

The Right to Have Rights: From Human Rights to Citizens' Rights and Back

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We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation ... The right that corresponds to this loss and that was never even mentioned among the human rights cannot be expressed in the categories of the eighteenth-century because they presume that rights spring immediately from the 'nature' of man ... Man of the twentieth century has become just as emancipated from nature as eighteenth century man was from history ... This new situation in which 'humanity' has in effect assumed the role formerly ascribed to nature or history, would mean in this context that *the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible.* For, contrary to the best-intentioned humanitarian attempts to obtain new declarations of human rights from international organizations, it should be understood that this idea transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and for the time being a sphere that is above the nations does not exist. Furthermore, this dilemma would by no means be eliminated by the establishment of a 'world government'. Such a world government is indeed within the realm of possibility, but one may suspect that in reality it might differ considerably from the version promoted by idealistic-minded organizations.¹

¹ H Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism* (London, Penguin, 1951) 177-78 (emphasis added).

I. INTRODUCTION

INTERNATIONAL)² HUMAN RIGHTS³ theory is *en vogue*. It has been the case for quite some years in Germany,⁴ and is now also the case in Anglo-American circles.⁵ The main accounts put forward in the last 15 years are

² In the course of this essay it will become clear why, in view of the interlocking human rights practice, and in particular in view of the fact that subjects of international and national human rights are the same and that the locus of application of human rights is domestic in priority (see, eg, S Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749; G Neumann, 'Human Rights and Constitutional Rights' (2003) 55 *Stanford Law Review* 1863), a theory of human rights has to be a theory of both domestic and international human rights. And this is even more the case of a legal theory of human rights, assuming of course that international law can be regarded as law (see, for that argument and refutation of different forms of scepticism relative to the legality of international law and to ethical thinking about international law, S Besson and J Tasioulas, 'Introduction' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 1). There should therefore be one concept of human rights that can capture not only their moral and legal dimensions, but also their legal guarantees at the domestic, regional and international levels. For a similar view about the human rights continuum, see R Forst, 'The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach' (2010) 120(4) *Ethics* 711 (depending on the existence of a political system, whether domestic or international). For human rights theories that focus exclusively on international (legal or political) human rights, see J Rawls, *The Law of Peoples* (Cambridge, Mass, Harvard University Press, 1999); CR Beitz, *The Idea of Human Rights* (Oxford, Oxford University Press, 2009); J Raz, 'Human Rights without Foundations' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 321; J Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31. And for human rights theories that focus on human rights independently from any political or legal system whether national or international, see J Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4 *Philosophical Compass* 938; J Tasioulas, 'Taking Rights out of Human Rights' (2010) 120(4) *Ethics* 647; J Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008).

³ The concept of human rights I am trying to elucidate in this essay is the modern and post-1945 concept of human rights. See also A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford, Oxford University Press, 2004); JW Nickel, *Making Sense of Human Rights*, 2nd edn (Oxford, Blackwell Publishing, 2007).

⁴ See, eg, R Alexy, *Theorie der Grundrechte*, 3rd edn (Frankfurt am Main, Suhrkamp, 1996); S Gosepath and G Lohmann (eds), *Die Philosophie der Menschenrechte*, 2nd edn (Frankfurt am Main, Suhrkamp, 1999); H Bielefeldt, *Philosophie der Menschenrechte. Grundlagen eines weltweiten Freiheitsethos* (Darmstadt, Primus, 1998); H Brunkhorst, WR Köhler and M Lutz-Bachmann (eds), *Recht auf Menschenrechte* (Frankfurt am Main, Suhrkamp, 1999); KP Fritzsche and G Lohmann (eds), *Menschenrechte zwischen Anspruch und Wirklichkeit* (Würzburg, Ergon, 2000); G Lohmann et al, *Die Menschenrechte: Unteilbar und Gleichgewichtig?* (Potsdam, University Press, 2005); R Forst, *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Frankfurt am Main, Suhrkamp, 2007); C Menke and A Pollmann, *Philosophie der Menschenrechte. Zur Einführung* (Hamburg, Junius Verlag, 2007); KP Fritzsche, *Menschenrechte*, 2nd edn (Paderborn, F Schöningh, 2009).

⁵ See, eg, H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, 2nd edn (Princeton, NJ, Princeton University Press, 1996); Rawls, *The Law of Peoples*, above n 2; Buchanan, above n 3; JW Nickel, above n 3; MJ Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (New York, Cambridge University Press, 2007); G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, Oxford University Press, 2008); Griffin, above n 2; J Griffin, 'Human Rights and the Autonomy of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 339; J Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracting Griffin's Steps' (2002) 10 *European Journal of Philosophy* 79; J Tasioulas, 'The Moral Reality of Human Rights' in T Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford, Oxford University Press, 2007) 75;

organised across a (self-imposed) divide between so-called ethical or traditional accounts of human rights⁶ and political or functional accounts of human rights.⁷ Recent attempts have been made to bridge this divide through moral-political accounts of human rights,⁸ or, more recently in the field of legal theory, through a moral-legal approach to human rights.⁹ Despite their differences, which will become clear in the course of this essay, the latter proposals share a republican conception of politics and hence of international human rights. In that context, they draw their original inspiration from Hannah Arendt's 1949 idea of 'the right to have rights',¹⁰ and usually flag a reference to her argument about the relationship between (universal) human rights and (particular) democratic membership.¹¹

In this essay, I should like to take a closer look at this argument. It is important indeed at the outset of, and as groundwork to, a republican account of international human rights,¹² to assess more precisely how human rights and democratic membership—or, as I understand it here, democratic citizenship—relate.¹³ This is essential to the understanding of the nature and legitimacy of international human rights, both aspects being connected.¹⁴ If democracy and human rights are

Tasioulas, 'Are Human Rights Essentially Triggers?', above n 2; Tasioulas, 'Taking Rights out of Human Rights', above n 2; Beitz, above n 2; Raz, 'Human Rights without Foundations', above n 2; Raz, 'Human Rights in the Emerging World Order', above n 2. See also the special issue of *Ethics* (2010) 120(4) edited by Allen Buchanan on Griffin's book (Griffin, *On Human Rights*); and CR Beitz and R 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 Eg Griffin, above n 2; Tasioulas, 'Taking Rights out of Human Rights', above n 2. For an excellent critique, see Forst, above n 2.

⁷ Eg Rawls, *The Law of Peoples*, above n 2; Beitz, above n 2; Raz, 'Human Rights without Foundations', above n 2; Raz, 'Human Rights in the Emerging World Order', above n 2. For an excellent critique, see Forst, above n 2; JL Cohen, 'Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization' (2008) 36 *Political Theory* 578.

⁸ Eg S Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights' (2007) 81 *Proceedings and Addresses of The American Philosophical Association* 7; Cohen, above n 7; Forst, above n 2. See also D Baynes, 'Discourse Ethics and the Political Conception of Human Rights' (2009) 2 *Ethics and Global Politics* 1, 2 and 18.

⁹ Eg S Besson, 'Human Rights *qua* Normative Practises—*Sui generis* or Legal?' (2010) 1 *Transnational Legal Theory* 127; S Besson, 'Human Rights—Ethical, Political ... or Legal? First Steps in a Legal Theory of Human Rights' in D Childress (ed), *The Role of Ethics in International Law* (Cambridge, Cambridge University Press, 2011) 211–45.

¹⁰ See H Arendt, 'The Rights of Man': What Are They? (1949) 3 *Modern Review* 24.

¹¹ See, eg, Forst, above n 2; Cohen, above n 7; Benhabib, above n 8; S Benhabib, 'The Legitimacy of Human Rights' (2008) 137(3) *Deedalus* 94; S Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' (2009) 103(4) *American Political Science Review* 691; D Ivison, 'Republican Human Rights?' (2010) 9 *European Journal of Political Theory* 31.

¹² My starting point in this essay, and my angle of approach to the 'right to have rights', is not citizenship theory (unlike S 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) but human rights theory.

¹³ In the rest of the essay, I shall 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.

¹⁴ See, eg, S Besson, 'The Authority of International Law—Lifting the State Veil' (2009) 31(3) *Sydney Law Review* 343.

mutually dependent sources of legitimacy in the domestic context, it is important to wonder how they relate once decoupled by the internationalisation of human rights and potentially re-coupled, both across governance levels and at the same supranational governance level,¹⁵ and whence international human rights draw their legitimacy. And this in turn implies assessing how Arendt's famous argument as regards their connection can still be of relevance more than 50 years after she first articulated her challenge to international human rights, and especially after half a century of steady development of international and regional law and institutions, on the one hand, and of entrenchment of international and regional human rights guarantees and adjudication, on the other.

Of course, there may be good reasons for not digging deeper than the usual passing reference to Arendt's argument one finds in most recent discussions in human rights theory. Some may indeed object to the obsolete nature of Arendt's arguments pertaining to international human rights, and reduce her contribution to an historical curiosity or a relic of modernity. Fears of anachronism expressed before using a 1949 argument in 2011 may, however, be placated by the legendary indeterminacy of Arendt's political theory. Furthermore, from a theoretical perspective, the limitations of Arendt's moral philosophy are well known; she was not a foundationalist thinker, and was clearly not interested in the philosophical justification of human rights. As a result, her argument leaves it to the moral philosopher to reconstruct a complete account of the nature of human rights. Neither are her views about the law and its relationship to morality sufficiently clear to draw conclusive arguments about the relationship between moral and legal rights. In any case, the present essay is not a contribution to a detailed exegesis of Arendt's ideas about international law¹⁶ and human rights in particular,¹⁷ and hence to the

¹⁵ See, eg, S Besson, 'Human Rights and Democracy in a Global Context—Decoupling and Recoupling' (2011) 4(1) *Ethics and Global Politics* 19; I Maus, 'Menschenrechte als Ermächtigungsnormen internationaler Politik oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie' in H Brunkhorst, G Köhler and M Lutz-Bachmann (eds), *Recht auf Menschenrechte* (Frankfurt am Main, Suhrkamp, 1999) 276; C Gould, *Globalizing Democracy and Human Rights* (Cambridge, Cambridge University Press, 2004); E Erman, *Human Rights and Democracy: Discourse Theory and Global Rights Institutions* (Aldershot, Ashgate, 2005).

¹⁶ See, eg, J Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt' (2007) 20 *Leiden Journal of International Law* 1; P Owens, *Between War and Politics: International Relations in the Thought of Hannah Arendt* (Oxford, Oxford University Press, 2007).

¹⁷ See, eg, JL Cohen, 'Rights, Citizenship, and the Modern Form of the Social: Dilemmas of Arendtian Republicanism' (1996) 3 *Constellations* 164; FI Michelman, 'Parsing "A Right to Have Rights"' (1996) 3 *Constellations* 200; H Brunkhorst, 'Are Human Rights Self-Contradictory? Critical Remarks on a Hypothesis by Hannah Arendt' (1996) 3 *Constellations* 190; S Benhabib, *The Reluctant Modernism of Hannah Arendt* (New York, Rowman & Littlefield, 2000); Benhabib, above n 12; P Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Bloomington, Indiana University Press, 2006); S Gosepath, 'Hannah Arendts Kritik der Menschenrechte und ihr "Recht, Rechte zu haben"' in Heinrich Böll-Stiftung (ed), *Hannah Arendt: Verborgene Tradition—Unzeitgemäße Aktualität?* (Berlin, Akademie Verlag, 2007) 279; JL Cohen, 'Sovereignty and Rights: Thinking with and beyond Hannah Arendt' in Heinrich Böll-Stiftung (ed), *Hannah Arendt: Verborgene Tradition—Unzeitgemäße Aktualität?* (Berlin, Akademie Verlag, 2007) 291; C Menke, 'The "aporias of human rights" and the "one human right": regarding the coherence of Hannah Arendt's argument' (2007) 74 *Social Research Paper* 739, available at <http://findarticles.com/p/articles/mi_m2267/is_3_74/ai_n24943363/print>; S Parekh,

growing field of 'Arendtology' in those contexts. It develops a self-standing and contemporary argument for the moral-political nature of human rights, using Arendt's original intuition as a starting point.

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*.¹⁸ Her argument was primarily based on a theoretical critique of the eighteenth-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 twentieth 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 be guaranteed only within a given political community, and more specifically in Arendt's account, the domestic political community.¹⁹ From that first conclusion, Arendt quickly moved to her famous aporia, however.²⁰ 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. The domestic political community becomes the solution to its own problems, in other words, but also as a result the reason for its failure to succeed where it has just failed. Faithful to her republicanism of fear,²¹ Arendt did not consider any alternatives 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 placed 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*.²²

Hannah Arendt and the Challenge of Modernity (Oxford, Routledge 2008); J Ingram, 'What is a "Right to have Rights"? Three Images of the Politics of Human Rights' (2008) 102 *American Political Science Review* 401.

¹⁸ Arendt, above n 1, 177.

¹⁹ *Ibid.*, 299.

²⁰ For a detailed discussion of this aporia or dilemma, see Gosepath, above n 17; and Menke, above n 17.

²¹ See, eg, R Forst, 'Republikanismus der Furcht und der Rettung. Zur Aktualität der politischen Theorie Hannah Arendts', in Heinrich Böll-Stiftung (ed), *Hannah Arendt: Verborgene Tradition—Unzeitgemäße Aktualität?* (Berlin, Akademie Verlag, 2007) 229.

²² H Arendt, *Eichmann in Jerusalem* (London, Penguin, 1965) ch 1, Epilogue and Postscript. See, eg, S Benhabib, 'International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin' (2009) 16(2) *Constellations* 331; T Mertens, 'Memory, Politics and Law—The Eichmann Trial: Hannah Arendt's View on the Jerusalem Court's Competence' (2005) 6 *German Law Journal* 407.

From a contemporary perspective, one may quibble with Arendt's aporia and disagree in particular with her grim views about the inherent limitations of domestic politics and the absolute nature of sovereignty, on the one hand, and the underdeveloped political nature of international law and the international community, on the other.²³ However, her groundbreaking analysis of the problem raised by the idea of universal human rights retains its original force more than 50 years after its first statement. Expressed at the dawn of the modern international human rights system, her argument even has the potential to lead us well beyond the intrinsic limitations of that system and provide an interesting reference in view of the development of democratic structures beyond the State.

More specifically, Arendt's idea of a 'right to have rights' remains still extraordinarily actual in three related respects: first, its ability to straddle the universal and the particular by putting universal human rights and particular political membership in a mutual equilibrium and tension; secondly, its sense of the hybrid nature of human rights that Arendt situates between politics and morality, thus laying the ground for a republican notion of legality distinct from positivity²⁴; and, lastly, her intuition about membership in a modern international community, where all of us are both insiders and outsiders at the same time depending on the political level in consideration. At the same time and despite the strength of those realisations encapsulated in one single idea, three fundamental questions remain open in Arendt's resolutely non-foundationalist account of the right to have rights: the idea of human rights, and whether they are 'rights' or not and what makes them 'human' rights by contrast to other rights such as contractual rights for instance; the nature of those rights, and whether they are moral or legal rights; and, lastly, the level of legalisation of those rights, and who are their right-holders and duty-bearers.

Interestingly, those three questions are still at the core of most contemporary discussions of human rights.²⁵ I shall take all three questions in turn in the following sections of this essay. I shall first argue for a moral-political account of human rights and emphasise the inherently legal nature of human rights (section II.), and then explain the relationship between international and domestic guarantees of human rights (III.).

²³ See the critiques by Cohen, 'Rights, Citizenship, and the Modern Form of the Social', above n 17; Cohen, 'Sovereignty and Rights', above n 17; A Arato and J Cohen, 'Banishing the Sovereign? Internal and External Sovereignty in Arendt' (2009) 16 *Constellations* 307; Benhabib, above n 12; and Gosepath, above n 17.

²⁴ See, eg, S Besson and JL Marti Marmol (eds), *Legal Republicanism: National and International Perspectives* (Oxford, Oxford University Press, 2009).

²⁵ They have not yet been broached head-on by proponents of the moral-political account of human rights (eg Forst, above n 4, and Forst, above n 2; Benhabib, above n 12; Benhabib, above n 8; and Benhabib, Benhabib, 'Claiming Rights across Borders', above n 11). The closest one gets to obtaining answers to those questions is Cohen's 2008 remarkable essay, 'Rethinking Human Rights', above n 7.

II. HUMAN RIGHTS: MORAL AND LEGAL

One of the first questions one should ask about human rights pertains to their nature.²⁶ It is also the *prima facie* paradox raised by the idea of a 'right to have rights'. One way to dissolve the paradox is indeed to look more closely at the nature of human rights and to understand, as some authors do, the former as a moral right and the latter as legal rights.²⁷ As I shall argue, this understanding does not do full justice to Arendt's fundamental intuition, nor, more specifically, to the intrinsic legality of human rights or to the interaction between international and domestic human rights law.

In this section, I start by arguing that human rights may be understood as moral propositions, and more specifically as universal moral rights that ground moral duties. When the fundamental interests that found human rights are legally recognised, I go on to explain how human rights ought also to be described as legal rights, and how those legal rights relate to the universal moral rights they recognise, modulate or create. Even though those two dimensions of human rights are addressed separately and one after the other for the sake of the exposition, they cannot be dissociated, as will transpire in the course of the argument.

A. The Morality of Human Rights

Human rights are a sub-set of universal moral rights (i) that protect fundamental and general human interests (ii) against the intervention, or in some cases non-intervention of (national, regional or international) public institutions (iii). Those three elements will be discussed in turn.

To start with, 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.²⁸ 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.²⁹ Rights are, on this account, intermediaries between interests and duties.³⁰ 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

²⁶ See Besson, 'Human Rights—Ethical, Political ... or Legal?', above n 9.

²⁷ See Benhabib, *The Reluctant Modernism of Hannah Arendt*, above n 17; Benhabib, above n 12, 56–61; Gosepath, above n 17.

²⁸ J Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194, 195.

²⁹ *Ibid* 200, 209.

³⁰ *Ibid* 208.

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.³¹

What makes it the case 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.³² A person's interests merit equal respect in virtue of her status as member of the community; those interests are recognised as socio-comparatively important by members of the community, and only then can they be recognised as human rights. This relationship to political equality bridges the sterile opposition between the individual and the group.³³ 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.³⁴ However, 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.³⁵ Human rights are power-mediators³⁶: they both enable political equality and stem from it. 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'.³⁷

³¹ See, on the ahistorical and synchronic universality of human rights: Tasioulas, 'Human Rights, Universality and the Values of Personhood', above n 5; Tasioulas, 'The Moral Reality of Human Rights', above n 5, 76–77. *Contra* J Griffin, 'First Steps in an Account of Human Rights' (2001) 9 *European Journal of Philosophy* 306. See also Raz, 'Human Rights in the Emerging World Order', above n 2.

³² See Forst, above n 2; R Forst, 'The Basic Right to Justification: Toward a Constructivist Conception of Human Rights' (1999) 6 *Constellations* 35, 48. On the relationship between political equality and human rights more generally, see T Christiano, *The Constitution of Equality* (Oxford, Oxford University Press, 2008) 138, 156, on public equality as ground for liberal rights; and A Buchanan, 'The Egalitarianism of Human Rights' (2010) 120(4) *Ethics* 679.

³³ The proposed account comes very close to Forst, above n 2; Forst, 'The Basic Right to Justification', above n 32, 48–50; and Forst, above n 4. 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, above n 32, 156). Both accounts, of course, rely on Habermas's idea of co-originality between democratic sovereignty and human rights (J Habermas, *Faktizität und Geltung* (Frankfurt am Main, Suhrkamp, 1998) ch III), although they provide different variations of that idea, notably by referring to an external right or value as a foundation for their co-originality. See C Brettschneider, *Democratic Rights—The Substance of Self-government* (Princeton, NJ, Princeton University Press, 2007) 29–38 for a similar interpretation of Habermas's co-originality.

³⁴ See JL Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?' (2004) 12 *The Journal of Political Philosophy* 190, 197–98; Forst, above n 2.

³⁵ See Cohen, above n 34, 197–98; Cohen, above n 7, 585–86.

³⁶ For the original idea of mediating duties, see H Shue, 'Mediating Duties' (1988) 98 *Ethics* 687, 703. See also C Reus-Smit, 'On Rights and Institutions' in CR Beitz and RE Goodin (eds), *Global Basic Rights* (New York, Oxford University Press, 2009) 25, on human rights and power mediation. On liberal rights and the exercise of power in general, see Christiano, above n 32, 134.

³⁷ Arendt, above n 1, 301.

In short, the proposed account of the nature of human rights follows a modified interest-based theory: it is modified by reference to considerations of equal moral-political status in a given community. 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.³⁸ It is important to pause at this stage and clarify what is meant by political membership or inclusion into an organised political society. 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 membership 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.³⁹ Human rights protect those interests tied to membership and disrespect of which 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 membership, while others, such as the right to life, 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. This is in line with the republican idea of the political community *qua* locus of rights.⁴⁰ 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.⁴¹

Of course, there can be many overlapping political communities (eg international organisations), and this argument is not limited to a national polity and to the State. Neither is the argument limited to citizens only, or at least to those citizens who are also nationals; membership ought to include to varying degrees all those normatively affected by the activities of political authorities and who are subject to the laws or decisions of the community. This includes asylum seekers, economic migrants, stateless persons and so on. As we shall see, human rights work as a political irritant and as mechanisms of gradual inclusion that lead to the extension of the political franchise, and in some cases of citizenship itself to new stakeholders in the community. Lastly, the argument does not imply that human rights apply only within national borders; if national political authorities affect the fundamental interests of other individuals outside national borders, those individuals deserve equal protection. This includes individuals and groups normatively affected by and subjected to law-making and decision-making abroad by military—and also by economic—interventions.

³⁸ See Tasioulas's critique of Griffin, *On Human Rights*: Tasioulas, 'Taking Rights out of Human Rights', above n 2.

³⁹ The following argument is a development of Cohen's argument, above n 34, 197–98.

⁴⁰ See Cohen, above n 7, 604, fn 47.

⁴¹ 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.

This brings me to the third element in the definition: human rights are entitlements against public institutions (national, regional or international). They generate duties on the part of public authorities to protect not only 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 favour and constrain it.⁴² 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.⁴³ 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 the primary duty-bearers.⁴⁴

In short, the proposed account is moral in the justification it provides for human rights, and political in the function with which it sees them vested: they are indeed regarded both as shields against the State 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.⁴⁵ In other words, the proposed moral-political account of human rights can salvage the political role of human rights without diluting their moral justification.⁴⁶

B. 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.

⁴² See A Buchanan, 'Equality and Human Rights' (2005) 4 *Politics, Philosophy & Economics* 69, 74; Buchanan, above n 32.

⁴³ See Shue, above n 5, on the different types of negative and positive duties corresponding to a human right, including duties to prevent other agents from violating them.

⁴⁴ 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 (eg individuals and groups of individuals). The universality of human rights obligations does not imply the generality of the duty-bearers of the corresponding duties, ie a personal scope that reaches beyond institutional agents whether domestic or international (*contra* O O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427; C Lafont, 'Accountability and global governance: challenging the state-centric conception of human rights' (2010) 3 *Ethics & Global Politics* 193, 203).

⁴⁵ See Cohen, above n 34.

⁴⁶ See also Forst, above n 2; Forst, above n 32, 48–50.

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.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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 shall see, human rights *stricto sensu* 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 give rise only to legal duties and not to moral (rights-based) duties. Legal human rights, however, can be regarded as rights *stricto sensu* only when their corresponding duties are not only legal, but also moral.

Two additional remarks are in order on the relationship between moral and legal rights, and on the relationship between moral and legal human rights. 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 which have not been recognised as legal rights. Neither 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

⁴⁷ J Raz, 'Legal Rights' (1984) 4 *OJLS* 1, 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', above n 2.

⁴⁸ 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.

⁴⁹ 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 S Besson, 'The Democratic Authority of International Human Rights' in A Follesdal (ed), *The Legitimacy of Human Rights* (Cambridge, Cambridge University Press, 2012) forthcoming.

are not made into legal rights or modulated by the law.⁵⁰ 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.⁵¹ Based on the moral-political account of human rights presented previously, the law provides the best and perhaps the only way of mutually recognising the comparative importance of those interests in a political community of equals.⁵² 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 *stricto sensu*. 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'.⁵³ Thus, while legal rights *stricto sensu* are necessarily moral in nature (*qua* rights), human rights (*qua* rights) are not only necessarily moral but also legal, and they are as a result both moral and legal rights.

Neither, on the other hand, do legal rights necessarily always pre-exist as independent moral rights. Most do, and are legally recognised moral rights,⁵⁴ but others are legally-created or legally specified moral rights.⁵⁵ 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.⁵⁶

⁵⁰ One may think here of the moral rights mentioned by the 9th Amendment to the US Constitution.

⁵¹ See Raz, 'Human Rights in the Emerging World Order', above n 2.

⁵² See, eg, Cohen, above n 7, 599–600; Forst, above n 2; Forst, above n 32, 48–50. See even T Pogge, 'Human Rights and Human Responsibilities' in A Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights* (New York, Routledge, 2005) 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.

⁵³ J Habermas, 'Die Legitimation durch Menschenrechte' in *Die postnationale Konstellation. Politische Essays* (Frankfurt am Main, Suhrkamp, 1998) 183. See also Habermas, above n 33, 310–12.

⁵⁴ The legalisation of pre-existing moral rights is rarely a mere translation; it usually specifies and somehow changes the moral right. See S Meckled-Garcia and B Cali, 'Lost in Translation: The Human Rights Ideal and International Human Rights Law' in B Cali and S Meckled-Garcia (eds), *The Legalization of Human Rights, Multidisciplinary Perspectives on Human Rights and Human Rights Law* (London, Routledge, 2006) 11; and B Cali and S Meckled-Garcia, 'Introduction: Human Rights' in Cali and Meckled-Garcia (eds), *ibid* 1.

⁵⁵ See Raz, 'Legal Rights', above n 47, 16–17. See also: Raz, 'Human Rights in the Emerging World Order', above n 2.

⁵⁶ Both examples are given by Raz, *ibid*.

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 the moral-political significance of which 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 turns them into human rights. As a result, human rights cannot pre-exist their legalisation as independent moral human rights *stricto sensu*, but only as independent universal moral rights.

III. HUMAN RIGHTS: INTERNATIONAL AND DOMESTIC

Once the moral-political nature and hence inherent legality of human rights has been clarified, the next question pertains to the level of legalisation of those rights.⁵⁷ To address this question adequately, it is useful to start by explaining the idea of the international right to have domestic rights, before turning to how this idea can illuminate the current international human rights practice and how international and domestic human rights are articulated. The third subsection below pertains to the relationship of mutual reinforcement between human and citizens' rights.

A. The Right to Have Rights

Theoretically, the legalisation of human rights, ie the legal recognition and modulation of universal moral rights *qua* human rights, could take place 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, but the democratic

⁵⁷ The argument presented in this section is a summary of a lengthier argument developed in Besson, 'Human Rights—Ethical, Political ... or Legal?', above n 9.

quality of its processes is not yet secured.⁵⁸ To be democratic, the primary locus of legitimation and accordingly of legalisation of human rights ought therefore to be domestic.

It is important at this stage to distinguish between two categories of human rights: human rights that pertain to the access to membership in a political community; and those that pertain to actual membership in the political community. Interestingly, this distinction helps in delineating two competing readings of Arendt's 1949 idea of the 'right to have rights'.

Starting with the former category of human rights, ie rights to membership, the distinction between domestic or international legalisation does not apply. That category pertains to human rights that contribute to constituting our political equality, and not to those that condition it in the first place as the rights that pertain to equal membership in a political community. Those rights 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.⁵⁹ They include also rights to asylum⁶⁰ and the customary right to *non-refoulement*. Those rights cannot be guaranteed first within a given political community since they work as constraints on democratic sovereignty and self-determination. They are to be legalised internationally as a result. However, to be legitimate, they have to be recognised legally through inclusive and deliberative processes of the kind that are incrementally developed in international law-making, and I shall get back to those.⁶¹ Rights to membership correspond to a first reading of Arendt's right to have rights: those universal moral rights, and potentially also legal rights, to membership are the only human rights that may be and have to be guaranteed legally from the outside a political community and that aim at guaranteeing the ulterior benefit of domestic rights within each political community, ie human rights *per se*.⁶²

By contrast, it is pertaining to the second group of human rights that guarantee membership in the political community, ie most human rights, that the locus of legalisation becomes most sensitive. As we saw before, they can be recognised only by those whose political equality they contribute to create and guarantee. Following the categories of rights presented before, this second group of international human rights as they stand under current international law 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 *stricto sensu* for lack of a moral-political community.⁶³

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 international organisations) (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 international organisations') duties to secure and ensure respect for those rights as 'human rights' within their own jurisdiction.⁶⁴ In that sense, international human rights duties are second-order duties for States (and/or arguably international organisations) to generate first-order human rights duties for themselves under domestic law, ie 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, ie 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,⁶⁵ however, this reading understands those rights as universal moral rights which 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 short, there are two groups of universal moral rights: the first group (that may be termed 'rights to membership'⁶⁶), which may and ought to be legalised internationally without yet being guaranteed domestically; by contrast, rights belonging to the second group ('members' rights') have to be legalised in domestic law in a given political community before they can be recognised as human rights *stricto sensu* 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 moral rights can be matched under Arendt's notion of 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

⁵⁸ See, eg, T Christiano, 'Democratic Legitimacy and International Institutions' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 119–37, on the lack of representativeness and the asymmetry of international law-making processes from a democratic theory's perspective. See also Cohen, above n 7, 599–600; Besson, above n 49.

⁵⁹ See Cohen, above n 7, 587.

⁶⁰ Universal Declaration of Human Rights, Art 14.

⁶¹ On the bootstrapping between international human rights law-making and their democratic reception and interpretation at domestic level, see Buchanan, above n 3; A Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 *Legal Theory* 39. See also section II.B. below.

⁶² See, eg, Cohen, above n 7; Benhabib, above n 12, 56–61.

⁶³ 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', above n 2.

⁶⁴ See O'Neill, above n 44, 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.

⁶⁵ See, eg, Benhabib, above n 12; Gosepath, above n 17.

⁶⁶ For a detailed discussion of the human right to democratic membership and participation, see S 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, available at <<http://www.venice.coe.int/docs/2010/CDL-UD%282010%29003-e.pdf>>.

regarded as human rights *stricto sensu*. True, this would require a minimal level of democratic organisation of that community, which to date is not yet given.⁶⁷

The European Union (EU) constitutes an interesting example of a supranational political community where human rights and democracy have developed hand-in-hand beyond the State in reaction to the increasingly direct impact of EU law over individuals.⁶⁸ There, EU institutions, and EU Member States when they apply EU law and act as indirect EU institutions as a result, are bound by human rights duties under EU law. And EU decision-making processes may be considered by and large democratic in terms of representative inclusion of all those normatively affected in their fundamental interests by and subject to EU laws and decisions. However, those supranational communities, whether European or international, 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.

One may not exclude, of course, further institutional developments, whether at a regional or functional level. The idea of a worldwide political community, and hence of a global democracy *stricto sensu*, however, is not only implausible, but normatively undesirable.⁶⁹ One may as a result share Arendt's fears about an unchecked global sovereign. And given what has just been 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 rights-holders and human rights duties-bearers would undermine the productive tension between human rights and political membership, and the equilibrium that may be reached between the universalising process of the particular and the particularisation of the universal.⁷⁰

B. 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 actual processes of legalisation of human rights under domestic and international law.

⁶⁷ See S Besson, 'Ubi Ius, Ibi Civitas. A Republican Account of the International Community' in S Besson and JL Marti (eds), *Legal Republicanism—National and Post-National Perspectives* (Oxford, Oxford University Press, 2009) 204.

⁶⁸ On EU institutions as human rights duty-bearers, however, see S Besson, 'The European Union and Human Rights: Towards a New Kind of Post-national Human Rights Institution' (2006) 6 *Human Rights Law Review* 323.

⁶⁹ See, eg, Besson, above n 67; S Besson, 'Institutionalizing global democracy' in L Meyer (ed), *Justice, Legitimacy and Public International Law* (Cambridge, Cambridge University Press, 2009) 58.

⁷⁰ For a similar position, see Benhabib, above n 12; Benhabib, above n 8; and Benhabib, 'Claiming Rights across Borders', above n 11.

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 which they reflect and entrench internationally.⁷¹ More importantly, they are usually abstract and meant to be fleshed out at domestic level, not only in terms of the specific duties attached to a given right but also in terms of the right itself.⁷² 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 favoured or even required by international human rights instruments.⁷³ Domestic human rights law does more than merely implement international human rights: it contextualises and specifies them. One actually often talks of 'reception' within the domestic legal order in that respect.⁷⁴ 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. In turn, this explains why, in the case where domestic guarantees of the same human rights exist, international guarantees are usually subsumed into domestic ones 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. There is nothing vacuous as a result in international human rights minimalism.⁷⁵ Quite the contrary: it corresponds not only to the current state of legality of international human rights, but also to their moral-political reality and democratic legitimacy.

Besides its explanatory value once faced with the reality of international human rights law and the latter's coordination with domestic human rights, the proposed

⁷¹ 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 (eg Switzerland and the European Convention on Human Rights in the 1970s, and currently in the context of the ratification of the additional Protocol to the International Covenant on Economic, Social and Cultural Rights or the European Social Charter).

⁷² 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 essay's moral-political argument. Of course, this does not yet mean that it will be the only way to make them effective (see, eg, SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, Ill, University of Chicago Press, 2006); SE Merry and M Goodale (eds), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge, Cambridge University Press, 2007)).

⁷³ Some international human rights instruments expressly establish positive duties to implement international human rights through domestic law (whether through domestic rights or not): eg Art 4 of the UN Convention on the Rights of the Child.

⁷⁴ On this term, see A Stone Sweet and H Keller, 'Introduction' in *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press, 2008) 3.

⁷⁵ Contra Raz, 'Human Rights without Foundations', above n 2, section IV.

normative approach 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 indeed form one of the pillars of the international order, a pillar which is complemented and not replaced—or even restricted as one often reads—by the second pillar of international human rights law.⁷⁶ The international legal order protects indeed the very interdependence between democracy and human rights alluded to before, by guaranteeing the basic conditions for political equality through State sovereignty and political self-determination, on the one hand, and the possibility to use them through human rights and the right to have rights, on the other. It is actually through the relationship of mutual reinforcement between citizens' rights and human rights to which we shall turn now, that this dualistic structure of the international legal order appears most clearly.

C. From Human Rights to Citizens' Rights and Back

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 human rights guarantees usually also benefit non-citizens domestically, however, and 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 is problematic. 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 affected by 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.⁷⁷ At the same time, however, whether the criterion for citizenship remains nationality or shifts towards residence, and whether certain political rights are granted to members of the political community without naturalisation and full citizenship, 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 not so much to exclude those boundaries but to make sure those boundaries are constantly being questioned and potentially pushed further to include more stakeholders among decision-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. Human rights are specified as citizens' rights, but citizens' rights progressively consolidate into human rights in return. Thus, the legalisation of human rights is a two-way street that is not limited to a top-down reception or a bottom-up crystallisation. 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.⁷⁸

This virtuous circle can actually be exemplified 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 so in the case law of the European Court of Human Rights, where common ground is a constant concern and is sought after when interpreting Convention rights. Consolidations of national best practices and benchmarking also occur, for instance, through general comments issued by the United Nations human rights committees. Within the EU, this actually occurs through the recognition of common constitutional traditions *qua* non-written general principles of EU law.⁷⁹ More broadly, one observes in international law the gradual development of general principles of law derived from domestic and regional human rights.⁸⁰ 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 national courts and legislatures.

IV. CONCLUSION

If there is one idea in Arendt's political theory that cannot be regarded as obsolete whatever changes have occurred in international law since 1949, it is her idea of a 'right to have rights'.

⁷⁶ See, for a similar argument, P Macklem, 'What is International Human Rights Law? Three Applications of a Distributive Account' (2007) 52 *McGill Law Journal* 575, 577; Cohen, above n 7, 595–97.

⁷⁷ Inevitably, problems of under-inclusiveness, but also over-inclusiveness, will be growing; see in more detail: J Carens, 'Membership and Morality: Admission to Citizenship in Liberal Democratic States' in WR Brubaker (ed), *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, Md, University Press of America, 1989); L Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' (2006) 10 *Citizenship Studies* 153.

⁷⁸ This virtuous circularity is reminiscent of Buchanan, above n 3, 187–89.

⁷⁹ Treaty on the EU, Art 6(3); EU Fundamental Rights Charter, Art 52(4).

⁸⁰ See eg JF Flauss, 'La protection des droits de l'homme et les sources du droit international' in Société Française pour le Droit International (ed), *La protection des droits de l'homme et l'évolution du droit international* (Paris, Pédone, 1998) 11.

Based on a contemporary and self-standing argument about the nature of human rights, this essay has demonstrated how Arendt had already, at the dawn of the post-1945 human rights regime, put her finger on the three questions that are still at the core of contemporary discussions in human rights theory: the rights-nature of human rights; the relationship between moral and legal human rights; and the relationship between international and domestic human rights guarantees. Although Arendt was not interested for philosophical reasons in giving full answers to those three interrogations, she was a precursor in proposing a resolutely modern conception of human rights that situates them in the constant tension between the universal and the particular, between politics and morality, and at the intersection of various levels of political integration. Sixty years later, the developments of European and international human rights law and practice have proved her right. An international community is nowhere to be seen *qua* full-blown political community, and remains undesirable from a normative perspective. However, international human rights law and multi-level citizenship have developed, and have generated a productive and mutual relationship with domestic politics, thus proving a greater resilience and power of transformation of both democratic sovereignty and international law than Arendt could have hoped for.

More specifically, and following Arendt's original republican intuition about human rights, and based on the relationship between democracy and individual rights, I have argued 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 *stricto sensu*. 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 which are not human rights. However, there cannot be human rights which are not *à la fois* universal moral rights and legal rights.

By virtue of human rights' close relationship to democracy, I have argued further that the legalisation of human rights ought to take place in each given political community, and hence, for the time being, at domestic level in priority. International human rights norms can be regarded as human rights only if they match, in a minimal way, an existing set of domestic human rights. This occurs through the mutual relationship of reception and consolidation I have described 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 at the most 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. The only human rights that may and ought to be recognised legally at the international level only and in the absence of corresponding domestic rights are a second group of human rights: human rights to membership and to all the human rights those rights require for their realisation in a given political community. Those human rights may be guaranteed only from outside a political community, and through inclusive and representative mechanisms of

international law-making. Those two kinds of human rights are two complementary interpretations of Arendt's right to have rights that go beyond a sterile opposition between moral and legal rights.

These rather modest and sobering conclusions about the nature and the existence of international human rights need not be a source of concern, however. International democratisation is 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 legitimised at the same time. The European Union is a good example of these *démocratie*-cratic developments at regional level, with EU human rights and EU citizenship reinforcing each other mutually. Those political developments within regional or functional international organisations trigger difficult questions though. It yet remains unclear, for instance, how the combination of multi-level citizenship and human rights standards beyond the State will and ought to impact on States' democratic and human rights regimes. But that will have to be the topic for another essay.⁸¹

⁸¹ See, eg, Besson, above n 15.