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International human rights and the challenge of legitimacy

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1. International human rights regimes: acceptance and resistance

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

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

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

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

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

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

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

1.1 International human rights regimes – universally contestable

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

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

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

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

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

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

> The system has been operating for years without being called into question by the High Contracting Parties. They ratified the Convention freely, presumably because they believed in what it stood for, and it is open to them at any stage to denounce it if they so desire. Far from seeking escape from their Convention obligations, the States are keen to observe and build upon the Convention *acquis* and to reform the system so that it can perform its tasks in a more efficient manner.
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> (O'Boyle 2011)

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

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

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

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

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

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

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

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

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

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

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

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