

# Human rights and democracy in a global context: decoupling and recoupling

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## Abstract

Human rights and democracy have been regarded as a mutually reinforcing couple by many political theorists to date. The internationalisation of human rights post-1945 is often said to have severed those links, however. Accounting for the legitimacy of international human rights requires exploring how human rights and democracy, once they have been decoupled or disconnected, can be recoupled or reunited across governance levels (vertically) and maybe even at the same governance level (horizontally) albeit beyond the state. The article does so in three steps. The first prong of the argument is dedicated to presenting the moral-political nature of human rights and their relationship to political equality and, hence, their inherent legal nature from a democratic theory perspective. The second section of the article then draws some implications for the domestic or international levels of legal recognition and specification of human rights by reference to their legitimation within the domestic democratic community. It explains the mutual relationship between human rights and citizens' rights and where international human rights draw their democratic legitimacy from. In the third and final section, the author discusses potential changes in the nature and legitimacy of international human rights once political structures beyond the state become more democratic, and human rights and democracy are being recoupled again at various levels of governance. The European Union being one of the most advanced examples of post-national political integration, recent developments in the regime of human rights protection within the EU are discussed in this new light. In a final step, the transposition to the global level of the argument developed in the European case is assessed and the author flags issues for further research on what democratic theorists should hope for in the new global order.

**Keywords:** *democracy; human rights; legitimacy; citizens' rights; Maus; right to have rights; Arendt; legal rights; international law; EU; global institutions; Habermas; Lafont*

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Hatte noch die politische Philosophie der Aufklärung den engen Zusammenhang zwischen Menschenrechten, Volkssouveränität und Frieden zu ihrem zentralen Gegenstand erklärt, so isoliert die aktuelle Begründung internationaler Menschenrechtspolitik Menschenrechte gegen die übrigen Elemente und läuft dabei [...] Gefahr, nicht nur diesen Zusammenhang zwischen den Prinzipien, sondern auch jedes einzelne dieser Prinzipien zu zerstören.<sup>1</sup>

## INTRODUCTION

The relationship between human rights and democracy is among the most classical questions of political and legal theory.<sup>2</sup> Who does not remember having read once at least about the priority of human rights over democracy or the reverse, about the democratic legitimacy of the constitutional entrenchment of human rights, or about that of human rights-based judicial review of democratic legislation?<sup>3</sup>

Among the reasons to tackle this classical question again, one should mention the internationalisation of one or both of its elements (i.e. ‘democracy’ and ‘human rights’). Since 1945, both human rights and democracy<sup>4</sup> have progressively been internationalised, thus severing the direct links there could be between them at the domestic level. International human rights and democracy were decoupled because democracy and human rights were not meant to be reunited, at first at least, in a newly created regional or global supranational state or in any kind of supranational political community. The question political theorists have been facing, therefore, is how to adapt their accounts of the relationship between democratic legitimacy and human rights when either the human rights or the democratic processes or even both of them are international. It is not only about how to make those accounts travel up to the international level, but also back to the domestic level when applying international human rights in the domestic context.

The recent boom in international law theory, and in human rights theory in particular,<sup>5</sup> makes it particularly pressing to redefine both concepts in their relationship to one another, but also in relationship to broader concepts such as global justice and legitimacy. If human rights and/or democracy are commonly identified as criteria of international law’s legitimacy,<sup>6</sup> their relationship to one another in the global context is rarely addressed and needs to be assessed anew.<sup>7</sup> It should come as no surprise, therefore, that questions pertaining to the democratic legitimacy of international human rights law or of international judicial review have now appeared in the wake of discussions of the legitimacy of international law in general.<sup>8</sup> Actually, recent developments in human rights theory and especially current discussions of the so-called political conception of human rights that explain human rights *qua* external limitations on state sovereignty<sup>9</sup> make the relationship between human rights and democracy a central feature of future human rights theories. Finally, and more practically, the coming of age of international and regional human rights regimes and the consolidation of national democracies thanks to those rights justify stepping back to reflect on their impact on the circumstances of national constitutional democracy. This implies in particular developing a

constructive critique or defence of the democratic legitimacy of the legal *acquis* in the human rights context.<sup>10</sup>

In this paper, I would like to take a closer look at how human rights and democracy relate in a global context.<sup>11</sup> If democracy and human rights are mutually dependent and reinforcing sources of legitimacy in the domestic context, it is important to wonder how they relate once decoupled through the internationalisation of either or both of them, and potentially recoupled across governance levels at first and then maybe even at the same regional or international governance level. This is essential if one is to account for the democratic legitimacy of international human rights.

My argument is three-pronged. Its focus is human rights and human rights theory, albeit assessed through the lenses of democracy and democratic theory. The first section of the article is dedicated to presenting the moral-political nature of human rights, their relationship to political equality and, hence, their inherent legal nature from a democratic theory perspective. The second section draws some implications for the domestic or international levels of legal recognition and specification of human rights by reference to their legitimation within the domestic democratic community. What this second section does is theorise the relationship between democracy and human rights once they are decoupled through the internationalisation of human rights and are recoupled again albeit vertically and across levels of governance. In the third and final section, the argument moves one step further and looks at how human rights ought to be conceived of once multilevel political structures beyond the state become more democratic and when, accordingly, human rights and democracy are or, at least, could be recoupled horizontally. My argument focuses on the European Union (EU) at first, and then considers the possibility of extending some of the conclusions drawn from the European case to the global level and the difficulties this raises.

## **HUMAN RIGHTS: MORAL AND LEGAL**

One of the first questions one should ask about human rights pertains to their nature, especially if their function is political and there is a close relationship between human rights and democracy.<sup>12</sup> In this section, I start by arguing that human rights can be understood as moral propositions and, more specifically, as a subset of universal moral rights that ground moral duties. When the fundamental interests that found human rights are legally recognised, I explain how human rights ought also be described as legal rights and how those legal rights relate to the universal moral rights they recognise, modulate, or create.

### **The morality of human rights**

Human rights are a sub-set of universal moral rights (1) that protect fundamental and general human interests (2) against the intervention, or in some cases

non-intervention of (national, regional, or international) public institutions (3). Those three elements will be presented in turn.

First of all, a human right exists *qua* moral right when an interest is a sufficient ground or reason to hold someone else (the duty-bearer) under a (categorical and exclusionary) duty to respect that interest vis-à-vis the right-holder.<sup>13</sup> For a right to be recognised, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context.<sup>14</sup> Rights are, on this account, intermediaries between interests and duties.<sup>15</sup> Turning to the second element in the definition, human rights are moral rights of a special intensity, in that the interests protected are regarded as fundamental and general human interests that all human beings have by virtue of their humanity and not of a given status or circumstance. They include individual interests when these constitute part of a person's well-being in an objective sense. The fundamental nature of the protected interests has to be determined by reference to the context and time rather than established once and for all.<sup>16</sup>

What makes it the case, secondly, that a given individual interest is regarded as sufficiently fundamental or important to generate a duty and that, in other words, the threshold of importance and point of passage from a general and fundamental interest to a human right is reached, may be found in the normative status of each individual *qua* equal member of the moral-political community, i.e. their political equality or equal political status.<sup>17</sup> A person's interests merit equal respect in virtue of her status as a member of the community and of her relations to other members in the community; those interests are recognised as social-comparatively important by members of the community and only then can they be recognised as human rights.<sup>18</sup> The recognition of human rights is done mutually and not simply vertically and, as a result, human rights are not externally promulgated as such but mutually granted by members of a given political community.<sup>19</sup> Of course, human rights are not merely a consequence of individuals' equal status, but also a way of actually earning that equal status and consolidating it. Without human rights, political equality would remain an abstract guarantee; through human rights, individuals become actors of their own equality and members of their political community.<sup>20</sup> Human rights are power-mediators, in other words:<sup>21</sup> they enable political equality. Borrowing Arendt's words: 'we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights'.<sup>22</sup>

In short, the proposed account of the nature of human rights follows a modified interest-based theory: it is modified or complemented by reference to considerations of equal moral-political status in a given community.<sup>23</sup> This relationship between human rights and political equality bridges the sterile opposition between the individual and the group.<sup>24</sup> Under a purely status-based or interest-based model, the manichean opposition between the individual and the group, and between his private and public autonomy would lead to unjustifiable conclusions that are tempered in the proposed account.<sup>25</sup>

It is important to pause at this stage and clarify what is meant by political equality or inclusion into an organised political society.<sup>26</sup> This will then enable me to clarify

how it is neither a parochial nor an exclusive criterion and can account for both the universality and the generality of human rights.

Political equality is a normative idea according to which a person's interests are to be treated equally and taken into consideration in a given political group's decision. Human rights protect those interests tied to equal political membership and whose disrespect would be tantamount to treating them as outsiders. Of course, some human rights, such as civic and political rights, are more closely tied to actual political membership, while others such as the right to life, for instance, are closer to basic demands of humanity and, hence, to access to political membership. Even the latter rights, however, constrain what equal membership can mean if it is to be legitimate and the kind of interests it must protect. By submitting individuals to genocide, torture, and other extreme forms of cruel treatment, a community excludes them and no longer treats them as equal members, thus violating the threshold of recognition of human rights: political equality.<sup>27</sup> This is in line with the republican idea of the political community *qua* locus of rights.<sup>28</sup>

This idea of equal political status or membership may also be referred to as democratic membership, as will be the case in the remainder of the present article. Democracy is indeed morally required by the commitment to the equal political status of persons. And one may even add that, just as human rights, democracy enlivens and enables political equality. Their common grounding in political equality actually confirms the mutual relationship between human rights and democracy. Of course, just as human rights, democracy implies more than political equality. Scope precludes discussing it extensively, but democracy *qua* political regime also implies egalitarian deliberation and decision-making procedures. True, one may object to the parochial dimension of democratic equality and accordingly of the proposed account of human rights and its dual grounding in fundamental interests and political equality. It is here that the proposed minimalist approach to equal political status *qua* principle of transnational justice becomes most interesting. Its institutional and political dimension and its need for contextual specification enable it to escape over-specification and parochialism.<sup>29</sup>

Of course, there may be many overlapping political communities (e.g. international organisations [IOs], regional organisations, and states) and the present argument is not limited to the national polity and to the state. Nor is the argument limited to formal citizens<sup>30</sup> only or at least to those citizens who are also nationals; membership ought to include at varying degrees all those normatively subjected to the activities of political authorities and who are therefore subjects to the laws or decisions of the community.<sup>31</sup> This includes asylum seekers, economic migrants, stateless persons, and so on. As we will see, human rights work as political irritants and mechanisms of gradual inclusion that lead to the extension of the political franchise and in some cases of citizenship itself to new subjects in the community. Nor, finally, does the argument imply that human rights apply within national borders only; if national political authorities subject the fundamental interests of individuals to domestic law and decisions outside its borders, those individuals deserve equal protection both in the decision-making process and the application of

those decisions. This includes individuals and groups subjected to law-making and decision-making abroad.<sup>32</sup>

This brings me to the third element in the definition of human rights: human rights are entitlements against public institutions (national, regional, or international). They generate duties on the part of public authorities not only to protect equal individual interests but also individuals' political status *qua* equal political actors. Public institutions are necessary for collective endeavour and political self-determination but may also endanger them. Human rights enable the functioning of those institutions in exchange for political equality and protection from abuse of political power. This is why one can say that human rights both are protected by public institutions and provide protection against them; they exist because of collective endeavour in order both to favor and constrain it. Of course, other individuals may individually violate the interests protected by human rights and ought to be prevented from doing so by public institutions and in particular through legal means.<sup>33</sup> This ought to be the case whether those individuals' actions and omissions may be attributed to public authorities or not *qua de jure* or *de facto* organs. However, public institutions remain the primary addressees of human rights claims and, hence, their primary duty-bearers.<sup>34</sup>

In short, the proposed account is moral in the justification it provides for human rights and political in the function it sees them vested with: they are indeed regarded both as shields against political authorities and as guarantees of political inclusion. In terms of justification, its moral-political dimension differs not only from accounts based on a purely ethical justification of human rights, but also from accounts that seek a political form of minimalist justification of human rights.<sup>35</sup> In other words, the proposed moral-political account of human rights can salvage the political role of human rights without diluting their moral justification.<sup>36</sup>

### The legality of human rights

It follows from the moral-political nature of human rights that the law is an important dimension of their recognition and existence. It is time to understand exactly how this is the case and to unpack the inherently legal dimension of human rights.

Just as moral rights are moral propositions and sources of moral duties, legal rights are legal propositions and sources of legal duties. They are moral interests recognised by the law as sufficiently important to generate moral duties.<sup>37</sup> The same may be said of legal human rights: legal human rights are fundamental and general moral interests recognised by the law as sufficiently important to generate moral duties.

Generally speaking, moral rights can exist independently from legal rights, but legal rights recognise, modify, or create moral rights by recognising moral interests as sufficiently important to generate moral duties.<sup>38</sup> Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognising them as legal 'rights'. Conversely, some legal rights may not actually



protect pre-existing moral rights or create moral rights, thus only bearing the name of 'rights' and generating legal duties at the most.<sup>39</sup> The same cannot be said of human rights more specifically, however. True, universal moral interests and rights may be legally protected without being recognised as legal 'rights'. But, as we will see, human rights can only exist as moral rights *qua* legal rights. Conversely, one may imagine legal norms referred to as human rights that do not correspond to moral human rights. In such a case, the legal norms named 'human rights' would only give rise to legal duties and not to moral (rights-based) duties. Legal human rights, however, can only be regarded as rights *stricto sensu* when their corresponding duties are not only legal but also moral.

Two additional remarks on the relationship between moral and legal rights and the relationship between moral and legal human rights are in order. The differences between rights and human rights, on the one hand, and between their respective moral and legal dimensions, on the other, can be quite important given the moral-political nature of human rights and what this implies in turn for their inherently moral and legal nature.

Not all moral rights are legally recognised as legal rights, on the one hand. There are many examples of moral rights that have not been recognised as legal rights. Nor should all moral rights be recognised and protected legally. Respect for them should be a matter of individual conscience in priority.

The same cannot be said about human rights, however. True, not all universal moral rights have been or are legally recognised as legal human rights. Some are even expressly recognised as universal moral rights by the law even though they are not made into legal rights or modulated by the law.<sup>40</sup> A distinct question is whether they ought to be legalised and, hence, protected by law. Again, respect for universal moral rights ought to be voluntary in priority and this independently from any institutional involvement. However, the universal moral rights that will become human rights create moral duties for institutions, and, hence, for the law as well to recognise and protect human rights.<sup>41</sup> Based on the moral-political account of human rights presented previously, the law provides the best and maybe the only way of mutually recognising the social-comparative importance of those interests in a political community of equals.<sup>42</sup> It enables the weighing of those interests against each other and the drawing of the political equality threshold or comparative line. In short, the law makes them human rights. As a result, in the moral-political account of human rights propounded here, the legal recognition of a fundamental human interest, in conditions of political equality, is part of the creation of a moral-political human right. In other words, while being independently justified morally and having a universal and general scope, human rights *qua* subset of universal moral rights are also of an inherently legal nature. To quote Jürgen Habermas, 'they are conceptually oriented towards positive enactment by legislative bodies'.<sup>43</sup> Thus, while legal rights *stricto sensu* are necessarily moral in nature (*qua* rights), human rights (*qua* rights) are also necessarily legal and they are as a result both moral and legal rights.

Nor, on the other hand, do legal rights necessarily always pre-exist as independent moral rights. Most do and are legally recognised moral rights,<sup>44</sup> but others are legally

created or legally specified moral rights.<sup>45</sup> In some cases, law and politics may affect a person's interests; thus, in a sense enhancing the moral interest and/or its moral-political significance which are necessary for that interest to be recognised as a source of duties and, hence, as a right. One may think of zoning rights in the context of land planning, for instance, or of government bond-holders' rights.<sup>46</sup>

The same cannot be said about legal human rights, however: all of them necessarily also pre-exist as independent universal moral rights. However, the law can specify and weigh moral human interests when recognising them as legal human rights. One may imagine certain political interests whose moral-political significance may stem from the very moral-political circumstances of life in a polity. As a result, the law does not create universal moral rights, but it can modulate them when recognising them. Furthermore, the inherently legal nature of human rights and the role the law plays in recognising given interests as sufficiently important in a group as to generate duties and, hence, human rights make it the case that the law turns pre-existing universal moral rights into human rights and, hence, actually makes them human rights. As a result, human rights cannot pre-exist their legalisation as independent moral human rights but only as independent universal moral rights.

## HUMAN RIGHTS: DOMESTIC AND INTERNATIONAL

The moral-political nature and, hence, inherent legality of human rights being clarified, the next question pertains to the political community that recognises their existence and, hence, to the level of legalisation of those rights.<sup>47</sup> To address this question adequately, it is useful to start by explaining the idea of the international right to have domestic rights, before showing how this idea can actually illuminate current international human rights practice and more precisely how international and domestic human rights are articulated in that practice. A third step in the argument pertains to the relationship of mutual reinforcement between human rights and citizens' rights and, hence, to the vertical recoupling of human rights and democracy.

### The right to have rights

Per se, the legalisation of human rights; that is, the legal recognition and modulation of universal moral rights *qua* human rights, could take place either at the domestic or at the international level: through national or international legalisation.

Given what was said about the interdependence between human rights and democracy, however, the political process through which their legalisation takes place ought to be democratic and include all those whose rights are affected and whose equality is at stake. As a result, using international law to recognise fundamental and general human interests as sufficiently important to generate state duties at the domestic level is delicate. Not only does international law-making include many other states and subjects than those affected by the laws and decisions of the polity



bound by human rights, but the democratic quality of its processes is not yet secured.<sup>48</sup> To be democratic, the primary locus of legitimation and accordingly of legalisation of human rights ought therefore to be domestic.

At the same time, however, not only are human rights broadly guaranteed through international law to complement domestic protection since 1945, but the universality of international human rights law seems to fit the universal moral nature of human rights. To solve this riddle and succeed in recoupling human rights and democracy, it is important to distinguish between two categories of human rights: human rights that pertain to the access to membership in a political community ('rights to membership') and those that pertain to actual membership in the political community ('membership rights').

Interestingly, this distinction corresponds to two competing readings of Hannah Arendt's 1949 idea of the 'right to have rights' depending on whether one understands them as being moral or legal rights and as being domestic or international rights.<sup>49</sup>

*Pro memoria*, Arendt's argument about the right to have rights can best be read from her essay 'The Decline of the Nation-State and the End of the Rights of Man' published in 1951 in *The Origins of Totalitarianism*.<sup>50</sup> Her argument is primarily based on a theoretical critique of the 18th-century idea of the Rights of Man according to which human beings have rights based on their human nature or reason alone. She draws a further argument against the classical idea of human rights from her sociological and political observations: the development of nationalism and statelessness in the first half of the 20th century and the atrocities of the Second World War have demonstrated that no rights can be guaranteed when one is deprived of membership in a political community. As a result, there can only be one human right *stricto sensu* that human beings have by virtue of their humanity and that is the 'right to have rights' in a given political community and, hence, to become a member of that community. All other rights can only be guaranteed within a given political community and more specifically in her account: the domestic political community.

From that first conclusion, Arendt's quickly moves to her famous aporia, however.<sup>51</sup> That aporia resides in the inherent limitations of the nation-state and nationalism, on the one hand, and the necessary exclusions triggered by political membership, on the other—hence, her legendary distrust of national sovereignty. While it may seem at first that the domestic political community constitutes the solution to its own problems, it also quickly becomes the reason for its failure to succeed where it has just failed. Faithful to her republicanism of fear, Arendt does not consider any alternatives as plausible. She disregards the idea of a world state as potentially dangerous and hence as undesirable. Later on, in a more optimistic move, however, she places her (dimmed) hopes in an embryonic international community; this is best exemplified in her critical report on the Eichmann trial and her discussion of the need and possibility to develop international criminal law and to establish the jurisdiction of international criminal tribunals to try those who have become *hostes humani generis*.<sup>52</sup>

By reference to the distinction I made between two categories of human rights and starting with the former, rights to membership contribute to the constitution of an equal political status, as opposed to the second category of human rights that protect that very equal political status. Rights to membership prohibit, for instance, submitting individuals to genocide, torture, and other extreme forms of cruel treatment, through which a community excludes individuals and does not treat them as equal members.<sup>53</sup> They also include rights to asylum (art. 14 UDHR) and the customary right to *non-refoulement*.

Rights to membership of this kind cannot be guaranteed exclusively from within a given political community since they work as constraints on democratic sovereignty and self-determination. This is why they are usually protected from the outside and through international human rights law. Of course, to be democratically legitimate, they have to be recognised legally through inclusive and deliberative processes. This may prove difficult in the current circumstances of international law, but processes of that kind are incrementally developed in international law-making. Importantly, the legalisation of international human rights is a two-way street that is not limited to a top-down reception but is also bottom-up and comes closer to a virtuous circle of legitimation. As we will see, the recognition and existence of those rights *qua* international human rights that constrain domestic polities ought to be based on democratic practises recognised domestically. And only those polities that respect international human rights are deemed legitimate in specifying the content of those rights and, hence, in contributing to the recognition and existence of those rights *qua* international human rights that will constrain themselves in return.<sup>54</sup>

In short, rights to membership correspond to a first and main reading of Arendt's right to have rights: those universal moral rights and potentially also international legal rights to membership are human rights that guarantee the ulterior benefit of human rights within each political community.<sup>55</sup>

The second group of human rights that guarantee membership in the political community (i.e. most human rights) can at least be regarded as legally protected universal moral rights and most of the time as legal rights as well. However, unless they refer to and correspond to existing domestic (moral-political and legal) human rights, they cannot (yet) be regarded as human rights for lack of an international moral-political community.<sup>56</sup>

*Qua* legal rights, those international human rights norms guarantee rights to individuals under a given state's jurisdiction, on the one hand, and to other states (or arguably IOs; international human rights are usually guaranteed *erga omnes*), on the other, to have those rights guaranteed as 'human rights' within a given domestic community. They correspond to states' (and/or arguably IOs) duties to secure and ensure respect for those rights as 'human rights' within their own jurisdiction.<sup>57</sup> In that sense, international human rights duties are second-order duties for states (and/or arguably IOs) to generate first-order human rights duties for themselves under domestic law, i.e. international duties to have domestic duties. What those international human rights norms do, in other words, is protect legally the universal moral right to have rights discussed as a first kind of human rights, i.e. the right to

equal membership in a moral-political community with all the other human rights this status implies.

Unlike most readings of Arendt's right to have rights,<sup>58</sup> this reading understands rights in the second category (i.e. membership rights) as universal moral rights that may also be protected as international legal rights. They are not human rights themselves but are rights to have human rights, the latter being at once moral and legal rights and not only positive legal rights.

In sum, there are two groups of human rights, the first group ('rights to membership'<sup>59</sup>) being legalised at the international level, while rights belonging to the second group ('membership rights') have to be legalised in domestic law in a given political community before they can be recognised as human rights under international law. In the meantime, international law's human rights norms that protect rights in the latter category guarantee rights to have human rights protected under domestic law. Those two groups of human rights can be matched under Arendt's notion of (human) rights to have (human) rights.

Of course, the situation would be altogether different if the moral-political community bound by legal human rights was an international one: the right-holders and duty-bearers would be the equal members, political actors, and law-makers of that international community. In that case, all international human rights could be regarded as human rights. True, this would require a minimal level of democratic organisation of that community, which to date is not yet given.<sup>60</sup> Furthermore, such supranational communities are not what is usually aimed at in the context of international human rights law: most international human rights instruments existing to date bind national authorities exclusively and only vis-à-vis individuals under their (territorial and extra-territorial) jurisdiction. I will come back to the potential recoupling of human rights and democracy beyond the state in the third section of the article.

### **International and domestic human rights law**

Interestingly, the normative considerations presented before about the locus of legitimation and legalisation of human rights are reflected in contemporary processes of legalisation of human rights under domestic and international law. They fit and justify, in other words, our current international human rights practice.

To start with, one observes that human rights guarantees in international law are usually minimal. They rely on national guarantees to formulate a minimal threshold that they reflect and entrench internationally.<sup>61</sup> More importantly, they are usually abstract and meant to be fleshed out at the domestic level, not only in terms of the specific duties attached to a given right but also in terms of the right itself.<sup>62</sup> Both levels of protection are usually regarded as complementary and as serving different functions, therefore, rather than as providing competing guarantees. This complementarity between international and domestic guarantees explains why the national reception of international human rights within domestic law is favored or even

required by international human rights instruments.<sup>63</sup> Domestic human rights law does more than merely implement international human rights therefore: it contextualises and specifies them. One actually often talks of ‘reception’ within the domestic legal order in that respect.<sup>64</sup> Through domestic legal reception, national authorities determine democratically what the actual threshold of importance of various human interests is to be and what duties that human right will give rise to in practice.

The role played by the minimal threshold constituted by international human rights is not to be underestimated; states are bound, through international human rights and duties, to keep the level of human rights protection they have achieved domestically and not to fall back below that minimal threshold. International human rights are guarantees against levelling-down in other words. There is nothing vacuous as a result in international human rights minimalism.<sup>65</sup> Quite the contrary: it corresponds to their moral-political reality and democratic legitimacy.

Besides its explanatory force faced with current human rights practice, this approach to international human rights has the further benefit of fitting the structure of the international legal order more generally. It puts international human rights law back into its political context. State sovereignty and political self-determination constitute indeed one of the pillars of the international order, a pillar that is complemented and not replaced or, strictly speaking, even restricted by the second pillar of international human rights law.<sup>66</sup> Through those two pillars and its dualistic structure, the international legal order protects the very interdependence between democracy and human rights alluded to before and, hence, keeps the tension between the individual and the group at the core of international law-making. International law guarantees the basic conditions for political equality and self-determination by protecting peoples through state sovereignty, on the one hand, and by protecting individuals through human rights, on the other.<sup>67</sup> As a matter of fact, it is through the relationship of mutual reinforcement between citizens’ rights and human rights that this dualistic structure of the international legal order appears most clearly.

### **From human rights to citizens’ rights and back: recoupling human rights and democracy vertically**

If human rights are to be democratically legitimate, they ought to be the outcome of a legalisation process in which human rights-holders can also be the authors of their own rights. Human rights ought to be citizens’ rights in other words. Having human rights *qua* citizens’ rights means both having them by virtue of one’s own laws and authoring them as author of one’s own laws.

International but also domestic human rights guarantees usually also benefit non-citizens domestically, however. They have a broader personal scope therefore than the rights that belong to citizens or members of a domestic or regional polity. This cleavage between citizens and non-citizens in most contemporary democracies is a

well-known difficulty. Obviously, the nexus between human rights and citizens' rights is not respected as long as political rights pertain to the holding of nationality; all resident non-nationals are excluded from political participation despite these people being potentially equally subjected to the laws and regulations of their host state. Needless to say, in circumstances of globalisation, increased mobility, and constant migration, the exclusion of non-nationals from the polity they actually live in is ever harder to justify.<sup>68</sup>

Whether the criterion for citizenship remains nationality or shifts towards residence or subjecthood to domestic laws and decisions, and whether certain political rights are granted to members of the political community without naturalisation and full citizenship, however, it should be clear that boundaries still have to be drawn between members of any given political community and non-members. As a matter of fact, the effect of human rights is that those boundaries are constantly being questioned and potentially pushed further to include more of the legal subjects into the group of law-makers. This is the result of the fruitful albeit irresolvable tension that exists between human rights and citizens' rights.

This constant interaction between human rights and citizens' rights is reminiscent of Arendt's universal right to have particular rights and the to-ing and fro-ing between the universal and the particular highlighted in the previous sections. Human rights are specified as citizens' rights but citizens' rights progressively consolidate into human rights in return. Thus, as we saw before, the legalisation of human rights is a two-way street that is not limited to a top-down reception or a bottom-up crystallisation. According to Buchanan, only those polities that respect international human rights (of both kinds discussed before) are legitimate in specifying the content of those rights *qua* citizens' rights and, hence, in contributing to the recognition and existence of those rights *qua* international human rights that constrain polities in return and so on.<sup>69</sup>

This virtuous circle can actually be exemplified by the sources of international human rights law. International human rights law is indeed deemed to belong to general international law and finds its sources in general principles of international law but arguably also in customary international law. Both sets of sources derive international norms from domestic ones and this jurisgenerative process is actually epitomised by international human rights law.<sup>70</sup> Within the EU, this actually occurs through the recognition of common constitutional traditions *qua* non-written general principles of EU law and the fact that EU fundamental rights were originally derived exclusively from general principles of EU law (see e.g. art. 6 par. 3 EUT; art. 52 par. 4 EU FR Charter). The mutual relationship between human rights and citizens' rights can also be confirmed by recent human rights practice, whether it is of a customary, conventional, or even judicial nature. On the one hand, citizens' rights contribute to the development of the corresponding international human rights' judicial or quasi-judicial interpretations. This is clearly the case in the European Court of Human Rights' case-law where common ground is a constant concern and is sought after when interpreting the European Convention on Human Rights (ECHR). Consolidations of national best practises and benchmarking also occur, for

instance, through general comments issued by the UN human rights committees. One should also mention, on the other hand, mechanisms of transnational consolidation of human rights. This takes place, for instance, through comparative constitutional borrowings in domestic courts and legislative debates.

## RECOUPLING HUMAN RIGHTS AND DEMOCRACY

The mutual relationship between international human rights and domestic or regional citizens' rights highlighted so far is currently facing new challenges with the development of new forms of democracy and, hence, of democratic membership beyond the state.<sup>71</sup> These challenges pertaining to the horizontal recoupling of democracy and human rights beyond the state are highlighted in a first part of the argument. As the European Union exemplifies some of these developments at regional level, the relationship between EU democracy and human rights is assessed more closely in a second step of the argument. Drawing on the European experience, a final section explores the possibility of recoupling human rights and democracy horizontally within a global political community and emphasises the difficulties such a possibility faces.

### The challenges of human rights and democracy beyond the state

When considering the legitimacy of law-making beyond the state, two sources of legitimacy are usually identified: international democracy (whether global or multi-level) and international human rights. Those two sources of legitimacy are mostly discussed separately or at least depicted as alternatives.

As a matter of fact, the difficulties of the democratic route usually lead to the endorsement of human rights as the most promising alternative source of legitimacy in international law.<sup>72</sup> It is, for instance, the route James Bohman takes in his *democratic account of democracy beyond the state*:<sup>73</sup> when pressed to account for the ultimate legitimisation of his account, he prioritises the human right to political membership and global human rights in general. This leads him to put human rights first, over any particular democratic process through which those rights may be legitimised.<sup>74</sup> For republican reasons, he cannot endorse a global democratic model that would imply a global state, but this comes at a price: disconnecting international human rights from any form of particular democratic legitimisation.

This decoupling of human rights and democracy in discussions of international legitimacy comes at a surprise at first. As we have seen before in this article, human rights require democracy to be legitimate and vice-versa. No democratic theorist or human rights theorist would argue for one of them as a unique source of legitimacy in the domestic context. However, what this relationship means once one of the two elements travels beyond the state is yet to be determined.

As alluded to in the introduction, the relationship between the two was depicted as a broken one ever since the development of international human rights law



post-1945 and the two elements were progressively decoupled in global political theory, albeit with great reluctance by some authors.<sup>75</sup> Recently, democratic theorists and human rights theorists alike have started tackling the question anew and recoupling those elements across various levels of governance. What they are concerned with usually, however, is the relationship between international human rights and domestic human rights, on the one hand, or the relationship between international democracy and domestic democracy, on the other. Sometimes they are also concerned with the relationship between international human rights and domestic democracy.<sup>76</sup> And this is the approach of their relationship and more precisely of their vertical recoupling that has been taken in this paper so far.

It is only slowly, however, that the relationship between democracy and human rights is assessed at the same governance level beyond domestic boundaries.<sup>77</sup> The questions raised by this horizontal recoupling of those two pieces of the domestic puzzle but at another level of governance are by no means easy. Indeed, if international or regional human rights norms can no longer be deemed only as external human rights to membership within a domestic polity and legal rights to have membership rights within the domestic or regional political community, one may wonder how those developments will and ought to impact on the respective democratic and human rights regimes of the corresponding international organisations' Member States. Multilevel democracy and human rights regimes present the specificity of interaction across political levels. Being a citizen of those different overlapping political communities cannot be compared to being a citizen and having human rights in juxtaposed polities as a result.

This question is particularly sensitive in regional organisations. As long as regional human rights behave as international human rights in the domestic context, the virtuous relationship between external human rights and internal citizens' rights alluded to before can be maintained: international human rights support domestic democracy by protecting the minimal rights necessary for domestic democracy, and citizens' rights developed within domestic democracy consolidate into international human rights in return. With its coming of age, however, supranational political integration is also progressively calling for political equality and, hence, for more than international human rights guarantees.

### **Human rights and democracy in the European Union**

In this section, I would like to argue that the legalisation of fundamental rights within EU law and the parallel development of EU citizenship can actually best be explained together. It is because EU law was increasingly directly affecting fundamental individual interests that individuals were gradually recognised not only as direct fundamental rights bearers under EU law but also as EU citizens. Arguably, therefore, the EU is currently experimenting the final stage of its transformation into a municipal democratic and human rights regime with its own international human rights duties, thus triggering new and fascinating dilemmas and questions. In the

European context, old arguments about the possibility of human rights regimes beyond the state have to be addressed anew.<sup>78</sup>

In order to fully grasp the extent of the changes that have occurred over 50 years of post-national integration within the European Union with respect to the relationship between human rights and democracy, one may distinguish three phases in human rights development: first, EU human rights as international human rights; second, EU human rights as transnational human rights; and, finally, EU human rights as municipal human rights.

The first phase of human rights protection in the EU may be described as the development of *international human rights*. That phase did roughly run from the 1960s up to the 1990s and started with the gradual recognition of EU fundamental rights through the European Court of Justice (ECJ)'s case-law from the 1960s onwards.<sup>79</sup>

Originally, the EU founding treaties did not include references to human rights nor did they bind EU institutions or EU Member States to any international or EU human rights duties—with the exception of the equality between men and women and the principle of non-discrimination on grounds of nationality whose justification may, however, be traced back to an economic rationale. What Member States feared, however, was a levelling down of both their domestic and international human rights guarantees under the pressure of EU law and the effects of the primacy of EU law. In that context, EU fundamental rights were gradually identified as general principles of EU law by the ECJ to ensure a minimal and negative level of protection of individuals within the scope of application of EU law and against EU institutions and national institutions *qua* institutions of each domestic polity.

Given its origins, the specificity of the EU fundamental rights regime lied then, and to a great extent still lies, both in the sources of those rights and their scope. On the one hand, the sources of EU fundamental rights were, and largely still are, bottom-up and indirectly derived *qua* general principles of EU law from national constitutional traditions and Member States' international human rights duties.<sup>80</sup> This specificity has survived in spite of the recognition of those rights in the EU treaties and in the EU Fundamental Rights Charter (see e.g. art. 6 par. 2 EUT; art. 52 par. 4 EU FR Charter). Their scope, on the other hand, was, and largely still is, limited to the implementation of or derogation to EU law and hence those rights were, and still are, only meant to bind EU institutions and EU Member States within the material scope of EU law.<sup>81</sup> This characteristic has also survived to date despite their recognition in the EU treaties and in the EU Fundamental Rights Charter (see e.g. art. 6 par. 1 EUT; art. 51 EU FR Charter).

The reason for this specific human rights regime is the absence of a direct general human rights competence of the EU.<sup>82</sup> Nowadays, the EU has many specific human rights competences (e.g. art. 19 EUFT), has duties to protect and respect human rights within the scope of its other competences (e.g. human rights protection in the asylum context) that one may refer to as an indirect human rights competence, and, finally, may even require Member States to respect EU law and, hence, EU fundamental rights in the context of their retained competences given the constant

reduction of areas of purely internal competence and Member States' duties of loyalty (art. 4 par. 3 EUT). It does not, however, have the power to legislate and adopt measures to promote and respect human rights outside the scope of its other competences in the EU treaties. This applies as much to an explicit as to an implied human rights competence.<sup>83</sup> The reason behind the absence of a general and direct human rights competence of the EU goes back to the Member States' resistance to the EU and to their original motivation to set human rights limitation on the EU but not on themselves. Given the mutual relationship between human rights and democratic sovereignty, indeed, Member States have always insisted on retaining their human rights competence. This has actually led them to deny the existence of an EU competence in the human rights field three times in the latest revision of the EU treaties (see the so-called standstill clauses of art. 6 par. 1 EUT; art. 6 par. 2 EUT; and art. 51 par. 2 EU FR Charter). Interestingly, this resistance to a centralised EU human rights competence can actually be compared to the resistance to federal human rights law at the time of the adoption of the first bill of rights in the United States.<sup>84</sup>

The specificities of EU fundamental rights are characteristic of a form of human rights protection that amounts to more than minimal and external international human rights guarantees while, at the same, avoiding the substitution of the domestic set of human rights in EU Member States by an EU set of human rights. They work, in other words, the way international human rights work in relation to citizens' rights in the domestic context, albeit in a more radical way and with a broader impact on domestic citizenship and citizens' rights due to the immediate validity and absolute primacy of EU law within domestic law. They also bind EU institutions directly and not only EU Member States. Hence, probably their quasi-domestic denomination: EU 'fundamental' and not 'human' rights. In fact, the international-plus role of EU fundamental rights in this first phase actually explains why international human rights law was never considered seriously as binding on EU institutions or on EU Member States through their EU membership.<sup>85</sup>

The second phase of human rights development in the EU is best captured as one of *transnational human rights*. It started running roughly from the early 1990s onwards and its start-off point was the creation of EU citizenship in 1992 and the development of EU citizens' rights (art. 19 ff. EUFT) through the ECJ's case-law thereafter. It is because EU law was increasingly directly affecting individual interests that the EU democratic deficit was emphasised at that time and that individuals were recognised by the Maastricht Treaty as EU citizens. As EU citizenship corresponds to the rights EU citizens have under the EU treaties, EU fundamental rights included from then on both citizens' rights and non-citizens' rights (see e.g. Title V of the EU Fundamental Rights Charter).<sup>86</sup>

European Union citizens' rights can be considered as transnational human rights and as lying as a result between the international human rights of the first phase of European integration and full municipal human rights one would have in a Member State. What EU citizens' rights do indeed is offer the benefit of domestic citizens' rights to all EU citizens in any Member State in which they reside, including theirs,

provided they have used their freedom of movement at some stage<sup>87</sup>—and arguably even without having done so.<sup>88</sup> Their direct effect and granting of domestic human rights in any given Member State, their indirect sources stemming from domestic and international human rights duties of EU Member States, together with the fact that they bind EU institutions as well as EU Member States distinguishes them from international human rights. But their material scope is still too limited to make them the equivalent of domestic human rights. This is reminiscent of the standard critique of EU citizenship: EU citizenship does not refer to full membership in the Member State of residence as national political rights are not granted on that basis and it cannot (yet) be equated with membership in a European political community, on the one hand; and, in the absence of such a political community, EU citizenship can be reduced to a sum of individual rights without the corresponding political duties, on the other.<sup>89</sup>

Finally, I would like to propose that a third phase in the development of human rights protection in the EU is currently in the making and may be described as one of *municipal human rights*. It started arguably in 2009 with the entry into force of the Lisbon Treaty.

The newly revised EU Treaties turn EU citizenship into a potential municipal citizenship based, for the first time, on the principle of political equality (art. 9 EUT) and on stronger political rights at EU level (art. 10 ff. EUT), on the one hand. As a result, EU citizenship will have to be made truly political, and not only a source of political rights within domestic polities of the EU but also a source of political rights at EU level. This will imply, for instance, full participation rights, or at least constituent power and, eventually, a full-blown parliamentary legislative initiative. On the other, the Lisbon Treaty turns EU fundamental rights into more than transnational rights: with the binding effect of the EU Fundamental Rights Charter (art. 6(1) EUT) from 1 December 2009 and the EU accession to the ECHR (art. 6(2) EUT) being currently negotiated, EU human rights are progressively being turned into a municipal human rights regime and potentially into complete citizens' rights of their own. Further evidence may be found in the fact that EU is also gradually binding itself directly to international human rights law the way Member States are.<sup>90</sup>

As a result, EU fundamental rights and EU citizenship that developed separately at first are finally being recoupled by the ECJ.<sup>91</sup> They are made to correspond to each other the way they would in a domestic polity. This municipal development trend in the EU was also noted by the Advocate General Maduro in his *Kadi* opinion.<sup>92</sup> Maduro actually made a proposal for a municipal interpretation of EU fundamental rights in his *Centro Europa* opinion.<sup>93</sup> Those developments in the ECJ case-law and, in particular, the mutual reinforcement between EU citizenship and EU fundamental rights have most recently been confirmed by Advocate General Sharpston in her *Zambrano* opinion.<sup>94</sup>

This, in turn, is bound to affect the way EU fundamental rights relate to domestic human rights and citizenship. Interestingly, and this confirms the trend towards a municipal human rights regime, the vexed question of the human rights competence

of the EU is resurfacing now that the Lisbon Treaty has entered in force. The fact that the United Kingdom, Poland, and the Czech Republic opted out of the EU Fundamental Rights Charter when it became binding in 2009 shows the resistance there is against EU law becoming a direct source of human rights and, hence, potentially attracting a human rights competence for the EU.<sup>95</sup> Earlier resistance to the drafting of the Charter in 2000 were already signalling some of the Member States' fears.

Those resistances are in plain contradiction with the current legal situation, however. The EU not only has indirect human rights competences throughout the scope of its competences, but it also has many specific direct competences in the human rights context and arguably an implied general and direct human rights competence as well. This argument finds backing in the creation of the EU Fundamental Rights Agency in 2007 and the fact that its legal basis was art. 352 EUFT, i.e. the flexibility clause.<sup>96</sup> Moreover, Member States' duties of loyalty (Article 4 par. 3 EUT) require, according to the ECJ, that when exercising their retained competences Member States comply with EU law<sup>97</sup> and contribute to the overall development of EU law.<sup>98</sup> Finally, the EU's imminent accession to the ECHR implies holding it accountable in the future to external human rights standards the way its Member States have been so far. True, art. 6 par. 2 EUT and Protocol no. 8 to the Lisbon Treaty specify that accession of the EU shall not affect the competences of the Union or the powers of its institutions. However, unless there is a way of holding either the Member States or the EU accountable for not having the competences necessary to ensure the respect of ECHR duties, the EU will continue to benefit from the *Bosphorus* presumption of equivalence between EU fundamental rights and the ECHR.<sup>99</sup> This *status quo* would be contrary to the idea of an accession that should place the EU in the same position as any other State party to the ECHR. Of course, it may be possible to refer the European Court of Human Rights (ECtHR) back to the EU division of powers and, hence, have it send the question back to the ECJ given the autonomy of the EU legal order.<sup>100</sup> Besides overloading a court that does not have the resources to be, this increase in judicial litigation over competences and joint liability before the ECJ would no doubt lead to the very increase of EU competences in the human rights context Member States sought to avoid. The judicial experience of federal states such as the United States or Switzerland is telling in this respect.

The current superposition of those three phases and types of individual rights in the EU does not go without difficulties. Not only is the relationship between the different phases and types of rights complex. The third phase currently in progress does also threaten the achievements of the first and second phases in terms of them being a *sui generis* international-plus human rights or transnational human rights regime. It will affect the way EU human rights and citizenship relate to domestic human rights and citizenship, on the one hand, and impact on the actual autonomy of domestic polities given the imbrication of domestic polities within the EU and the identity of the different peoples, on the other. One may, therefore, predict a new era in the treatment of sensitive questions of democratic sovereignty in the European

multilevel political community and, hence, potentially the beginning of a new phase in the European process of supranational political integration.<sup>101</sup>

### Human rights and democracy in a global multi-level community

If this analysis of the EU's human regime holds, it would be very interesting to see whether the horizontal recoupling of human rights and democracy beyond the domestic polity could and ought to become a trend in other IOs (e.g. the WTO) and their gradual democratisation in the future.

International democratisation is indeed developing fast following the development of common fundamental interests and the need to address them together in an inclusive fashion. In those conditions, the recognition of human rights in international law will be required by the expansion of political equality and new ways of political inclusion in international law-making, and hence could be legitimised at the same time. As long as those human rights and post-national democratic processes remain within the framework of the external/internal tension with domestic human rights and politics or at the most within the transnational framework experienced in the EU so far, there is no reason the transnational model of human rights may not hold in those IOs as well. However, once the seemingly irresistible move into the municipal human rights phase has started, as it seems to be confirmed by current developments in the EU, important challenges may arise beyond Europe as well.

Whether the EU solves those issues by turning into a federal supranational entity on a state-model or manages to maintain a third kind of multilevel political community of the type it has now, it is clear that those options are not open outside the EU. Indeed, the first option is not plausible at the global level and the only legitimate solution would be to maintain a multilevel political community of some sort. The difficulty with this second option, however, is that once human rights and democracy are recoupled in an IO, it is difficult to maintain a general human rights competence at the domestic level. Current developments in the EU are evidence to the instability of the transnational model. As to the first option, i.e. the idea of a world-wide political community and, hence, of a global democracy *stricto sensu*, it is not only implausible but normatively undesirable.<sup>102</sup> One may indeed share Arendt's fears about an unchecked global sovereign. Given what was just said about the externally guaranteed international legal rights to have human rights on the inside and the beneficial tensions between those international rights and duties and the corresponding internal ones, conceiving of the international community as a political one with its own human right-holders and human rights duty-bearers would undermine the productive tension between human rights and democracy, and the equilibrium that may be reached between the universalising process of the particular and the particularisation of the universal.<sup>103</sup>

This is also the reason why Jürgen Habermas, in his statement of what post-national democracy should look like, does not favor a full human rights regime beyond the regional or intermediary level in his proposed multilevel political



structure.<sup>104</sup> His co-originality model prevents him from doing so, at the risk otherwise of leading his model of global democracy towards the world state he does not wish to arise.<sup>105</sup>

One may actually add, based on this article's argument, that it is the right to have rights that prevents us and Habermas from making that step. Distinguishing more carefully between international human rights and citizens' rights, and between the two kinds of rights to have rights may help Habermas out of the much too modest human rights proposal he makes for the new international order. He could indeed accept as human rights a further group of human rights that may be recognised legally at the international level only and in the absence of corresponding domestic rights: human rights to membership with all the human rights those rights require for their realisation in a given political community. Those human rights can only be guaranteed from outside a political community. They draw their legitimacy from inclusive and representative mechanisms of international law-making, however, that find their inspiration in domestic democratic practises and feed them into international legal standards that will in return constrain those domestic practises. This external/internal tension between human rights and citizens' rights would get lost in a global world state. As to the international human rights that do not correspond yet to a set of domestic human rights, they are not yet human rights, but legal rights that correspond to the universal moral rights to have human rights in every given jurisdiction. To those rights to have human rights correspond second-order state duties to have human rights duties under domestic law and procedures. These are the rights states ought to incorporate into their legal orders in order to respect them.

This cautious approach to the joint development of human rights and democracy beyond the state does not seem to be shared by Cristina Lafont.<sup>106</sup> In her most recent work on global democracy, she argues rightly that global democracy ought not and need not mean a global state. To prove that institutional human rights accountability may be organised beyond the state without a global state, she makes an argument for the accountability of non-state actors for human rights violations.<sup>107</sup>

There are two sets of difficulties with this argument: one that pertains to human rights and the other to their relationship to democracy. With respect to the former, Lafont's account draws a distinction between 'non-state actors' duty to respect human rights and states' duty to protect human rights. Lafont does not draw a sharp distinction among non-state actors between international institutions such as IOs and NGOs or private actors, however. The fact that most of her examples concentrate on international 'institutions', however, indicates some kind of institutional or public requirement within her approach to human rights duty-bearers.<sup>108</sup> That requirement can only be explained by reference to democracy in her argument. The difficulty is that Lafont cannot have recourse to that distinguishing argument because she is making a human rights-argument for democracy itself. Another related difficulty is the absence of mention of how states and IOs' human rights duties to respect and/or protect would be allocated and articulated in her model.

A second set of difficulties Lafont faces pertains to her approach to the relationship between human rights and democracy. Using human rights accountability to prove the possibility of democratic accountability seems counterproductive given that they require each other. As they cannot be separated, comparing them as distinct phenomena is not plausible. Her gradual shift towards institutional actors within her human rights argument is evidence of that tension. Furthermore, once democracy and human rights are recoupled within an IO besides democratic states and once human rights cease to be international human rights and external standards, the attraction of a human rights competence and of popular sovereignty makes it difficult to maintain a multilevel human rights and democratic model that would have all those political communities co-exist at the same time.

## CONCLUSION

Following Ingeborg Maus's warning about the consequences of the decoupling between human rights and democracy, this article aimed at clarifying how the legitimacy of human rights can be accounted for once they are decoupled from democracy through their internationalisation, but also potentially recoupled beyond the state, across different governance levels at first and then maybe even at the same level of governance. I have termed the first kind of post-national recoupling vertical recoupling and the second kind horizontal recoupling.

Based on the mutual relationship between democracy and human rights, I have started by arguing, first of all, that human rights are inherently moral and legal: the law cannot create universal moral rights but it can recognise or even modulate them, and turn them into human rights. Of course, there can be universal moral rights that are not matched by legal rights, and legal norms that go by the name of human rights that are not human rights. However, there cannot be human rights that are not *à la fois* universal moral rights and legal rights.

In a second stage of the argument, I have argued that, by virtue of human rights' close relationship to democracy, the legalisation of human rights ought to take place in each given political community and, hence, given the current state of the international community, at the domestic level in priority. International human rights norms can only be regarded as human rights if they match, in a minimal way, an existing set of domestic human rights. This occurs through the mutual relationship of reception and consolidation between international legal human rights norms and citizens' rights. In the absence of such a set of domestic human rights, international human rights are legal rights that correspond to the universal moral rights to have human rights in a given political community. To those rights to have human rights correspond second-order state duties to have human rights duties under domestic law. The only human rights that may be recognised legally at the international level in the absence of corresponding domestic rights are a second group of human rights: human rights to membership with all the human rights those rights require for their realisation in a given political community. Those human rights

can be legitimately guaranteed from outside a political community through inclusive and representative mechanisms of international law-making that draw inspiration from democratic domestic human rights practises and turn them into international human rights standards that may in return constrain those democratic polities. Those two kinds of human rights are two complementary interpretations of Arendt's right to have rights.

The third stage of the argument made in this article pertained to the ways in which democracy and human rights are gradually being recoupled horizontally and at the same level of governance with the development of democracy beyond the state, in regional and international organisations in particular. Those developments have implications, I have argued, for democratic theory, of course, but also for human rights theory as the picture presented in the first and second sections of the article and its external/internal dynamic ought to be thought through again once democracy and human rights are matched, not only across levels of governance but also within a single political community beyond the state.

In that section, I have argued that the European Union is a good example of these developments at regional level with EU human rights and EU citizenship reinforcing each other mutually, as I have demonstrated on the basis of recent legal developments, and even reaching a stage where the political autonomy of EU Member States may be called into question. Once this development reaches the global level and international IOs, I have argued that the situation ought to be regarded as much more complex than in the EU. One should, indeed, stay clear of a global state if one wants to preserve the external/internal tension between international human rights and citizens' rights I have uncovered in the second section of the paper. Whether the transnational model of citizenship and human rights experienced in the EU since the 1990s is sufficiently stable to hold globally is unclear, and recent developments in the EU seem to indicate it is not. It remains to be seen, for instance, how the combination of multilevel citizenship and pluralist human rights standards can and ought to impact on states' democratic and human rights regimes. Answers to those difficult questions will have to remain open for now.

## **ACKNOWLEDGEMENTS**

Many thanks to Eleonor Kleber Gallego and Thierry Leibzig for their diligent research assistance, and to Feryel Kilani for her help with the formal layout of this article. I would also like to thank Andreas Follesdal and Eva Erman for inviting me to present a previous draft of this article in the workshop 'Human Rights and European and Global Citizenship' at Stockholm University on 26 May 2010. I am particularly grateful to Eva Erman for her very perceptive and helpful comments on that occasion, and to the other participants for their feedback and critiques, in particular to Sofia Näsström, Michael Goodhart, Christine Chwaszcza, and Ken Baynes. Last but not least, I am grateful to two anonymous referees for their extremely helpful comments and critiques.

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3. See for example Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).
4. On democracy beyond the state, see e.g. Samantha Besson, 'Institutionalizing global democracy', in *Justice, Legitimacy and Public International Law*, ed. L. Meyer (Cambridge: Cambridge University Press, 2009), 58–91; Samantha Besson, 'Ubi Ius, Ibi Civitas. A Republican Account of the International Community', in *Legal Republicanism and Republican Law – National and Post-National Perspectives*, eds. S. Besson and J. L. Martí (Oxford: Oxford University Press, 2009), 204–37; Samantha Besson, 'The Authority of International Law – Lifting the State Veil'. *Sydney Law Review* 31, no. 3 (2009): 343–80; Thomas Christiano, 'Democratic Legitimacy and International Institutions', in *The Philosophy of International Law*, eds. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), 119–37; Philip Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective', in *The Philosophy of International Law*, eds. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), 139–60; Allen Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions'. *Ethics and International Affairs* 20, no. 4 (2006): 405–37.
5. See for example in German, Robert Alexy, *Theorie der Grundrechte*. 3rd ed. (Frankfurt: Suhrkamp, 1996); Stefan Gosepath and Georg Lohmann, eds., *Die Philosophie der Menschenrechte*. 2nd ed. (Frankfurt am Main: Suhrkamp, 1999); Heiner Bielefeldt, *Philosophie der Menschenrechte. Grundlagen eines weltweiten Freiheitsethos* (Darmstadt: Primus, 1998); Hauke Brunkhorst, Wolfgang R. Köhler, and Matthias Lutz-Bachmann, eds., *Recht auf Menschenrechte* (Frankfurt am Main: Suhrkamp, 1999); Karl-Peter Fritzsche and Georg Lohmann, eds., *Menschenrechte zwischen Anspruch und Wirklichkeit* (Würzburg: Ergon, 2000); Georg Lohmann et al., *Die Menschenrechte: Unteilbar und Gleichgewichtig?* (Potsdam: University Press, 2005); Rainer Forst, *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Frankfurt am Main: Suhrkamp, 2007); Christoph Menke and Arnd Pollmann, *Philosophie der Menschenrechte. Zur Einführung* (Hamburg: Junius Verlag, 2007); Karl-Peter Fritzsche, *Menschenrechte*. 2nd ed. (Paderborn [etc.]: F. Schöningh, 2009). And more recently in English, e.g. Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*. 2nd ed. (Princeton: Princeton University Press, 1996); John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); James W. Nickel, *Making Sense of Human Rights*. 2nd ed. (Oxford: Blackwell Publishing, 2007); Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (New York: Cambridge University Press, 2007); George

- Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2008); James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); James Griffin, 'Human Rights and the Autonomy of International Law', in *The Philosophy of International Law*, eds. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), 339–55; John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracting Griffin's Steps', *European Journal of Philosophy* 10 (2002): 79–100; John Tasioulas, 'The Moral Reality of Human Rights', in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, ed. T. Pogge (Oxford: Oxford University Press, 2007), 75–101; John Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' *Philosophical Compass* 4, no. 6 (2009): 938–50; John Tasioulas, 'Taking Rights out of Human Rights', *Ethics* 120 (2010): 647–78; Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2010); Joseph Raz, 'Human Rights without Foundations', in *The Philosophy of International Law*, eds. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), 321–37; Joseph Raz, 'Human Rights in the Emerging World Order', *Transnational Legal Theory* 1, no. 1 (2010): 31–47. See also the special issue of *Ethics* (120: July 2010) edited by Allen Buchanan on Griffin's book (Griffin, *On Human Rights*); and Charles R. Beitz and Robert Goodin, eds., *Global Basic Rights* (Oxford: Oxford University Press, 2009), an edited collection assessing the impact of Shue's book (Shue, *Basic Rights*) 30 years after the publication of its first edition.
6. See for example Allen Buchanan, 'Human Rights and the Legitimacy of the International Order', *Legal Theory* 14 (2008): 39–70; Allen Buchanan, 'The Legitimacy of International Law', in *The Philosophy of International Law*, eds. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), 79–96; John Tasioulas, 'The Legitimacy of International Law', in *The Philosophy of International Law*, eds. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), 97–116; Besson, 'The Authority of International Law'.
  7. See for example Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach', *Ethics* 120, no. 4 (2010): 711–40; Griffin, *On Human Rights*, Ch. 14; Charles Beitz, 'Democracy and Human Rights', *Human Rights & Human Welfare* 7 (2007): 100–4; Christoph Menke, 'The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument', *Social Research Paper* 74, no. 3 (2007): 739–62; Joshua Cohen, 'Is There a Human Right to Democracy?', in *The Egalitarian Conscience*, ed. C. Sypnowich (Oxford: Oxford University Press, 2006), 226–50; Buchanan, *Justice, Legitimacy, and Self-Determination*, 142–47; Shue, *Basic Rights*, 67–78.
  8. See for example Samantha Besson, 'The Democratic Authority of International Human Rights', in *The Legitimacy of Human Rights*, ed. A. Follesdal (2011, forthcoming); Seyla Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty', *American Political Science Review* 103, no. 4 (2009): 691–704; Seyla Benhabib, 'The Legitimacy of Human Rights', *Deedalus* 137, no. 3 (2008): 94–104; Andreas Follesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights', *Journal of Social Philosophy* 40, no. 4 (2009): 595–607; Allen Buchanan and Russell Powell, 'Constitutional Democracy and the Rule of International Law: Are They Compatible?' *Journal of Political Philosophy* 16, no. 3 (2008): 326–49; Andreas Follesdal, 'Why International Human Rights Judicial Review Might Be Democratically Legitimate', *Scandinavian Studies in Law* 52 (2007): 103–22.
  9. See for example Raz, 'Human Rights without Foundations'; Raz, 'Human Rights in the Emerging World Order'. With a slight difference, see also Beitz, *The Idea of Human Rights*; Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?' *The Journal of Political Philosophy* 12, no. 2 (2004): 190–213. For a critique, see Forst, 'The Justification of Human Rights'; and Jean Cohen, 'Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization', *Political Theory* 36, no. 4 (2008): 578–606.



10. See for example. Samantha Besson, 'European Human Rights, Supranational Judicial Review and Democracy – Thinking outside the judicial box', in *European Human Rights Protection between the European Court of Human Rights and the European Court of Justice*, eds. P. Popelier and C. Van den Heyning (Cambridge: Intersentia, 2011, forthcoming).
11. See also Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004); Eva Erman, *Human Rights and Democracy: Discourse Theory and Global Rights Institutions* (Aldershot: Ashgate, 2005).
12. The argument presented in this section is a summary of a lengthier argument developed in Samantha Besson, 'Human Rights – Ethical, Political ... or Legal? First Steps in a Legal Theory of Human Rights', in *The Role of Ethics in International Law*, ed. D. Childress (Cambridge: Cambridge University Press, 2011, forthcoming).
13. Joseph Raz, 'On the Nature of Rights', *Mind* 93, no. 370 (1984): 194–214, 195.
14. *Ibid.*, 200, 209.
15. *Ibid.*, 208.
16. See on the historical and synchronic universality of human rights: Tasioulas, 'Human Rights, Universality and the Values of Personhood'; Tasioulas, 'The Moral Reality of Human Rights', 76–77. See also Raz, 'Human Rights in the Emerging World Order'. Contra: James Griffin, 'First Steps in an Account of Human Rights', *European Journal of Philosophy* 9, no. 3 (2001): 306–27.
17. See Forst, 'The Justification of Human Rights'; Rainer Forst, 'The Basic Right to Justification: Toward a Constructivist Conception of Human Rights', *Constellations* 6, no. 1 (1999): 35–60, 48. On the relationship between political equality and human rights more generally, see e.g. Christiano, *The Constitution of Equality*, 138, 156.
18. In this account, political equality and interests are the two complementary components of the grounding of human rights. Recently, a few authors have tried to link *international* human rights to equality and equal status in particular and, hence, to fill a gap that was left open not only by human rights theorists but also by equality specialists. Neglect for that connection is attributable both to the lack of interest for international law and politics beyond domestic boundaries that has long plagued theories of egalitarianism that are meant to be universal in application but whose relevant set of institutions remains the state's, but also to the resilience of foundationalist and especially monist approaches to the justification of human rights. Even though the egalitarian dimension of international human rights has now been uncovered, especially thanks to Allen Buchanan's seminal essays on the topic [Allen Buchanan, 'The Egalitarianism of Human Rights', *Ethics* 120 (2010): 679–710 on equal status as ground for international human rights; and Allen Buchanan, 'Equality and Human Rights', *Politics, Philosophy & Economics* 4, no. 1 (2005): 69–90], more work is needed on what that normative ideal actually means in this context.
19. See Cohen, 'Minimalism about Human Rights', 197–98; Forst, 'The Justification of Human Rights', 740.
20. See Cohen, 'Minimalism about Human Rights', 197–98; Cohen, 'Rethinking Human Rights', 585–86.
21. For the original idea of mediating duties, see Henry Shue, 'Mediating Duties', *Ethics* 98 (1988): 687–704, 703. See also Christian Reus-Smit, 'On Rights and Institutions', in *Global Basic Rights*, eds. C.R. Beitz and R.E. Goodin (New York: Oxford University Press, 2009), 25–48. On liberal rights and the exercise of power in general, see Christiano, *The Constitution of Equality*, 134.
22. Hannah Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism* (London: Penguin, 1951), 147–82.
23. Scope precludes discussing the notion of political equality to a full extent here. It suffices to say I am using it to refer to equal political status as opposed to distributive equality, and as a minimalist requirement of transnational justice. On the importance of equal status, see e.g. E. Anderson, 'What is the point of equality?' *Ethics* 109 (1999): 287–337; J. Waldron, *God,*



- Locke and Equality* (Cambridge: Cambridge University Press, 2002). More work is still needed to distinguish this minimalist idea of equal status from more robust egalitarian ideals such as equality of resources or equality of welfare, equality of opportunities or equality of outcomes, on the one hand, and from the idea of mere equal status independently from political membership, on the other. For a first attempt, see e.g. Samantha Besson, 'International Human Rights and Political Equality', in *Equality in Transnational and Global Democracy*, eds. E. Erman and S. Näsström (2012, forthcoming).
24. The proposed account comes very close to Forst, 'The Justification of Human Rights'; Forst, 'The Basic Right to Justification', 48–50; and Forst, *Das Recht auf Rechtfertigung*. My account differs ultimately as Forst's is based on a reflexive *right* to political justification, whereas the present account is based on political equality and its mediation through human rights (see also Christiano, *The Constitution of Equality*, 156). Both accounts, of course, rely on Habermas's idea of co-originality between democratic sovereignty and human rights (Habermas, *Faktizität und Geltung*, Ch. III), although they provide different variations of that idea, notably by referring to an external right or value as foundation for their co-originality. See Brettschneider, *Democratic Rights*, 29–38 for a similar interpretation of Habermas's co-originality.
  25. See Tasioulas's critique of Griffin, *On Human Rights*: Tasioulas, 'Taking Rights out of Human Rights'.
  26. The following argument is a specific development of Cohen, 'Minimalism about Human Rights', 197–98s argument.
  27. As a result, it is not possible to distinguish, among human rights, between those that are connected to political equality and to democracy and those that are not.
  28. See Cohen, 'Rethinking Human Rights', 604 fn. 47.
  29. For such a minimalist and non-parochialist approach to equal status as a component of the grounding of international human rights, see e.g. Buchanan, 'The Egalitarianism of Human Rights', 708–10; and Buchanan, 'Equality and Human Rights', 78–80.
  30. In the rest of the paper, I will be using 'citizenship' to mean democratic membership. Of course, one may be a citizen of a non-democratic state or a non-democratic post-national political community more generally, but this will not be my concern here.
  31. Scope precludes not only addressing the question of the boundaries of democracy in this article, but also providing a full defence of the all-subjected principle endorsed here. See for a discussion of the all-affected or the all-subjected principles, e.g. Robert Goodin, 'Enfranchising All Affected Interests, and Its Alternatives', *Philosophy & Public Affairs* 35, no. 1 (2007): 40–68; Sofia Näsström, 'The Challenge of the All-Affected Principle', *Political Studies* (2010): 1–19. See on the boundaries of democracy debate, Arash Abizadeh, 'Closed Borders, Human Rights and Democratic Legitimation', in *Driven from Home: Human Rights and the New Realities of Forced Migration*, ed. D. Hollenbach (Washington, DC: Georgetown University Press, 2010), 147–66.
  32. This corresponds to the notion of extra-territorial jurisdiction fleshed out by the European Court of Human Rights' case-law: see e.g. ECtHR, Chamber, *Al-Saadoon and Mufdhi v. United Kingdom* (no. 61498/08), 2 March 2010.
  33. See Shue, *Basic Rights*, on the different types of negative and positive duties corresponding to a human right, including duties to prevent other agents from violating them.
  34. This normative argument actually corresponds to the state of international human rights law that only directly binds states and/or international organisations to date and no other subjects (e.g. individuals and groups of individuals). The universality of human rights obligations does not imply the generality of the duty-bearers of the corresponding duties, i.e. a personal scope that reaches beyond institutional agents whether domestic or international (contra: Onora O'Neill, 'The Dark Side of Human Rights', *International Affairs* 81, no. 2 (2005): 427–39; Cristina Lafont, 'Accountability and global governance: challenging the

- state-centric conception of human rights', *Ethics & Global Politics* 3, no. 3 (2010): 193–215, 203).
35. See Cohen, 'Minimalism about Human Rights', 197–98
36. See also Forst, 'The Justification of Human Rights'; Forst, 'The Basic Right to Justification', 48–50.
37. Joseph Raz, 'Legal Rights'. *Oxford Journal of Legal Studies* 4, no. 1 (1984): 1–21, 12. For a recent restatement of his theory of moral and legal rights and their relationship, see Raz, 'Human Rights in the Emerging World Order'.
38. Legal recognition of human rights can therefore be taken to mean, depending on the context, both the legal recognition of an interest *qua* human right and the legal recognition of a pre-existing human right.
39. Note that this duty is the primary moral duty to protect the interest that founds the legal human right, and not the secondary moral duty to obey the legal norm 'human right': see Besson, 'The Legitimate Authority of International Human Rights'.
40. One may think here of the moral rights mentioned by the 9th Amendment of the US Constitution.
41. See Raz, 'Human Rights in the Emerging World Order'.
42. See for example Cohen, 'Rethinking Human Rights', 599–600; Forst, 'The Justification of Human Rights'; Forst, 'The Basic Right to Justification', 48–50. See even Thomas Pogge, 'Human Rights and Human Responsibilities', in *Global Responsibilities: Who Must Deliver on Human Rights*, ed. A. Kuper (New York: Routledge, 2005), 1–35, 3, fn. 26 who concedes this point in the case of civil and political rights. It seems, however, that the egalitarian dimension of human rights and, hence, their inherently legal nature would apply even more to the case of social and economic rights.
43. Habermas, 'Zur Legitimation durch Menschenrechte', 183. See also Habermas, *Faktizität und Geltung*, 310–12.
44. The legalisation of pre-existing moral rights is rarely a mere translation; it usually specifies and somehow changes the moral right. See Saladin Meckled-Garcia and Başak Cali, 'Lost in Translation: The Human Rights Ideal and International Human Rights Law', in *The Legalization of Human Rights, Multidisciplinary Perspectives on Human Rights and Human Rights Law*, eds. B. Cali and S. Meckled-Garcia (London: Routledge, 2006), 11–31; and Cali and Meckled-Garcia, 'Introduction: Human Rights', in *The Legalization of Human Rights, Multidisciplinary Perspectives on Human Rights and Human Rights Law*, eds. B. Cali and S. Meckled-Garcia (London: Routledge, 2006), 1–8.
45. See Raz, 'Legal Rights', 16–17. See also Raz, 'Human Rights in the Emerging World Order'.
46. Both examples are given by Raz, 'Legal Rights', 16–17; and Raz, 'Human Rights in the Emerging World Order'.
47. The argument presented in this section is a summary of a lengthier argument developed in Besson, 'Human Rights – Ethical, Political ... or Legal?'.
48. See for example Christiano, 'Democratic Legitimacy and International Institutions', 119–37 on the lack of representativity and the asymmetry of international law-making processes from a democratic theory's perspective. See also Cohen, 'Rethinking Human Rights', 599–600; Besson, 'The Legitimate Authority of International Human Rights'.
49. On Arendt's views on international law, see e.g. Jan Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt', *Leiden Journal of International Law* 20 (2007): 1–23. For Arendt's views on human rights, see e.g. Frank Michelman, 'Parsing a "Right to Have Rights"'. *Constellations* 3, no. 2 (1996): 200–208; Hauke Brunkhorst, 'Are Human Rights Self-Contradictory? Critical Remarks on a Hypothesis by Hannah Arendt', *Constellations* 3, no. 2 (1996): 190–99; Jean Cohen, 'Rights, Citizenship, and the Modern Form of the Social: Dilemmas of Arendtian Republicanism', *Constellations* 3, no. 2 (1996): 164–89; Seyla Benhabib, '“The right to have rights”: Hannah Arendt on the contradictions of the nation-state', in *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge:

- Cambridge University Press, 2004), 49–70; Stefan Gosepath, ‘Hannah Arendts Kritik der Menschenrechte und ihr Recht, Rechte zu haben’, in *Hannah Arendt: Verborgene Tradition – Unzeitgemäße Aktualität?*, ed. Heinrich-Böll-Stiftung (Berlin: Akademie Verlag, 2007), 253–62; Jean Cohen, ‘Sovereignty and Rights: Thinking with and beyond Hannah Arendt’, in *Hannah Arendt: Verborgene Tradition – Unzeitgemäße Aktualität?*, ed. Heinrich-Böll-Stiftung (Berlin: Akademie Verlag, 2007), 291–309; Menke, ‘The “Aporias of Human Rights” ’; James Ingram, ‘What is a “Right to have Rights”? Three Images of the Politics of Human Rights’, *American Political Science Review* 102, no. 4 (2008): 401–16; Samantha Besson, ‘The Right to Have Rights – From Human Rights to Citizens’ Rights and Back’, in *Arendt and Legal Theory*, eds. M. Goldoni and C. McCorkindale (Oxford: Hart Publishing, 2011, forthcoming).
50. Arendt, ‘The Decline of the Nation-State’, 177–78. For her first essay on the topic, see Hannah Arendt, ‘“The Rights of Man”: What Are They?’ *Modern Review* 3, no. 1 (1949): 24–37.
  51. For a detailed discussion of this aporia or dilemma, see Gosepath, ‘Hannah Arendts Kritik der Menschenrechte’; and Menke, ‘The “aporias of human rights” ’.
  52. Hannah Arendt, *Eichmann in Jerusalem* (London: Penguin Books, 1965), Ch. 1, Epilogue, and Postscript.
  53. See Cohen, ‘Rethinking Human Rights’, 587.
  54. On the bootstrapping between international human rights law-making and their democratic reception and interpretation at domestic level, see Buchanan, *Justice, Legitimacy, and Self-Determination*, 187–89. See also the discussion below.
  55. See for example Cohen, ‘Rethinking Human Rights’; Benhabib, ‘“The right to have rights” ’, 56–61.
  56. There is, in other words, a form of political parochialism or legal contingency of human rights that conditions their recognition as international legal human rights, well before parochialism arises as a problem for the scope of legitimacy of an existing legal human right. See also Raz, ‘Human Rights in the Emerging World Order’.
  57. See O’Neill, ‘The Dark Side of Human Rights’, 433 on the distinction between the first-order human rights duties at domestic level and second-order human rights duties generated by international human rights law.
  58. See for example Benhabib, ‘“The Right to Have Rights” ’; Gosepath, ‘Hannah Arendts Kritik der Menschenrechte’.
  59. For a detailed discussion of the human right to democratic membership and participation, see Samantha Besson, ‘The Human Right to Democracy – A Moral Defence, with a Legal Nuance’, in *Souveraineté populaire et droits de l’homme* [Collection Science et Technique de la Société] (Strasbourg: Editions du Conseil de l’Europe, 2010), <http://www.venice.coe.int/docs/2010/CDL-UD%282010%29003-e.pdf> (accessed November 2, 2010).
  60. See Besson, ‘*Ubi Ius, Ibi Civitas*’ on the nature and boundaries of the international community.
  61. This is confirmed by the way in which democratic states usually ratify human rights instruments and, hence, generate international human rights duties for themselves only once they have recognised minimal international human rights standards in domestic law (e.g. Switzerland and the ECHR in the 1970s, and currently in the context of the ratification of the additional Protocol to the ICESCR or the European Social Charter).
  62. It is important to note that the contextualisation of human rights ought to take place through the form of domestic legal rights according to this chapter’s moral-political argument. Of course, this does not yet mean that it will be the only way to make them effective (see e.g. Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006); Sally Engle Merry and Mark Goodale, eds., *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

63. Some international human rights instruments expressly establish positive duties to implement international human rights through domestic law (whether through domestic rights or not): e.g. art. 4 UN Convention on the Rights of the Child.
64. On this notion, see Alec Stone Sweet and Hellen Keller, 'Introduction', in *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008), 3–30.
65. Contra Raz, 'Human Rights without Foundations', sec. IV.
66. See for a similar argument, Patrick Macklem, 'What is International Human Rights Law? Three Applications of a Distributive Account', *McGill Law Journal* 52, no. 3 (2007): 575–604, 577; Cohen, 'Rethinking Human Rights', 595–97.
67. See for a more detailed argument on the relationship between state sovereignty and international human rights, Samantha Besson, 'The International Rule of Law, Sovereignty and Democracy', print symposium on Jeremy Waldron's 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' *European Journal of International Law* no. 1 (2011, forthcoming); Samantha Besson, 'Sovereignty', in *Max Planck Encyclopedia of Public International Law*, ed. Wolfrum, R. et al. (Oxford: Oxford University Press, 2011, forthcoming).
68. See in more detail Joseph Carens, 'Membership and Morality: Admission to Citizenship in Liberal Democratic States', in *Immigration and the Politics of Citizenship in Europe and North America*, ed. W. R. Brubaker (Lanham, MD: University Press of America, 1989), 31–49; Ludvig Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' *Citizenship Studies* 10, no. 2 (2006): 153–65.
69. See Buchanan, *Justice, Legitimacy, and Self-Determination*, 187–89.
70. See for example B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', *Australian Yearbook of International Law* 12 (1988–1989): 82–108; J.F. Flauss, 'La protection des droits de l'homme et les sources du droit international', in *La protection des droits de l'homme et l'évolution du droit international. Colloque de Strasbourg* [Société française pour le droit international] (Paris: Pedone, 1998), 11–79.
71. On European and international *demos*-cracy and citizenship, see e.g. Besson, 'Institutionalizing global *demos*-cracy'.
72. See for example Goodin, 'Enfranchising All Affected Interests, and Its Alternatives'; James Bohman, *Democracy across Borders: From Demos to Demoi* (Cambridge: MIT Press, 2007); James Bohman, 'A Response to my Critics: Democracy Across Borders', *Ethics & Global Politics* 3, no. 1 (2010): 71–84; Michael Goodhart, 'Human Rights and Global Democracy', *Ethics and International Affairs* 22, no. 4 (2008): 395–420. For an excellent critique of this democracy-compensatory use of human rights, see Cristina Lafont, 'Can Democracy go Global?' *Ethics & Global Politics* 3, no. 1 (2010): 13–19; and Eva Erman, 'Human Rights do not make Global Democracy', *Contemporary Political Philosophy* (2011, forthcoming).
73. See Bohman, *Democracy across Borders*, 103.
74. See the critiques of Bohman, *Democracy across Borders* in Lafont, 'Can Democracy go Global?' and Erman, 'Human Rights do not make Global Democracy'.
75. See for example Maus, 'Menschenrechte als Ermächtigungsnormen internationaler Politik', 279; Klaus Günther, 'From a Gubernative to a Deliberative Human Rights Policy – Definition and Further Development of Human Rights as an Act of Collective Self-Determination', in *Souveraineté populaire et droits de l'homme* [Collection Science et Technique de la Société] (Strasbourg: Editions du Conseil de l'Europe, 2010), <http://www.venice.coe.int/docs/2010/CDL-UD%282010%29002-e.pdf> (accessed November 2, 2010).
76. See for example Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law'.

77. See for example Lafont, 'Accountability and Global Governance'; Lafont, 'Can Democracy go Global?'; Erman, 'Human Rights do not make Global Democracy'.
78. See for example the debate between Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', *Common Market Law Review* 37 (2008): 1307–38; and Samantha Besson, 'The European Union and Human Rights: Towards a New Kind of Post-National Human Rights Institution', *Human Rights Law Review* 6, no. 2 (2006): 323–60.
79. See for example ECJ, Case 6/64, *Costa v. ENEL*, [1964] ECR 585; Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125; Case 4/73, *Nold v. Commission*, [1974] ECR 491.
80. See for example Besson, 'The European Union and Human Rights'.
81. See for example ECJ, C-260/89, *ERT*, [1991] ECR I-2925.
82. On the question, see e.g. Samantha Besson, 'The Human Rights Competence in the EU – The State of the Question after Lisbon', in *Taxation and Human Rights in Europe and in the World*, ed. Pasquale Pistone and Goerg Kofler (Amsterdam: IBFD, 2011, forthcoming); Claude Blumann, 'Les compétences de l'Union européenne en matière de droits de l'homme', *Revue des affaires européennes* 14 (2006): 11–30; Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review* 39 (2002): 945–94; Jean-Paul Jacqué, 'Droits fondamentaux et compétences internes de la Communauté européenne', in *Libertés, justice, tolérance: mélanges en hommage au Doyen Gérard Cohen-Jonathan*, ed. Luigi Condorelli et al. (Bruxelles: Bruylant, 2004), 1007–28; Joseph H.H. Weiler and Sybilla C. Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences', in *The EU and Human Rights*, ed. P. Alston (Oxford: Oxford University Press, 1999), 147–65.
83. See ECJ, *Opinion 2/94*, [1996] ECR I-1759, par. 27–30; ECJ, Case C-249/96, *Grant v. South-West Trains*, [1998] ECR I-62, par. 45.
84. See for example Alexander Hamilton, *Federalist Paper* 84 (1788), 575–81.
85. See Israel Butler and Olivier De Schutter, 'Binding the EU to International Human Rights Law', *Yearbook of European Law* 27 (2008): 277–320 for a discussion of the scarce and unsystematic references to international human rights law in the ECJ case-law.
86. See Samantha Besson and André Utzinger, 'Towards European Citizenship', *Journal of Social Philosophy* 39, no. 2 (2008): 185–208; Samantha Besson and André Utzinger, 'Future Challenges of European Citizenship. Facing a Wide-Open Pandora's Box', *European Law Journal* 13, no. 5 (2007): 573–90.
87. See for example ECJ, C-184/99, *Grzelczyk* [2001] ECR I-6193; Case C-158/07, *Förster* [2008] ECR I-8507; Case C-85/96, *Martínez Sala* [1998] ECR I-2691; Case C-209/03, *Bidar* [2005] ECR I-2119; Case C-60/00, *Carpenter* [2002] ECR I-6279, par. 43–44.
88. See for example ECJ, Case C-135/08, *Rottmann* [2010] ECR not yet reported, par. 42; AG Sharpston, Case C-34/09, *Zambrano* [2010] ECR not yet reported, par. 69–74, 75–80 and 91–97. See also ECJ, Case C-457/09, *Chartry* (pending).
89. See for example Besson and Utzinger, 'Future Challenges of European Citizenship'.
90. See for example Butler and De Schutter, 'Binding the EU' referring to the UN Convention on the Rights of Persons with Disabilities.
91. See AG Sharpston, Case C-34/09, *Zambrano*, par. 69–74, 75–80 and 91–97's reading of ECJ, Case C-135/08, *Rottmann*.
92. AG Maduro, C-402/05 P, *Kadi* [2008] ECR I-6351.
93. AG Maduro, C-380/05, *Centro Europa* [2008] ECR I-349, par. 18–19.
94. AG Sharpston, Case C-34/09, *Zambrano*, par. 3 and 170.
95. Declaration no 1 to the Lisbon Treaty (2007).
96. Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, Preamble, par. 31. See, however, art. 3 Regulation 168/2007.



97. See ECJ, Case C-438/05, *Viking Line* [2007] ECR I-10779, par. 40; Case C-544/03 et C-545/03, *Mobistar* [2005] ECR I-7723, par. 27.
98. See AG Maduro, Case C-380/05, *Centro Europa*, par. 18–19.
99. ECtHR, *Bosphorus v Ireland* (n. 45036/98) EHRR 2005-VI.
100. See Olivier De Schutter, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation', *Revue trimestrielle des droits de l'homme* 83 (2010): 535–72, 545–46.
101. For a similar concern, see Hauke Brunkhorst, 'Zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung. Europas zweite Chance', in *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, eds. P. Niesen and B. Herborst (Frankfurt: Suhrkamp, 2007), 321–50, 322.
102. See for example Besson, 'Ubi Ius, Ibi Civitas', 213–9.
103. For a similar position, see Seyla Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty', *American Political Science Review* 103, no. 4 (2009): 691–704; Seyla Benhabib, 'The Legitimacy of Human Rights', *Daedalus* 137, no. 3 (2008): 94–104.
104. Jürgen Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in *Der gesplittene Westen* (Frankfurt: Suhrkamp, 2004), 113–37, 136; Jürgen Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?', in *Zwischen Naturalismus und Religion* (Frankfurt: Suhrkamp, 2005), 324–65, 336; Jürgen Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik', in *Anarchie der kommunikativen Freiheit. J. Habermas und die Theorie der internationalen Politik*, eds. P. Niesen and B. Herborst (Frankfurt: Suhrkamp, 2007), 406–60, 450.
105. This is something Cristina Lafont, 'Alternative Visions of a New Global Order: What should Cosmopolitans hope for?' *Ethics & Global Politics* 1, no. 1–2 (2008): 41–60, 48 does not seem to realise in her critique of Habermas' project.
106. See for example Lafont, 'Accountability and Global Governance'.
107. *Ibid.*, 198.
108. *Ibid.*, 199, 200.