about international institutions in many countries. While some suggest that the so-called legitimacy deficit of global governance institutions is indicated by the resistance such institutions and governments face from a host of civil society groups and non-governmental organizations, such groups rarely voice resistance against international human rights treaties and their sometimes expanding authority. In the human rights area, reluctance and resistance rather comes from executives, legislatures, judiciaries, and bureaucracies – the institutional agents of the state who will have to bear the costs of implementing an international treaty with a potential to restrict their discretion and change domestic politics in subtle but unforeseeable ways.

While the argument has been restricted to international human rights treaties, as a special class of international institutions, could it be generalized beyond that case? An ontological notion of international institutions – what they are, why they come about, what their impact is and on whom – sets the terms for analyzing problems of their legitimacy. And compared to other kinds of international institutions, international human rights institutions are *sui generis*: They do not entail any joint benefits among states and are not enforced through reciprocal action. They are negotiated among states, but create stakeholders in domestic societies, who can use the rights specified in international treaties as resources to hold their governments to account. Of course, this depiction of two species of international institutions is ideal-typical, an abstraction from the complexity of reality for analytical purposes. To the extent that institutions in other issue-areas resemble international human rights institutions, the conceptions of legitimacy I have suggested here may have a more general validity. Andrew Moravcsik argues that other kinds of international agreements may be explained not just as inter-state bargains, but as independent institutional constraints governments use to increase domestic policy predictability, for instance some trade agreements.³⁸ Michael Zürn suggests that new types of complex policy issues have changed the role of global governance: Whereas the institutions established after the second world war addressed states in the predictable regulation of inter-state problems, new types of institutions, such as global governance regimes in the environmental area, rather target intra-state issues and rely on the compliance of domestic actors for their successful implementation.³⁹ Moreover, some international regimes may be of a mixed kind. For instance, international regulations on trafficking in persons both seek to address coordination and collective action problems among states and detail a set of rights for individuals to claim against those states. Such cases may seem to transcend the simple ideal-typical notions of international institutions employed here, and indicate a need for even more hybrid standards of legitimacy that are able to address such mixed authority relations. Yet, international human rights institutions uniquely empower individuals and groups to pursue their rights vis-à-vis their governments, a singular feature that has important, if subtle, political effects, and which may call for a special notion of legitimacy.

Finally, just as empirical international relations scholars have frequently looked for the impact of international human rights norms in the wrong place, normative political theorists have often misunderstood their role in world affairs, too. For instance, a range of cosmopolitan theorists have recently proclaimed that international human rights regimes and human rights

³⁸ Moravcsik 2000.

³⁹ Zürn 2004.

law represent an emerging cosmopolitan legal framework, a shift toward a global constitutional order, in which the conception of human beings as carriers of universal rights challenge the Westphalian norms of state sovereignty.⁴⁰ However, international human rights institutions, as they currently exist, have consistently failed to realize their presumed cosmopolitan potential, seemingly crushing cosmopolitan hopes and affirming realist skepticism. This failure is hardly surprising, as the main political impact of international human rights regimes has not been to change international order or subvert national sovereignty in any significant way, but to alter, subtly, the relation between citizens and their government. If so, skeptics and optimists alike may have neglected and misinterpreted the true political significance of international human rights institutions – a significance that clearly merits not just further empirical research, but normative political analysis, too.

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⁴⁰ Gould 2004; Beetham 1998; Montgomery 1999; Benhabib 2007; Goodhart 2008; Beitz 2009.

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