Authority of International Institutions: 
The Case for International Human Rights Treaty Bodies

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International human rights law treaties and their monitoring institutions raise important questions about the moral standing of institutions outside of the state and on what terms such institutions should be understood in political theory. International human rights treaties have been part of international law since the 1960s and they are ratified by a significant number of states.\(^1\) Human rights treaty bodies, created by the treaties themselves, do not have powers of legal enforcement and they cannot impose sanctions. They decide on individual complaints against states only when a state expressly agrees.\(^2\) The bulk of their work is human rights treaty interpretation, report reviewing and highlighting the changes in law, policy and practice that states should make in order to fulfil their international human rights treaty commitments.

The everyday practice of human rights treaty bodies, rather unsurprisingly, shows that some states follow the directives of these institutions and some do not.\(^3\) States employ a mix of legal and moral reasons in order to justify their records of

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\(^1\) The core international human rights treaties which have monitoring bodies are the International Covenant on the Elimination of All Forms of Rational Discrimination (1965) with one hundred and seventy three state parties; the International Covenant on Civil and Political Rights (1966) with one hundred and sixty two state parties; the International Covenant on Economic, Social and Cultural Rights (1966) with one hundred and fifty nine state parties; the Convention on the Elimination of All Forms of Discrimination against Women (1979) with one hundred and eighty five state parties; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) with one hundred and forty five state parties; the International Convention on the Rights of the Child (1989) with one hundred and ninety three state parties; the International Convention on the Protection of the Rights of All Migrant Workers and their Families with thirty nine state parties (1990) and the Convention on the Rights of Persons with Disabilities (2006) with forty state parties.


\(^3\) Von Stein (2005); Hafner-Burton and Tsutsui (2005).
compliance and non-compliance. The unmatched institutional nature of human rights treaty bodies presents a challenge for political theorists as it is not clear what the theoretical conception of these institutions ought to be and what concepts are relevant in assessing the point of these institutions. The aim of this article is to supply an argument for what the appropriate conception of authority applied to human rights bodies, as a distinct type of international institution, should be. For this, we survey the repertoire of moral reasons available in assigning authority to human rights treaty bodies in the current literature and assess the strengths and weaknesses of such reasons. The central argument of the article is that a successful theory for the justification of authority of international institutions has to account, firstly, for the very purpose of the authoritative relationship and, secondly, provide special and sufficient content-independent reasons to comply with the directives of these institutions.

This article is composed of three parts. In Part I we clarify what kind of authority is engaged in the case of international human rights bodies. In doing so, we aim to demonstrate that the concept of authority in the international sphere is useful because it offers a standard of agency-justification and reasons for action. In Part II we survey two ways in which theories of authority, as reasons for the justification of supremacy, have been applied to international human rights bodies in the existing literature. These are the autonomy-based approach and the instrumentalist approach to authority. In Part III we shall argue that these arguments remain incomplete as they fail to adequately provide normative justifications for the right of international human rights bodies to interpret human rights treaties and for states to have good reasons to take these interpretations into account. We argue that the very purpose of the relationship that is established by international human rights treaties is to hold states internationally accountable for how they treat individuals within their jurisdiction within the terms of an international treaty. In the context of this existing

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5 There exist a number of other influential theories of authority, such as the argument from the principle of fairness, see Klosko 1994, the argument from associative obligations, see Dworkin 1986, or reasonable consensus theories of authority, see Rawls 1996. However, for the purpose of this paper we will only focus on those arguments that have been brought to bear on the authority of international human rights bodies.
relationship, the claim of supremacy over the treaties by human rights bodies is justified because of the two central properties of the tri-partite accountability relationship between states, human rights bodies and individuals. First, no state should be made the arbiter of its own performance for human rights protections that it accepts publicly by way of an international treaty commitment. Second, individuals should be afforded uniform protection under the international human rights treaty from which they benefit. We show that this non-instrumentalist account provides a more comprehensive framework, providing reasons for all states to respect the authority of human rights treaty bodies.

Justification of Authority in the International Sphere

Whether international human rights bodies have the authority to interpret human rights treaties and demand compliance from states has been a neglected issue in international political theory. We identify two principal reasons for this negligence: 1. a lack of attention to authority relationships in the sphere of theories of human rights and, 2. the difficulties of using the concept of authority in the international sphere.

First, the lack of attention to authority relationships can be put down to the fact that theorists have spent more time trying to answer the question of how best to interpret human rights treaties. Yet normative justifications for the right of international human rights institutions to interpret and claim supremacy over states have not been linked to theories about the interpretation of human rights. The debate on the authority of international human rights institutions has, instead, largely been left to international lawyers who have used the criterion of the formal standing of an international institution to issue legally binding versus legally non-binding decisions to ground the authority of treaty bodies. Of course, the question of how to interpret

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6 This is not to say that this principle should only apply when a state has signed up to an international human rights treaty. The principle, however, has special force, when a group of states plug into an international monitoring system by way of creating or joining to an international human rights treaty.
7 For example see Griffin 2008; Letsas 2004; Waldron 1984.
8 There are some notable exceptions to this general neglect, Hessler 2005 and Buchanan 2004, whose contribution we discuss in the later part of the paper.
9 Hannum 2004. Positivist-inclined analysts have also reported that some states follow the recommendations of the human rights bodies and some challenge them. Such analyses pointed out that there exists an ongoing controversy between states and human rights bodies about whether the latter have a right to claim supremacy in the interpretation of treaties, but that state practice on these claims were inconclusive, see Fitzmaurice 2006.
human rights treaties is important. It is, however, distinct from the question of who has the legitimate authority to interpret them. The former question requires an account of normative theories of human rights. Who should interpret human rights treaties requires a distinct normative account of who is in the right position to interpret them.

The second reason for the neglect of the question of international authority comes down to the complexity that surrounds the very concept of authority and whether it leads to any useful analysis when applied to the international sphere. At the domestic level, the concept of authority comes in many forms and is connected to different varieties of concerns. For example, one can distinguish between being an authority and being in authority. Whilst the former refers to specialist knowledge or expertise, the latter refers to the right/justification of an agent to issue directives or make decisions. In this discussion we use the latter term. There is a further distinction between the right to make a decision and, in light of that decision, the right to be obeyed. In this paper, we focus on the former question: that of the normative justification for the right to interpret and not the latter: that of the political obligation of states to obey human rights bodies. It is first necessary to discuss why these are two distinct and separate issues.

The distinction between the Obligation to Obey and the Right to Interpret

The position which equates the question of having authority with that of political obligation reflects accounts of authority understood as the ‘right to rule’ developed for the domestic sphere. This mirrors the idea that the establishment of an authoritative relationship necessarily involves an obligation on the part of the subject

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10 It can also be argued that because decision in the international sphere making stems from a process of argumentation and persuasion between the two entities it is not possible to any kind of authoritative relationship between the state and the human rights body. The reason we shall not take this argument up is that it is a descriptive explanation of some of the current interactions between the state and human rights bodies and does not settle the normative issues at stake in this paper.
11 See Friedman 1990 and Christiano 1994 for a clear overview of different conceptions and theories of authority.
12 Friedman 1990 p. 77-84. There are a number of other distinctions made in many discussions of authority, for example the difference between de jure and de facto or authority over beliefs and authority over conduct, however we will not explore these distinctions in this particular paper as they are not directly relevant to the issues at stake.
13 For example see Simmons 1999; Klosko 1994.
to obey a directive. If we say that X has legitimate authority over Y we are saying that by the mere fact that Y is subject to X’s authority it is obliged to obey, regardless of the content of the particular order (content-independent) and regardless of other reasons that might exist (a pre-emptive duty). This account of authority is highly demanding because it is associated with a duty to obey that is owed to the authority.

This conception of authority for the most part is motivated by the idea of protecting the freedom of the individual from the state in the domestic case. The idea of individual freedom not only supports the demands that there should be content independent and pre-emptive reasons to obey, but also that the domestic authority complies with the fundamental duty of equal respect for all individuals. Departing from the simple fact that individuals will disagree on which decision is the correct one, domestic political theorists make a further compelling case for democratic legitimacy to ground the authority of domestic institutions. The central point here is that whichever institution gets to make a decision that institution ought to have generally acceptable democratic and representative credentials.

The conception of authority as the right to rule and the correlating obligation to obey, combined with democratic legitimacy as grounding authority, runs into problems in the international sphere. International institutions do not make a claim to rule over individuals or states, as the state does over its citizens. There are no central political institutions in the international sphere that make binding law for all individuals or states. Political obligation and democracy legitimacy arguments focus on decisions which are enforceable and binding on members of a community.

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14 Some political philosophers, who regard authority as intrinsically linked to a duty to obey the authority, therefore conclude that authority, because of its highly demanding character is not a useful concept, particularly in the international sphere. Buchanan, for example, proposes that the concept of political legitimacy better captures the right to decide and reasons to act than political authority. Buchanan 2004, pp. 145-148. Others, however, see the authority as the right to decide and authority as a justification of political obligation as two separate approaches to authority. See Ladenson, 1990, Christano 2004 and Sadurski 2006. We follow the second approach in this paper. As long as it is defined in which sense authority is used, the concept continues to have an important purchase as it provides a justification for reasons to defer to someone else’s judgment.

15 Simmons 1999.


17 Bellamy 2007.

18 The EU, as a sui generis institution, is perhaps an exception to this given the extent of its authority over member states and their citizens. The vast amount of literature that examines the democratic deficit of the EU also demonstrates these concerns see, for example, Bellamy 2007 and Lord and Magnette 2004.
regardless of how much individuals disagree. In the international sphere there exists no institutional settings to address disagreement between individuals and the relationship between states and international institutions focus on reasons as to why the former should comply with the decisions of the latter rather than a strict obligation to obey.

Having the authority to take decisions in the international sphere does not, therefore, ride on the problem of political obligation and democratic legitimacy. Instead, the concept of having international authority simply implies that those over whom authority is exercised have some kind of duty with regard to the authority, which is suggestive of a weak kind of moral relationship. Justifying that an agent has the right to make decisions that affect other institutions points to the presence of a special type of influence that one agent has over another, in that it constitutes a distinctive reason for action for those subject to the authority. This is to say that when the reasons for an agent having the right to make certain decisions are provided, it is not only authority that is conferred on that agent, but also legitimate authority. When a legitimate authority issues a directive there exists a special and sufficient reason to comply with it by the mere fact that it was issued by an entity acknowledged as having or being in authority.

In the international sphere, the reasons for compliance are not tied exclusively to the authority itself. Such reasons are grounded in duties owed to other agents. The duty to conduct peaceful relations, for example, is owed by each state to all the other members of the United Nations rather than specifically to the United Nations Security Council, which has the primary responsibility to maintain international peace and security. In international human rights treaties, states owe duties to individuals under their political powers. In both of these cases, international institutions established in these fields have authority because the reasons to comply with its directives are grounded not simply in the content of the directives but in the right of the institutions to issue such directives. These reasons are, therefore, content-independent. Reasons to comply that arise from being subject to an authority are not, however, pre-emptive. This means that states are in a position to take into

19 Friedman 1990, p. 68.
20 See, Articles 1 and 24 of the United Nations Charter.
account other international duties they have and identify what their more stringent obligations are when there is a conflict of duties.\textsuperscript{21}

Following on from this, there are two features that need to figure into any conception of the justification of authority in the international sphere. First, we have to ground why an international institution has the right to make a decision. Second, we need to explain why no other agent is in a similar position to make the same kind of decision. This means that we have to supply an argument about the exclusiveness of the position of the international authority in a specific issue area. These two justifications, taken together, provide content independent and sufficient reasons for states to comply with decisions taken by an international authority. The general reason and the exclusive reason may differ from international institution to international institution based on the issue area in which the institution claims to have authority. The stronger these reasons are supported by the belief systems of states the more compliance we may observe in actual practice.\textsuperscript{22} Consider that even the strongest international organisation, the United Nations Security Council, does not have coercive powers and relies purely on states for its directives to be enforced. Security Council Resolutions are complied with most of the time, but this is not the independent justification for the authoritativeness of these resolutions. It is the very purpose of the relationship between the states and the Security Council, combined with the latter's standing as the primary agent to secure international peace and security, which determines the authoritative qualities of the Security Council resolutions. The fragmented nature of the international system, therefore, requires us to focus on the purpose of the relationships between states and international institutions in the international sphere and the reasons that justify the authority of the institution in the light of the properties of these relationships.\textsuperscript{23}

\textbf{Conceptions of Authority Applied to the International Sphere}

\textsuperscript{21} However, a strong case can be made for peremptory commands by some international authorities such as the Security Council. Human Rights Institutions and the International Criminal Court, on the other hand, may require exclusion of certain reasons from serious consideration.

\textsuperscript{22} For work examining the relationship between perceived legitimacy and compliance see Steffek 2003 and Hurd 1999.

\textsuperscript{23} Bodansky 2007, p. 2.
In this section we identify two dominant approaches to authority in the international sphere that are used to justify who has the right to interpret human rights treaties. The first of these approaches is the autonomy-based approach where authority rests with the state at all times. The second is the instrumentalist approach, where we shall examine two sub-branches of this approach. The first sub-branch is the statist approach where the assignment of interpretive authority is dependent upon a cost-benefit calculation of states’ interests. The second sub-branch is the principled approach where the assignment of authority is dependent upon the best protection of basic human rights.

The Autonomy Approach to Authority

The starting point of autonomy-based theories is the equality of states and the voluntary basis of treaty obligations at the international level. Treaties are based on two inter-related values: voluntary consent and exchange. The voluntary creation of rights and obligations is an extension of the autonomy of states in international affairs. No state is better qualified than any other to interpret the content of treaties. This implies that there are neither pre-emptive nor content-independent reasons that require states to set aside their own views of the merits of any obligation they undertake. If international obligations cannot be imposed they are, by their very nature, self-imposed.

This view has clear implications for understanding authority in the international sphere. First, it treats the state as a moral entity entitled to pursue its preferences. Second, it holds that the imposition of obligation is a central quality of authority. There cannot be authority proper in the international sphere as no agent can impose obligations on states outside of the will of the state. A further idea inherent in this approach is that the powers to enforce, to impose and to interpret obligations all overlap. The basis for compliance with international treaties is each individual state’s

24 As mentioned (fn note 9) there are a number of other conceptions of authority that we have not included in this analysis as we only focus on the arguments that have been brought to bear on the authority of human rights bodies.
support for and therefore consent to a particular norm in international law.\textsuperscript{27} Compliance is content-dependent, as it does not imply in any way that a state is required to follow an international directive when it does not agree with it. Authority, therefore, is a highly demanding concept and directly associated with the right to rule and the imposition of coercion. Under this approach, no international institution other than a world state can have authoritative qualities in the international sphere.

In the case of international human rights bodies this argument has important consequences as there is no space for an external authority to provide reasons for action. If a state thinks that the interpretation of the treaty body is correct it acts on the bases of its own assessment of the interpretation provided. If a state thinks that the interpretation of the treaty body is incorrect, it has no reason to follow it. Even international human rights courts, which enjoy a transfer of authority from states to interpret human rights treaties, do not enjoy ultimate interpretive authority. In cases of disagreement between international courts and states, the autonomy of the state will prevail over the authority of the human rights court as the former has full authoritative standing and the latter merely derives its authority from the former.\textsuperscript{28}

\textit{Instrumentalist Approaches to Authority}

The instrumentalist approach to authority in the international sphere follows Joseph Raz’s conception of authority, focusing in particular on his normal justification thesis.\textsuperscript{29} This thesis states that the normal way to establish authority involves demonstrating that:

the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives as authoritatively binding and tries to follow them, rather than by trying to follow

\textsuperscript{27} Goldsmith and Posner 2005.
\textsuperscript{28} Some of the government’s legal positions also mirror this view. See for example, General Comment 24 Government Responses by France (CCPR A/51/40), the United States of America (CCPRA/50/40/Vol.1) and the United Kingdom (CCPR A/50/40).
\textsuperscript{29} Raz’s service conception of authority also includes the dependence thesis and the pre-emption thesis. See Raz 1986 and Raz 2006 for further discussion of his conception of authority.
reasons which apply to him directly.\textsuperscript{30}

Given this we can understand that the central claim of the instrumentalist approach is that the assignment of authority depends upon whether the subject is likely to do better (in terms of reasons that apply to that subject) by following the directives of the alleged authority, than without. The justification of authority, therefore, lies in the quality of the alleged authority’s position to enable the subject to conform better to those reasons that apply to him. It is because authority is justified in such a way that it can be classified as an instrumentalist approach; authority lies with the entity able to produce better outcomes, in terms of conforming to reason.

In answering the question of who has the right to interpret human rights treaties this approach directs us to ask which of the two entities would enable us to better conform to reason.\textsuperscript{31} The instrumentalist approach can, therefore, be utilised in different ways depending upon which reasons are identified as being central in the assignment of authority. As stated earlier, we define and examine two sub-branches of this. First is what we term the statist approach. Here, relevant reasons are understood as being rational reasons which apply directly to the state’s interests. We define the second approach as the principled approach in which the relevant reason that applies to the subject is the moral reason it has to better protect human rights.

\textit{Instrumentalism and the Statist Approach}

In a statist version of instrumentalism we see that the authority of international human rights bodies can be justified if it is possible to demonstrate that the state is likely to do better, in terms of its own interests, if it follows the directives of the human rights body, than if it does not. As Raz points out authority can often be justified in this way in relation to problems of coordination, defined as a situation ‘in which the vast majority have sufficient reason to prefer to take that action which is

\textsuperscript{30} Raz 1986, p. 53.

\textsuperscript{31} It is of relevance to note that according to Raz’s conception of authority rules and principles can also be understood as possessing authoritative qualities. However, for the purpose of this article we shall focus specifically on the authoritative qualities of agents, given that we are examining the specific case of human rights bodies.
For example, in relation to air traffic regulations, considerations of safety require that all individuals who fly aircrafts within a particular airspace follow the same rules. An entity that has the ability to set down these rules and enforce them can be understood as a legitimate authority. This is because following the directives allows individuals to conform to reasons that they have (to follow the same air traffic rules as everyone else) better than they could alone.

In the international arena we can find similar situations in which it is possible to make a cost-benefit analysis in terms of state interest and see that the establishment of and membership in an international regime would make it more likely that a state would be better able to conform to reasons that apply directly to it. For instance, actors in the international arena may seek to reduce conflicts of interest and risk by coordinating their behaviour through an international authority. Through such international regimes, states will be able to make beneficial agreements that serve their particular interests and reduce their transaction costs. As Robert Keohane argues, an international regime will be established and maintained when sufficient complementary or common interests exist so that the agreements benefit all essential regime members. The authority of an international institution can be justified so long as the state is at least more likely to be better off participating with the regime than being outside. The authority of international regimes and institutions develops, therefore, from the fact that they provide ‘established negotiating frameworks (reducing transactions costs) and in helping to coordinate actor expectations (improving quality and quantity of information available to states)’.

These arguments seem to be quite plausible when we examine, for instance, institutions charged with coordinating behaviour in areas such as mutual non-aggression or trade agreements, which offer states clear reciprocal benefits in exchange for acting in accordance with the directives of the international institution. Human rights bodies present a different challenge, as they do not appear to provide such immediate benefits for the state. However it is possible to argue that they can play a similar role in coordination and in doing so provide benefits to states with fairly

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32 Raz 1986 p.49.
33 Robert Keohane, 1982.
34 Ibid. p. 339.
low costs. Moravscik, for example, argues that the establishment of a regional, European human rights system benefits newly and emerging democratic states by enabling them to ‘lock in’ civil and political rights.\(^{35}\) Equally not being party to human rights treaties may have certain costs, such as damage of reputation or access to certain benefits. In addition, the enforcement of many international human rights treaties is viewed as fairly weak resulting in the costs to states of joining being fairly low.\(^{36}\) Human rights bodies can also serve as a coordinating body for collective action on behalf of those states whose interests include the protection and promotion of human rights. International institutions have the status and position to be able to monitor state action fairly and consistently, also providing a forum for argument and persuasion which may lead to human rights norms being internalised by other states.

*Instrumentalism and the Principled Approach*

The principled approach, in contrast, focuses on the idea that the relevant reason in the assignment of authority should be understood as the moral reasons that we all have to better protect basic human rights. In deciding who ought to interpret human rights provisions we should look at which institution will best be able to protect and promote them. As such we must establish whether human rights will be better protected if authority lies with the state or with the human rights bodies, which in turn will depend on the particular qualities of the state in question.

Following such an approach it can be forcibly argued that human rights will be better promoted and protected if states with very poor human rights records are subject to the interpretive authority of international human rights bodies. The justification of the authority of the human rights body in such cases lies with its position to enable the state to better conform to reason, the relevant reason being understood as the moral reasons we have to respect human rights. Participation in a regime of international human rights protection by states with poor human rights records would, in all

\(^{35}\) Moravscik, 2000.

\(^{36}\) See for example Downs, Rocke and Barsoom, 1996.
likelihood, lead to the better protection of human rights in that particular state. This is because individuals in such states can legitimately claim their human rights because of the international commitments of that state.

There is, however, some dispute about whether the assignment of interpretive authority over liberal democratic states with good human rights records can be morally justified if the aim is the better protection of human rights. It seems highly contestable that international human rights bodies are in a position that better enables these ‘excellent’ states to conform to those moral reasons it has to respect human rights. For example Kirsten Hessler, who employs an instrumentalist approach to the issue of authority in the international sphere, argues that there exists a strong prima facie case that ‘appropriately deliberative and participatory state governments should have final interpretative authority’. This is because such mechanisms increase the likelihood that a diverse range of views will be reflected in the final decisions and will contribute to a ‘better shared understanding of the abstract moral principles relevant to a political decision’. Liberal democratic states have stronger mechanisms for participation and deliberation and are, therefore, more likely to issue better and more reliable interpretations of human rights provisions, providing us with a moral reason to accept their interpretations as authoritative.

What Hessler specifically means by mechanisms of participation and deliberation, and whether any state currently can be said to adequately satisfy these, is unclear. Hessler points towards ‘participatory local institutions’ which have access to local knowledge and ‘directly involves people’ in the process of decision making as being key features of liberal democracies. This argument requires empirical assessments of each individual state’s internal arrangements in order to establish which ones effectively involve these institutions in the process of human rights interpretation. Such an empirical assessment will necessarily have to engage with questions of how

37 There is some justifiable concern as to whether empirical evidence can actually substantiate this claim, however, for the purpose of this essay we are not examining this as an empirical claim and as such will not be investigating this issue.
38 Ibid. p. 30.
39 Ibid. p. 35.
40 Ibid. p. 45.
41 Ibid. p. 44.
often it should be carried out, who should carry it out and how one should account for changing circumstances. Hessler gives the example of the United States as a liberal democratic state. This example is, at best, controversial and begs the question of which criteria are applied to which facts.

In spite of this an advocate of the argument may claim consistent application by setting out a more rigorous criteria and method for applying it. However, other proponents of this principled approach have argued that there exist further instrumental reasons to assign interpretative authority to human rights bodies, even over those states that have excellent provisions to protect human rights. Alan Buchanan, for example, argues that there are further and sufficient reasons as to why all states ought to recognise the ‘supremacy’ of international human rights regimes. This is because, in order to fulfil our limited obligation to help ensure that all individuals have their basic human rights protected (Natural Duty of Justice), we require an arrangement in which global legal institutions ‘have ultimate authority’ regarding the formulation of human rights norms. The reasons for this position are, firstly, that even ‘excellent’ states make mistakes and acknowledging the supremacy of international human rights regimes will reduce the likelihood of these occurring. The second reason is that by recognising the supremacy of international human rights bodies within their own borders these excellent states can ‘enhance their effectiveness as leaders’ in the development of a global culture of human

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42 Ibid. pp. 44-45.
43 The US interpretation of what constitutes torture or inhumane and degrading treatment has been single-handedly rejected by all international human rights bodies and inter-governmental organisations. As has their argument that the prohibition on a state from sending an individual to a state where there are substantial grounds to believe that they would be in danger of being subjected to torture does not include individuals seized by the US outside of its territory. See Mayerfeld 2007 and Response of the United States to the U.N. Comm. Against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America, 32, May 5, 2006, available at http://www.us-mission.ch/Press2006/CAT-May5.pdf.
44 It is important to note that Buchanan queries the usefulness of the term authority in the international sphere, as he argues that authority necessarily includes a strict obligation to obey, a condition not fulfilled at the international level. Rather he talks of political legitimacy as the ‘credible attempt to establish supremacy in the making, application and enforcement of laws.’ Given this understanding and the fact in later works he refers to the ‘authority’ of international law over states (Buchanan & Powell 2008), his arguments are still of direct relevance to our discussion of interpretive authority, which we do not argue includes a strict obligation to obey. See Buchanan 2004, p. 147 and also Buchanan & Keohane 2006, p. 411.
45 Buchanan 2004, p. 183
46 ‘Excellent states’ for Buchanan refers to those states who have a highly developed legal system, which generally does an excellent job in protecting human rights, for example UK, Germany, Norway. See Buchanan, 2004, p.184
rights. That is by setting a good example for other less excellent states we are more likely to promote a global commitment towards human rights and thus help protect and respect them for all individuals.

For Buchanan these arguments are sufficient to demonstrate that international human rights bodies ought to have authority over even ‘excellent’ states. This is because in being subject to their authority states are more likely to better conform to those moral reasons that they have to better protect basic human rights. Like many instrumentalists, Buchanan distinguishes between excellent states and non-excellent states in relation to their domestic qualities and their ability to protect human rights. Importantly, given his arguments, this suggests that different states have different reasons as to why they ought to recognise the supremacy of human rights bodies. Authority over non-excellent states is justified in terms of better protecting the human rights of the individuals within that state. In contrast, the reasons that apply to excellent states rely on the idea that joining the human rights regime provides a good example to other states, allowing them to better fulfil the moral duty to protect the human rights all of individuals globally, not just those individuals within the jurisdiction of the excellent state. This branch of instrumentalism, unlike the statist version, therefore justifies authority in terms of the moral reasons that we have to promote and protect basic human rights.

What is missing? International Accountability and Uniform Application

Though the approaches in the previous section point us towards valuable attributes of states and human rights bodies, we argue that they still fail to provide an adequate conceptualisation of authority as it exists in the international sphere and that they do not fully capture the moral reasons for the allocation of interpretive authority. We shall argue, firstly, that the argument from autonomy makes no space for an external authority in the international system and for that reason it is at odds with the basic

48 Ibid.
49 Alongside these arguments Buchanan is clear to emphasise that excellent states do not have an absolute duty to follow the decisions of human rights bodies. If the moral costs of acknowledging the supremacy of international human rights regimes are too high then the state ought to follow its own reasoning. Though it is interesting to note that he does not discuss either non-excellent states may also not comply if there is a particularly high moral cost involved.
institutional facts of international life. Secondly, that the statist instrumentalist view has important weaknesses because the costs of recognising the authority of human rights treaty bodies are visited on the state, whereas the benefits lie with the individual. Thirdly, that the differentiation of states based on their internal qualities by the instrumentalists rests on a controversial assumption that some states may not need international supervision due to their internal credentials. This view further begs the question of how it will be applied in practice. Finally, we argue that an independent justification that focuses on the relationship of accountability between the state and the human rights body better captures the nature of the authoritative relationship between the two agents and the reasons to follow the recommendations of human rights bodies.

The key concern with the autonomy argument is that it insists that each state ought to act on the basis of its own assessment of right and wrong. This argument relies heavily on a form of philosophical anarchism that holds that authority is an unattainable concept as it directly clashes with autonomy. General criticisms of this idea aside, it is not clear why this is an adequate way of framing the problem in the international sphere. States are complex institutions pursuing a number of domestic and international aims. International institutions emerge when states identify collective international aims. Given the fact that independent justification exists for the creation of international institutions, it is not clear why the autonomy of states is in need of protection from the issue-specific authoritative directives of international institutions. This view becomes further susceptible when the institution at stake is established to protect the human rights of individuals against the states themselves by the very same states.

This argument, therefore, is unable to account for the facts of international life in the case of human rights bodies. The consent of states is necessary to establish international institutions, but once the institutions are created there exists issue-specific authoritative relationships between states and these institutions. As we have argued, the fact that such relationships are purely voluntary does not necessarily

50 Wolff 1970.
51 Raz 1986; Dworkin 1986; Rawls 1996.
52 Keohane 1984.
mean that they are not authoritative. It only means that states can opt out from these relationships.\textsuperscript{53} The autonomy argument, therefore, offers an unworkable solution for understanding the point and purpose of international institutions. Individual states’ interpretations of their own obligations are not an adequate way to understand the aims of an international institution acting on behalf of an international collective. First, there are too many interpretations. Second, there is still the need to resolve conflicts between different interpretations.\textsuperscript{54} International institutions, therefore, need to have some form of interpretive authority over their founding document in order to stay alive.

The argument from statist instrumentalism views international human rights as a domain of cost-benefit analysis from the perspective of states’ interests. This version of instrumentalism has important weaknesses because the costs of recognising the authority of human rights treaty bodies are visited on the state, whereas the benefits are conferred to individuals. It is not possible to focus on immediate, tangible benefits of recognising the authority of human rights treaty bodies. It is also possible that benefits conferred to individuals may conflict with the state interests defined within a specific time frame. It would be possible to categorise benefits as indefinitely long term or purely reputational. In the former case, it is no longer possible to focus on outcomes. In the latter case, there is no longer a cost-benefit analysis as we have to argue that the human rights reputation of a state has lexical priority over other benefits.

The principled approach, in contrast, differentiates between the internal qualities of states in deciding which reasons apply to states in recognising the authority of international human rights bodies. We have shown that this version of instrumentalism can focus on reasons that apply to individual states to protect human rights domestically or internationally. There are three reasons to object to principled instrumentalism.

\textsuperscript{53} Indeed, Trinidad and Tobago, who was a party to the Optional Protocol of International Covenant on Civil and Political Rights since on 14 November 1980 denounced this treaty on 26 May 199 with effect from 26 August 1008 because of an interpretive dispute it had with the Human Rights Committee. It is interesting, however, that on that same date, the Government of Trinidad and Tobago re-accessed to the Optional Protocol with a new set of reservations.

First, the principled approach to authority fails to account for the basic principles of international co-operation. This concern is most clearly demonstrated in relation to Hessler’s argument that states with democratic and deliberative credentials should have the final say in the interpretation of international treaties. International treaty-making is a process through which states commit to voluntary undertakings because they believe that a treaty serves some common and worthy purpose internationally. If the decisions of a democratic and deliberative state is regarded as better in kind from an institution that lacks these credentials, it would be impossible to make a case for international co-operation in the absence of a democratic and deliberative international institution. Given that such an institutional setting is not part of international life, the insistence on the internal quality of states is not able to serve the purpose that it serves in the domestic case: the need to exclude hegemony from political life.

Second, even if we assume that there is a basis for the argument that the internal structure of the state affects the justification of the authority of human rights institutions there remains the problem of practical application. Who decides if the qualities of a state constitute its categorisation as a good or bad state? There are obvious problems if a state were to determine for itself if it is an excellent state. There cannot be any guarantee for the impartiality and the honesty of such an assessment. If an international institution were to make the assessment this would beg the very question as to how we then justify this authoritative relationship between the state and the international institution. The justification of authority seems to simply change focus, instead of asking who has the authority to interpret human rights treaties we must ask who has the authority to determine when a state is to be classified as excellent and thus have a different type of authoritative relationship with the human rights bodies.

Finally, the categorisation of states in order to justify whether or not they have reasons to follow human rights bodies cannot, by itself, explain the right of human rights bodies to make decisions. The central arguments used by these approaches presuppose that there are different kinds of states rather than justifying why international authority ought to rest on state differentiation and overlooks the role
human rights play internationally as a constraint on the wielding of political power. The differentiation of states fails to distinguish between the rights generally protected by liberal democratic states and human rights proper. The qualities that enable a state to be classified as liberal democratic or excellent in terms of its human right protections have more to do with the protection of constitutional rights in these states. A key purpose of human rights protections is its uncompromising identification of the right-holder as an individual as opposed to a citizen.\textsuperscript{55} The category of the individual is independent from the category of a citizen, as it is not marked by affiliation, loyalty or membership to a group. Differentiating states in to ‘excellent’ and ‘non-excellent’ states in terms of their protection of citizens right’s fails to capture this central purpose of international human rights protections. That one state better protects its citizens than another is not the sole determinate factor in the role of human rights bodies. They are established in order to protect all individuals as equals, regardless of their citizenship status.

This discussion points us closer towards the key problem with the arguments put forward by principled instrumentalist approaches to authority. They ignore the independent value of human rights bodies as external agents which are able to hold states morally accountable for their actions. In focusing primarily on outputs they neglect the importance of the relationship itself and the source from which interpretative directives are being issued. This is not to say that outcomes are not a very important feature of human rights institutions, it is clear that they matter. If a human rights body consistently made poor decisions in the interpretation of human rights provisions the legitimacy of their authority would be clearly eroded.\textsuperscript{56} However, using outcomes as the sole normative justification as to who should have interpretative authority is not sufficient, because it negates the very specific object and purpose that international human rights bodies serve in the contemporary international system. Outcomes can tell us if an authority is a good authority but it

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\item See for example, ICCPR, Human Rights Committee General Comment 31.
\item There may be an argument that even if one accepts a \textit{prima facie} case about the right of these institutions to make decisions, there still remains the question of whether the quality of their decisions is worthy of support. Because of the composition of the institutions or lack of expertise it may be argued that they are \textit{in effect} unable to make decisions that are worthy of support. This is a separate question, however, as it focuses on how to increase the perceived legitimacy of an authoritative relationship. It would trigger a duty to reform these institutions or to criticise the actual decisions themselves.
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does not, however, fully capture what it is to be an authority, only a relationship of accountability can do this.  

In the case of the authority of human rights treaty bodies the relationship of accountability has some distinctive features. The relationship is not simply bilateral between two agents, but rather involves the state, the human rights body and the individual. The principled instrumentalist approach to authority justifies the establishment of an authoritative relationship by asking if the alleged authority would allow the subject to better conform to reason, specifically the moral reason to uphold human rights. These reasons, however, are not easily applicable to states, as states themselves do not have human rights to be protected. The justification of authority in relation to the interpretation of human rights provisions lies at the level of the individual and reasons that apply to them. In saying that interpretative authority lies at the human rights body we are saying that states ought to be subject to their interpretations, but the justification for this lies with the protection of the human rights of the individuals, who in turn is subject to the authority of the state.

None of the arguments that we have examined easily accommodate this particular nature of the relationship of authority between international human rights bodies and states. The primary element of this relationship that is neglected is the role of human rights bodies in holding the state accountable for its actions towards the individuals. International human rights obligations apply uniformly to all states signing up to a human rights treaty. A state cannot forcibly argue that they already have these rights in their Constitution or elsewhere or that they have an alternative interpretation of these rights. This goes contrary to the purpose of joining a collective association to be monitored. As Weber reminds us ‘…the concept of an authority relationship (Herrschaftsverhaltnis) naturally does not exclude the possibility that it has originated in a formally free contract’. The existence of international human rights treaty-monitoring bodies, therefore, means that states who are parties to these treaties are not the sole arbiter of their human rights law performance. Impartial assessment of states’ performance is a value at the heart of international human rights treaty bodies regardless of the type of state under examination. Human rights bodies receive this

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57 Hershovitz, forthcoming.
58 Weber 1968 p. 213.
moral standing from the international agreement states make with each other. It is for this reason that these bodies hold the state accountable in the context of their international commitments, regardless of what their particular domestic laws may say.

International human rights bodies, therefore, create an issue-specific authority relationship with the state. The voluntary undertaking of the states enables individuals to benefit from a body of standards of treatment with a different source from that of domestic law. Persons benefit from this law not as citizens, but as individuals. Individuals from different countries that benefit from an international human rights law treaty therefore are equalised in terms of their status. It is for this reason that all individuals that benefit from international human rights treaty law are entitled to uniform treatment. If states challenge a principled understanding of an international human rights treaty by the monitoring body, the principle of uniform application of human rights becomes at risk. Given the nature of the duties imposed on the state by the human rights body, only very exceptional circumstances, if any, may justify a state not conforming to its directives. The nature of the duties imposed also limits the kinds of reasons that can figure in such a weighing exercise. The correct way to see the problem is whether the state is trying to avoid international accountability by challenging the human rights body or whether it publicly provides the reasons that make it unable to follow the directive. Such reasons have to be content-independent as the state’s own substantive standards cannot constitute an obstacle to follow the directive of an international authority. In such cases, there is always the option of opting out from the authoritative relationship. The voluntary nature of the commitments, therefore, is relevant only when a state decides to put an end to the authoritative relationship and not while it is in the relationship.

The argument that human rights bodies have the authority to interpret human rights treaties is based, as such, upon the principles of impartiality and uniform application. It is an authoritative relationship because it signifies, for the state, a distinct reason for action, it has influence merely by the fact it was issued by the human rights body. It is a source of legitimate authority because its key purpose is to hold states
accountable for their actions, which in turn legitimates their authority over individuals. Given the nature of the relationship between the state, the human rights body and the individual the issuing of a directive by a treaty body demonstrates a special reason for action on the part of the state, which is not dependent on the content of those directives, and, as such, the directives should be considered as authoritative.

Conclusion

This article surveyed the issues that arise in the justification of authority in the international sphere by focusing on the basis of authority of international human rights bodies. We have argued that authority in the international sphere ought to be understood as a distinctive case and that it is inadequate to apply theories of authority that focus on the right to rule, the strict obligation to obey, pre-emptive reasons for action and democratic legitimacy. We have instead argued that the understanding of authority in the international sphere has to account for the purpose of the authoritative relationship between the state and international institutions. International authoritative directives do not demand a strict obligation to comply on the part of states, but instead demonstrate a special reason for action. Authority is, therefore, a valuable concept in the international sphere because it justifies content-independent reasons for action and it better accounts for the facts of contemporary international life, where issue-specific authoritative relationships exist between states and international institutions.

In the case of human rights bodies, we have argued that the special reason for action is based on the two attributes of tri-partite accountability relationship: impartiality and uniformity. Human rights treaty bodies are in an exclusive position to carry out the monitoring by virtue of the international agreement between states to subject themselves to an international and collective monitoring process. This is a distinct type of political accountability, which has been progressively entrenched in

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59A similar argument is made by Andreas Follesdal who argues that international human rights judicial review can be understood as having legitimate authority because there exists good liberal reasons to restrict domestic authorities to human rights standards, for example to offer assurance to minorities, protect citizens from domination, ensure sufficient protection of specific needs and so forth. Follesdal 2007.
the international system since the end of the Second World War. The idea that the political power employed by states towards individuals should be subject to monitoring internationally is a central feature of international human rights law created through international agreements. States owe duties to individuals under international human rights law and human rights bodies have authoritative qualities by virtue of these duties. The conceptualisation of the individual as a universal right-holder, the states as duty-holders and the monitoring of this relationship by an external agent is central to understanding of the authority of human rights bodies.

We have shown that the autonomy-based approach and instrumentalist approaches are inadequate to capture the distinctive nature of authority in the international sphere. The argument from autonomy makes no room for any external authority. The principled and statist approaches to instrumentalism also do not adequately accommodate the nature of the authoritative relationship that exists between the state, the human rights body and the individual. We have specifically rejected the differentiation between states based on democratic credentials as a method to ground the authority of human rights treaty bodies. We have shown that these views are not practical. More importantly, they do not provide a complete justification of the standing of human rights bodies for all states that have signed up to human rights treaties, excellent or non-excellent, democratic or anti-democratic. It is necessary to move away from a differentiation of states as a starting point in order to ground the purpose of human rights institutions as providing accountability for citizens as well as non-citizens beyond and above the state.

In this paper we have not focussed on the question of what the correct application of human rights should be by international human rights treaty bodies. It could be argued that if human rights treaty bodies move outside the scope of ‘human rights’ and start imposing duties on states in other areas under the guise of ‘human rights’, one has to reserve the right to resist such interpretations. Our argument is not inconsistent with this provided that a compelling case is given for not following unreasonable interpretations. In the case of human rights monitoring, however, we must note that the repertoire of reasons to refuse to provide information about domestic arrangements are likely to be extremely rare. We do reject, however, all
forms of blanket justifications for rejecting the authority of human rights bodies, be it the moral autonomy, or democratic or excellent credentials of states.

Finally, it is an upshot of our analysis that there is no one-size-fits all approach to normatively grounding issue-specific international authorities. Content-independent reasons that call for special reasons for action will vary from area to area, as will the range of more stringent obligations to be taken into account as serious considerations not to follow the directives of the authorities. For each international institution it is necessary to identify the very purpose of the authoritative relationship and analyse what special and sufficient content-independent reasons exist for states to abide by its decisions. Only through such a process can we hope to capture the nature of authority in the international sphere.

References


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