

The legitimate authority of international human rights

On the reciprocal legitimation of domestic and international human rights

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1. Introduction

International human rights have been part of international law since the 1950s. Today, they bind more than 80 per cent of the world's states qua treaty law¹ and, although this is more controversial, all or most of them qua customary international law and general principles of international law.² Having been an important part of international law for the past fifty years, human rights have become an object of interest for political and legal theorists alike. Not only have they become the lingua franca of most recent accounts of international relations (Raz 2010; Tasioulas 2002), but they are often put forward as the ground for the legitimate authority of international law and institutions (Buchanan 2004, 2008; Goodin 2007) and, as a result,

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¹ For an overview of international human rights treaties, see: www2.ohchr.org/english/law/index.htm.

² On the sources of international human rights law, see the two seminal pieces by J. F. Flauss (1998) and Simma & Alston (1989).

for that of individual states' legal orders (from an international perspective (Beitz 2009; Buchanan 2004; Raz 2010), but also arguably from a domestic one (Føllesdal 2007; Forst 2010)) and even of regional organizations' legal orders (e.g. the European Union's³). Surprisingly, however, very little attention has been given so far to the legitimacy of international human rights law itself (Benhabib 2008, 2009; Besson 2011a, 2011e; Buchanan 2010a; Cohen 2008; Donoho 2003; Hessler 2005).

At a basic level, the question of the legitimacy of international human rights, and more precisely its legitimate or justified authority as I will understand it here,⁴ can be elucidated along the lines of the legitimacy of international law. The legitimacy of international law amounts to the imposition of moral duties of obedience on its subjects, i.e. categorical and exclusionary moral reasons for action (Raz 1986: 23). Those moral duties are duties to obey international law not because it is just, morally correct and justified, but qua law. They are moral duties, however, and are distinct therefore from the legal duties to obey the law because it is law (Raz 1995: 342–343). Furthermore, the existence of international law's legitimacy is the result of an objective evaluation: international law may have legitimate authority whether or not its subjects think it does and whether or not they have consented to its authority. In other words, it is not the perceived or sociological legitimacy of international human rights law this chapter is concerned about, but its normative legitimacy (Raz 2006: 1006–1007).⁵ While the former can be established from the striving international human rights discourse (Çalı, Koch & Bruch 2011), the latter needs to be argued for in other ways.

Of course, in recent years, the various prudential or non-prudential, and self-regarding or cosmopolitan reasons states may have to ratify and then to comply with international human rights instruments have been at the centre of many sociological and political empirical studies (Hafner-Burton & Tsutsui 2005; Moravcsik 2000; Risse, Ropp & Sikkink 1999; Simmons 2009). Some of those reasons have also been assessed and discussed from a philosophical or jurisprudential perspective (Buchanan & Powell 2008:

³ See e.g. European Court of Justice, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, judgment of the Court (Grand Chamber) of 3 September 2008, European Court Reports 2008 Page I-06351; German Bundesverfassungsgericht, Beschluss vom 30. Juni 2009, Lissabonsvertrag, 2 BvE 2/08.

⁴ In what follows, I will use 'authority' to mean legitimate authority (see also Besson 2009a). For the same use of the term, see Raz (1986, 1995, 2006).

⁵ See also Buchanan (2004). See, however, Franck (1988); Franck (2006: 88, 91 and 93) who conflates the sociological and normative approaches to legitimacy.

330 ff.; Gardbaum 2008). The various reasons there may be to ratify and/or to comply with international human rights norms ought not, however, to be confused with content-independent moral reasons to obey those norms qua legal norms.⁶ There may be moral reasons to create and support international human rights guarantees and institutions because they are morally valuable⁷ or just (Rawls 1971: 114–117 and 333–337; Waldron 1993: 3) independently from human rights law's legitimacy. They ought not be confused, as a result, with moral reasons to obey the legal human rights applied or generated by those states and international institutions.⁸

Recently, some authors have started looking more closely at the question of the legitimacy of international human rights institutions and their decisions.⁹ The question of those institutions' legitimacy, however fascinating, is distinct from that of international human rights law itself.¹⁰ True, international law's authority is the authority of international legal norms, but also accordingly of their law-making and legal interpretation processes and hence in part a product of the legitimacy of the domestic or international institutions involved in those processes.¹¹ One cannot indeed distinguish a legal norm from its interpretation. In the context of international human rights law, there are reasons, however, to address the two issues separately, or at least to address the legitimacy of human rights norms generated by states before that of international human rights institutions, on the one hand, and of their decisions and interpretations in the context of international human rights, on the other.

On the one hand, it is true that international human rights institutions can make or contribute to making international human rights law by interpreting and hence specifying international human rights further and issuing application decisions. They are not usually involved in making those norms in the first place, however, or at least not independently from states themselves. Furthermore, some international human rights instruments

⁶ See, for example Raz (1986: 66 ff.; 1995; 2006), on the distinction.

⁷ See on those different justifications, e.g. Buchanan (2008) and Buchanan & Powell (2008).

⁸ See, for example Raz (1986: 66 ff.; 1995; 2006), on the distinction. See also Buchanan (2008).

⁹ This has been the case especially for international judicial human rights institutions and decisions: see e.g. Besson (2011b); Føllesdal (2007, 2008); Hessler (2005); Letsas (2008).

¹⁰ The article focuses on legal authority in contrast to private authority, but also to political authority in general. On the distinction, see Raz (1979; 1986: 23, 38 and 70; 1995: 210, 341 and 355; 2003; 2006:1004–1005).

¹¹ See Besson (2009a); Buchanan (2008). Of course, the correlation is not perfect: illegitimate institutions may produce legitimate laws, and legitimate institutions may produce illegitimate laws.

do not have international bodies connected to them or, on the contrary, have many of them without clear division of labour: some specialized and some general; of many different kinds: some judicial, some quasi-judicial and others political; and implying different subjects: states, but also individuals. As to those institutions' decisions, on the other hand, they are quite rarely binding and almost never self-executing. Even when they are, their alleged contribution to the interpretation of international human rights norms (their so-called jurisprudential authority or *erga omnes* effect) is deeply contested and rarely recognized by states. This is because international human rights norms are to be interpreted and applied in priority (or, in some cases, only) by states in their domestic legal orders and with the help of all their national institutions, and only in a subsidiary fashion (and never completely anyway) by international human rights bodies (Besson 2012a; contra: Letsas 2010). Thus, while the legitimacy of international human rights institutions and their decisions in their vast diversity raises intriguing and important questions, those questions cannot be addressed without first considering the legitimacy of international human rights law itself. The purpose of this chapter therefore is to address this first question only, leaving the question of international human rights institutions' legitimacy per se and in relation to domestic institutions for another time.

So far, very few studies have focused on the justified authority of international human rights law qua law. Presumably, however, the contribution of international human rights norms to the legitimation of other national and international legal norms will depend in part or entirely on their legitimacy. Taken on their own, furthermore, ascertaining the existence and the scope of their justified authority over states is important. The existence of an entirely illegitimate, albeit valuable for different reasons (Tasioulas 2010a), set of human rights norms would not be sustainable in the long run. The law's distinctive contribution to the advancement of valuable goals lies precisely in successfully laying down authoritative directives to reach those goals (Tasioulas 2010a). Furthermore, the fact that valid human rights law necessarily claims to be legitimate implies that it should be capable of being legitimate and hence be produced so that it can be. In those conditions, ensuring the legitimacy of international human rights law has a key influence on the organization of international human rights law-making and decision-making processes. This will prove particularly important when addressing potential conflicts between international human rights norms and/or their interpretations by international human rights bodies with national human rights law (Hessler 2005). Finally, due

to the increasingly direct impact of international human rights norms on individuals and public authorities in areas previously exclusively covered by domestic human rights law (Gardbaum 2008; Stone Sweet & Keller 2008), a legitimacy gap is gradually widening and the legitimacy of international law in those areas has become more pressing (Kumm 2004). This is particularly obvious when international human rights constitute direct limitations on democratically legitimate decisions and legislation at domestic level.

The neglect of those issues is even more surprising as discussions of the legitimacy of international law in general have become more common in recent years (Besson 2009a; Bodansky 2008; Charlesworth & Coicaud 2010; Franck 1988, 2006; Goldsmith & Posner 2005; Kumm 2004; Tasioulas 2010a; Teson 2005; Wolfrum 2007). Curiously, however, the legitimacy of international human rights is barely ever mentioned in that context or only to stress that it is precisely not in contention.¹² Indeed, the more robust and the more intrusive supranational human rights law becomes in the domestic sphere, the more effective (Helfer & Slaughter 1997), but also, interestingly, the more legitimate it is perceived to be (Bayefsky 2001). Their subjective or sociological legitimacy would therefore seem to be in greater tension with their objective or normative legitimacy than is the case for other international legal norms. Furthermore, the more other international institutions and legal norms are in need of legitimacy, the more those justifications are sought after, by analogy with what applies domestically, within international human rights law whose legitimacy itself cannot as a result be in contention (Buchanan 2004: 189; Buchanan 2008; Goodin 2007).

A first kind of explanation for this neglect or at least for this presumption of legitimacy resides precisely in the *prima facie* counterintuitive nature of the question in the domestic context. Among domestic legal norms, human rights norms are those whose legitimate authority is usually the least likely to be doubted. This is, primarily, because the direct bearers of the duty to obey human rights are public authorities and not individuals, and, second, because human rights norms create rights to the benefit of all individuals and corresponding rights-based duties for all public authorities. Finally, the special authority of domestic human rights usually stems from their constitutional nature, and hence from the highly inclusive and democratic adoption procedures of constitutional

¹² See e.g. Gardbaum (2008: 768). On the unquestionability of human rights, see O'Neill (2005: 439).

norms due to their constraining role on ordinary democratic procedures. Democracy and human rights are indeed often regarded as being grounded by reference to the same value: political equality, and work as necessary mutual constraints when protecting that value.¹³ Human rights are deemed as necessary for the democratic process and as having to be protected from it, albeit in a way that is democratic. As a result, human rights and democracy are commonly regarded as mutually reinforcing at domestic level and their interdependence turns human rights into an inherent part of the democratic legitimation from which they have to benefit. It follows that their democratic credentials and accordingly their legitimacy are bound to be different from that of other domestic law norms.

While the two former characteristics may be true of international human rights as well, the legitimacy of international law pertains mainly to states' duties to abide by international law. Thus, the fact that the duty-bearer in both cases is a state cannot explain the lack of concern for the legitimacy of human rights at the international level. As to the third explanation, it cannot simply be transposed onto international human rights without further argument. Of course, some authors may argue that international human rights actually contribute not only to the democratic legitimation of international law, but also to the democratic legitimation of states and that as a result trying to assess their democratic legitimacy, even from an international perspective, is not feasible (Buchanan 2004: 189). It remains, however, that international human rights have not been deliberated and adopted by highly inclusive international democratic procedures the way constitutional rights have; they are deliberated and adopted by both democratic and non-democratic states, and through procedures that are not necessarily inclusive, egalitarian and transparent (Donoho 2003: 27 ff.; Gould 2004). Not to mention the lack of correspondence between those adopting international human rights and those actually bound by them and whose political equality is protected. Even if they are approved democratically at domestic level before being ratified at an intergovernmental level, they have not been deliberated over through democratic channels. As a result, international human rights are not usually regarded as source-based superior constraints on such procedures whether domestic or

¹³ See Christiano (2008: 130 and 260–264) on the mutual grounding of democracy and liberal rights in the principle of public equality. See also Brettschneider (2007: 23–26) on equality as one of the core values of democracy and substantive rights.

international.¹⁴ This explains why international human rights do not per se take priority over domestic constitutional law. Nor do they necessarily take priority, either due to their source or to their content, over other norms or regimes of international law. If they cannot be associated in a straightforward fashion with the legitimation of international law the way they are in domestic law, their legitimating role in the process cannot be held against trying to account for their own legitimacy through that process. While it would be wrong to reduce human rights to democracy and prioritize the latter over the former, the contrary would be equally wrong and oblivious of their mutually supportive albeit complex relationship.¹⁵

A second explanation for this differentiated take on international human rights may be that they stem from international agreements between democratic states. And indirect democratic consent through the consent of democratic states is usually put forward as a major justification for international law's authority. This explanation fails to persuade, however. Consent is neither a sufficient nor a necessary condition of legitimacy per se (Besson 2009a; Buchanan 2004). This applies both at the domestic and the international levels. Of course, as we will see, state consent still has an important role to play in the ascertaining and strengthening of international legal authority, but it is not in and of itself a justification for obligations to obey the law. Nor is it correct to identify democratic consent with democratic legitimacy (Besson 2005a, 2009a; Hershovitz 2003). Again, in the absence of international democracy, consent may play an identification role in the generation of state duties in a fair association model (Christiano 2012), but this should not be mistaken for democracy itself.

A third explanation may actually be that the adoption of international human rights instruments historically found part of their justification in the reinforcement of national democracies when democracy did not fare that well as a binding international principle and was replaced by human rights (Letsas 2008; Moravcsik 2000). On this view, if human rights are there to consolidate national democracy, their democratic legitimacy itself cannot be questioned. In a similar vein, if international human rights instruments were initially adopted to curb democratic violations of human rights, accounting for their legitimacy in democratic terms would be counterproductive. These arguments come close to the democratic precommitment

¹⁴ This explains why some authors try to conceive international human rights as a form of international or domestic (thick) constitutional law (see Gardbaum 2008 for the various arguments). For a democratic critique of this argument, see Besson (2009b: 381–407).

¹⁵ See for the same balanced approach to the legitimacy of international human rights: Benhabib (2008, 2009); Cohen (2008).

argument that is often used in the context of discussions of the democratic credentials of constitutional rights. Even if this historical explanation pertains, times and circumstances have changed, however; national democracies have developed and consolidated, including through domestic human rights catalogues and judicial institutions of their own. Furthermore, neither democracy nor human rights alone suffice to provide full legitimacy to any law; as they are mutually supportive, privileging one over the other would amount to providing an impoverished account of legitimacy. Finally, precommitment types of argument based on the protection of human rights (including the right to self-government) against themselves raises well-known difficulties in the domestic context, that are magnified when brought to the international level (Besson 2005b; Waldron 1999).

A fourth explanation may be found in the moral nature of human rights and the widespread belief in their universal moral justification. The alleged straightforward relationship between universal moral rights and legal human rights is sometimes regarded as dispensing the latter's authority from having to be justified the way the authority of other legal norms would in a content-independent fashion: their uncontested moral justification and the corresponding moral duties suffice (e.g. Gardbaum 2008: 768). Or else, if the possibility of reasonable moral disagreement is contemplated, the difficulty is said to lie exclusively in the lack of universal scope of legitimate authority in the context of the cultural parochialism or exceptionalism debates, but not in the possibility of moral justification per se. While parochialism raises important questions that will be broached at the end of this chapter, the moral nature of international human rights is not exclusive of their legal nature and is not left untouched by their legalization, hence the need to account for their legitimacy qua legal norms. Legal specifications of moral human rights may be controversial and trigger important reasonable disagreements of their own. Moreover, the institutional recognition and the legalization of human rights do affect their moral counterparts (Besson 2011a) and, as I will argue, it is precisely there that the key to their legitimacy may be found.

Finally, yet another explanation for the absence of discussion of the legitimacy of international human rights may lie in the specific nature of human rights qua rights and the kind of legitimate authority rights may claim to have. Rights are interests which are regarded as sufficiently important to give rise to duties. Qua entitlements and source of a normative relationship, rights correspond to correlative duties albeit with a justificatory priority over those duties. Legal rights are legally recognized, specified or created moral rights and trigger as a result both legal and moral duties. When moral agents are bound by a legal right, they are bound by

the primary moral duties corresponding to the right and by the secondary moral duties to obey this right qua legal norm and to abide by its corresponding moral duties. Those duties are usually reduced to each other and go unnoticed at the domestic level. The same may be said about the right-holders of both kinds of duties in a democracy where the group of those affected in their fundamental interests and the citizens overlap: they are all the citizens in a given polity. And this in turn may explain why the justification of the second-order duties to abide by a legal right and its duties is not usually regarded as an additional requirement. That does not necessarily apply to the international level, however. International human rights can bind states as international legal norms but generate corresponding human rights duties for other subjects as well whether on the international or the domestic plane: state authorities in their domestic setting, IOs, etc. The same may be said about the right-holders of both kinds of duties: states and arguably the international community as a whole for the second-order duty to abide by international human rights law and individuals for the first-order duty to respect human rights. As a result, the question of the legitimacy of those second-order duties can be regarded as an important one and its justification as logically distinct from the justification of first-order human rights duties, albeit intrinsically related to it.

All five explanations provide interesting insights into the specificity of international human rights norms and about the ways one may justify their authority. It reveals, if need be, how complex the enquiry into those different justifications is bound to be: it requires a good understanding of difficult issues such as the nature and justification of moral and legal human rights, and the relationship between their moral justification and their legitimate authority, a good grasp of law's and human rights' authority and a view of the relationship between human rights and democracy at the domestic level, on the one hand. It also requires, however, explaining how one can make all three questions travel to the international level and back to the domestic level and how to adapt our accounts of the relationship between democratic legitimacy and domestic human rights when the human rights and/or the democratic processes at stake are international, on the other. A separation between domestic and international law in the field of human rights would make no political and legal sense in the light of existing human rights practice that straddles the different sources of human rights¹⁶ and hence no sense in terms of legitimacy either.

¹⁶ On the domestic constitutionalization of international human rights in Europe, see Gardbaum (2008); and on the ECHR in domestic human rights reasoning in the United Kingdom and Ireland, see Besson (2008).

In order to know whether international human rights norms have a justified claim to legitimate authority over states, the chapter focuses on their normative or 'supply' side and in particular on their corresponding duties (O'Neill 2005: 430). It starts by assessing what kind of duties and hence what kind of reasons states have by virtue of recognizing human rights. This implies determining whether those norms can be described as legal human rights in the first place with the respective legal and moral duties they imply and what is the relationship between domestic and international human rights law in that context. Then it turns to the different conditions of their legitimate authority and to the issue of how the reasons given by international human rights law can not only match corresponding states' reasons, but also contribute to improving conformity to those reasons. It is the interdependence between human rights and political equality and the role of human rights for democratic authority at domestic level that is at the core of the argument about the mutual legalization and legitimation of international and domestic human rights.

To that effect, the argument in this chapter is three-pronged: in the first section, I start by general considerations about the model of legitimate authority of international legal norms, before discussing the moral-legal nature of international human rights and the relationship between domestic and international legal guarantees of human rights in the second section (Besson 2009a, 2011c). The third step of the argument enables us to bring those two groups of considerations together and address the question of the legitimate authority of international human rights law, by looking at four basic issues: how states may bind themselves to create human rights duties for themselves, what the justification for the duty to obey those rights could be, whether they can consent to more than they have to and, finally, whether sovereignty can be invoked against the legitimate authority of international human rights.

2. The legitimate authority of international law

The model of legitimate authority of international law that is used in this chapter is best captured by explaining, first, the concept of legitimate authority of international law that is chosen and, second, the conception that is applied to international human rights law.¹⁷

¹⁷ This section is borrowed and summarized from Besson (2009a).

2.1 *The concept of legitimate authority of international law*

The first difficulty facing any explanation of the legitimacy of international law lies in the identification of a concept of legitimacy that can account for the legitimacy of (at least some part of) international law. The differences between international and national law in that respect are well known (Buchanan 2008): international law is mostly the product of horizontal interstate law-making practice and, to be more precise, of different interstate practices. Some international legal norms are more akin to making contractual promises and others to general legal rule-making for all subjects of international law. As a result, international law is said to lack a centralized and hierarchical ensemble of law-making institutions and processes that may be equated with domestic law-making authorities and legislating procedures, on the one hand, and is mostly exempt from sanctions backing up its norms, on the other.

To make things more complex, new forms of international law have arisen in recent times that question the exclusivity of the horizontal interstate law paradigm. Subjects no longer only include states making law for other states, but also international organizations (IOs) and individuals as subjects of rights and obligations. With respect to its object, international law no longer pertains only to interstate relations, but also, for instance in the case of international human rights, to intrastate relations and therefore directly regulates the life of individuals alongside domestic law. Finally, and maybe as a result, the sources of international law and its law-making processes have become more diverse and have developed to include, besides the 'famous three' (treaties, customary law and general principles), general multilateral interstate law-making processes that often associate individual actors, and unilateral legislation by IOs. Interestingly, those very sources which include subjects of international law other than states regulate matters previously covered by domestic law only and often through majority rule (Besson 2009a; Kumm 2004; Wolfrum 2007). In terms of normativity as well, international law no longer offers a unified face. International legal norms can bind subjects universally or not (e.g. *erga omnes* and *omnium* duties) and to varying degrees (e.g. *jus cogens norms* and, more controversially, soft law) (Tasioulas 1996; Weil 1983).

Thus, either the concept of legitimacy that is chosen accounts for the legitimate authority of both national and international law, but in a way that can capture not only their differences but also the sheer diversity of international law-making itself, or two (or more) separate concepts of legitimacy are used in each case. Given the increasing intermingling of international

and domestic legal orders and, arguably, their reciprocal legitimation (Buchanan 2011), but especially given the common individual subjects of those legal orders, authors writing about the legitimacy of international law ought to choose and use one of the concepts of legitimate authority developed for the domestic context and apply it in a transitive manner (Besson 2009a; Tasioulas 2010a). Of course, this does not imply that the specific justifications for the authority of international law or its consequences will be the same as those applicable to domestic law given the differences identified before between those two legal orders. The remainder of this chapter is actually devoted to exploring the specificities of the legitimacy in international law, and in international human rights law in particular. Rather, what matters for our purpose is that the concept that is used when assessing the legitimacy of legal norms stemming from both orders is the same.

Besides the virtues of conceptual unity in a pluralist legal order, it is important, when choosing a concept of legitimate authority of international law, that it can also be applied to individual legal subjects and not only to states.¹⁸ When states are bound by obligations of international law, their institutions and subjects are bound indirectly and have to comply with them through the actions of their state, when they are not bound directly. As a result, assessing the legitimacy of international law and national law with the same concept, but on an interstate basis in the case of international law and on a state-individual basis in the case of national law is unhelpful. The legitimacy of international law can only be understood if the reasons for action it provides to all subjects of that authority are assessed at the same time and by reference to individual subjects as ultimate subjects of authority. Of course, this is not to deny that international law may provide different subjects with different reasons: states with some reasons and individuals with others. However, because the relationship between those subjects is one of constituency, separating the justifications for those reasons or, worse, eluding some of them blinds to an essential connection between them. When a state is bound by an international legal norm, its institutions and subjects are bound at the same time, whether directly or indirectly, and this must necessarily affect in return the way in which the state itself can be bound (Kumm 2004: 910; Murphy 2010).

Those two points are particularly important in the case of international human rights law whose content overlaps with that of domestic human

¹⁸ See Besson (2009a). For a similar argument but in relation to the application of the international rule of law to states, see Besson (2011d); Waldron (2011).

rights law and whose subjects overlap with those of domestic human rights law. This correspondence of content and scope is actually part of what international human rights are about: providing a subsidiary and minimal set of human rights guarantees that prevent a levelling-down in domestic human rights protection. Moreover, when states bind themselves through international human rights law, they bind the domestic polity and in turn contribute to mutually securing the equal status of each of its individual members within the polity itself. In that respect, it is very important to assess the legitimate authority of international human rights law for the state but with individual members of the domestic polity in mind.

2.2 *The conception of legitimate authority of international law*

2.2.1 Razian authority

Joseph Raz's seminal and refined account of authority, and of legitimate legal authority in particular (Raz 1986, 1995, 2006), constitutes a useful starting point for any discussion of international law's authority (Tasioulas 2010a). It is also the conception that constitutes the basis of the model of democratic authority that I propose, albeit complemented with a democratic procedural requirement.¹⁹

In a nutshell, the Razian conception of legal authority comprises two elements: A has legitimate authority over C when A's directives are (i) content-independent and (ii) exclusionary reasons for action for C. In other words, the directives are authoritative reasons for action, first, by virtue of the fact that A issued them and not because of the content of any particular directive (Raz 1986: 35 ff.; 2006: 1012–1020), and, second, because these reasons are not simply to be weighed along with other reasons that apply to C but, instead, have the normative effect of excluding some countervailing reasons for action (Raz 1986: 57 ff.; 2006). The authority of those reasons for action is justified, according to Raz, if two conditions are fulfilled: (i) the dependence condition (DC); and (ii) the normal justification condition (NJC). Both conditions are intrinsically related. First, A's directives have to match (objective) reasons that apply to C independently of A's directives (Raz 1986: 42 ff.; 2006). Second, A has legitimate authority over C if the latter would better conform with those reasons that apply to him or her if he or she intends to be guided by A's directives than if he or she does not (Raz 1986: 53; 2006: 1014). So, an authority is legitimate

¹⁹ I have argued elsewhere for this complement to the Razian basic account of legal authority: Besson (2005a, 2005b).

when its subjects would likely better conform with the reasons that apply to them by treating the authority's directives as content-independent and exclusionary reasons for action than if they did not. This is what is meant by the so-called 'service conception' of legitimate authority: it facilitates its subjects' conformity with the (objective) reasons that already apply to them and hence respects their autonomy (Raz 2006: 1012 ff.). By autonomy, I mean having and exercising the capacity to choose from a range of options (Griffin 2008: 33).

Among the content-independent reasons that may trigger the application of the NJC, one usually mentions the authority's epistemic expertise, its cognitive, decisional or volitional ability, its executive capacity or its coordinative ability (Raz 1986: 75 ff.). The specific justification will vary depending on the circumstances and the concrete ability of each legal norm or set of legal norms, on the one hand, and the subject's own objective reasons, on the other. This explains the piecemeal nature of law's legitimate authority in Raz's account, i.e. the fact that the law cannot have general legitimate authority over all subjects at one given time, and this realization is quite illuminating when the piecemeal nature of legal authority is contrasted with the law's general claim to authority.

2.2.2 Revised Razian authority

One of the major content-independent sets of reasons for action that can be provided by a public authority in the legal context is a salient set of coordinative reasons.²⁰ When there is an independent reason to choose one single interpretation or course of action in circumstances of reasonable disagreement and hence to coordinate, legal authority can help identify some of the conflicting reasons for action or orderings of reasons as salient and hence can help legal subjects coordinate over them.

In fact, as I have argued elsewhere, coordination on issues of common concern is a much more common requirement in the pluralist circumstances of contemporary politics than legal theorists are usually ready to concede. In conditions of pervasive and persistent reasonable disagreement about justice, the creation of a legal order as a means of general coordination over matters of justice is actually in itself a requirement of justice (Besson 2005b; Finnis 1984: 115–138; Waldron 1993; 1999: 101–113). And the law constitutes the best coordination mechanism one may think of: it provides a framework through which one may identify in a

²⁰ See, for coordination-based accounts of legal authority founded on Razian authority, Besson (2005b); Waldron (2003).

determinate and public manner a salient solution from a range of morally eligible solutions. This has to do with its decisional and expressive abilities, but also, although not only, with the sanctions it can provide in case of non-conformity (Besson 2005b: 459, 503; Waldron 1999: 101–113). As a result, the reason to coordinate over certain issues is not restricted to certain contexts and legal areas where so-called ‘coordination problems’ arise, such as environmental law, migration law or disarmament law, but it is a more general reason to constitute a legal system and then to abide by the rules of that legal system as a whole, whether or not those rules effectively solve coordination problems in practice.

The kind of coordination I have in mind here is (partial-conflict) coordination over moral concerns when people disagree reasonably over them and therefore have an independent reason to coordinate over a common take on those issues if they know others will do so as well and can identify what all of them will coordinate over – even if this means not doing things the way they separately think would be the right way to go about doing them.²¹

Scope precludes expanding here on the question of law and coordination, but any form of coordination over matters of common concern cannot be judged in the same way. Democratic coordination provides the most legitimate mode of coordination in circumstances of reasonable disagreement over matters of justice.²² It respects equality by including all those affected in the decision-making process over issues of disagreement. Democratic legitimacy is another dimension that escapes most recent accounts of law’s authority that are still, and questionably so, focused on a hierarchical divide between rulers and governed.²³ In any case, since democracy is incremental and rarely fully realized, the proposed account of coordination-based authority does not exclude less or non-democratic forms of legitimate coordination (Raz 2006: 1031 fn. 20, 1037–1040). In a nutshell, democratic decision-making is intrinsically valuable because it respects basic political equality in circumstances of pervasive and persistent reasonable disagreement about morality. More precisely, majority rule provides all participants with an equal chance of giving salience to their

²¹ On the difference between consent and coordination, see Besson (2005b: 473–475); Waldron (1993: 25–27). Consent can enhance coordination, but is not necessary for coordination to take place.

²² See Besson (2005b: 459 ff.); Waldron (1999: 101–113) on democratic coordinative authority. See for a non-coordination-based account of democratic authority that is very similar, Christiano (2008: 231–259).

²³ See, for example Hershovitz’s (2003: 209–210) critique of Raz’s account of legal authority.

own views over what ought to be done over matters of common concern and thus by taking turns in the decision-making process.²⁴

If all this pertains, (democratic) coordination provides one of the main justifications for the law’s authority. It is a justification that may actually overlap with some of the others mentioned above, including epistemic expertise and executive or volitive ability in certain cases (Raz 2006: 1031), but it also applies much more broadly than most. This has consequences for the piecemeal approach to legal authority presented before – although law’s legitimate authority is not necessarily as general as the law claims it is, its scope can be much broader than conceded by proponents of the Razian account. This does not mean, however, that other justifications of authority cannot apply on an individual basis and complement the democratic coordination-based legitimacy of the law.²⁵ Nor does it prevent the coordination-based account from coexisting with other reasons for respect and recognition of law’s authority that usually fill the gap between the law’s general claim to legitimate authority and the piecemeal scope of its objective legitimacy.

Importantly, the coordination-based approach to authority just presented ought not be understood as an alternative to the Razian account described before, but, on the contrary, as a re-interpretation of that account in circumstances of ordinary law-making and public authority (Besson 2005a: 89; 2005b: 490–498).²⁶ This re-interpretation requires specifying the concept of justified authority and its conditions, in order to accommodate the way the law provides a whole class of subjects, and not each of them separately, and a class of subjects who are also authors of the law they are subjected to, rather than dominated by the law and its authors, with reasons for coordinated action over matters of justice and common concern.

Thanks to its minimal and flexible features, the revised democratic coordination-based account of Raz’s service conception of authority provides the perfect account of the legitimacy of international law and of international human rights law in particular. It is piecemeal and does not

²⁴ In contrast to what is often said (see, for example, Tasioulas 2010a) and presumably derived from a skewed idea of participatory practices in a democracy, individual consent ought not therefore be conflated with democracy as a justification of authority. See Hershovitz (2003: 215).

²⁵ See Waldron (2003: 66) on the contrast between purely individual and coordination-based individual reasons to obey the directives of a public authority.

²⁶ See Besson (2005a: 89; 2005b: 490–498); Waldron (2003). See also the replies by Raz (2003; 2006: 1040–1044).

understand the legitimate authority of law to be general and applicable to all subjects in a similar fashion, on the one hand, and it encompasses many different justifications that can fit different social and cultural contexts, on the other. Those two features fit the many authors, subjects and sources of international human rights law. The proposed conception of legitimacy corresponds, in other words, to the fragmented and non-monolithic nature of international human rights law.

3. The nature of human rights

The notion of human rights that is used in this chapter is best captured by explaining, first, the moral nature of human rights and, second, what lies in their legalization and how legal human rights relate to the universal moral rights they recognize, modulate or create.²⁷

3.1 *Moral human rights*

In a nutshell, human rights may be considered a subset 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) political institutions (iii). Those three elements will be presented 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 (Raz 1984b: 195). For a right to be recognized, a sufficient interest must be established in a particular social context (Raz 1984b: 200, 209). Rights are, on this conception, intermediaries between interests and duties (Raz 1984b: 208). It follows, first of all, that a right may be recognized and protected before specifying which duties correspond to it (MacCormick 1977: 201). Once a duty is specified, it will be correlative to the (specific) right, but the right may pre-exist abstractly without its specific duties being identified. The relationship between rights and particular duties is justificatory therefore, and not logical (MacCormick 1977: 199–202; Raz 1984b: 196, 200). As a result, the determination of the duty-bearer(s) of a right and its claimability are not conditions of the existence of a moral right (Tasioulas 2007). A right is, second, a sufficient ground for holding other individuals under all the duties necessary to protect the

²⁷ This section is borrowed and summarized from Besson (2011c).

interest rather than in terms of the details of these duties (Waldron 1984: 10–11). It follows that a right might provide for the imposition of many duties and not only one. Rights actually have a dynamic nature and, as such, successive specific duties can be grounded on a given right depending on the circumstances (Raz 1984b: 197–199). This application indeterminacy of rights also implies that rights need to be localized to be fully effective; it is only in local circumstances that the allocation and specification of duties can take place (Buchanan 2004: 180–186).

Turning to the second element in the definition, human rights are moral rights of a special intensity and universal moral rights, in that the interests protected are regarded as fundamental and general interests that all human beings have by virtue of their existence 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. That person need not believe that it is the case for her interest to require protection as a human right.

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, i.e. their political equality or equal political status.²⁸ A person's interests are owed equal respect in virtue of her status as member of the community and of her relations to other members in the community; those interests are recognized as socio-comparatively important by members of the community and only then can they be recognized as human rights (Besson 2012b, 2013a; Buchanan 2005, 2010b). 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 (Cohen 2004: 197–198; Forst 2010). 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 (Cohen 2004; 2008: 585–596). Human rights are power-mediators, in other words:²⁹ they enable political equality. Borrowing Hannah Arendt's

²⁸ See Forst (1999: 48; 2010). On the relationship between political equality and human rights more generally, see e.g. Christiano (2008: 138, 156).

²⁹ For the original idea of mediating duties, see Shue (1988: 703). See also Reus-Smit (2009). On liberal rights and the exercise of power in general, see Christiano (2008: 134).

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' (Arendt 1951).

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.³⁰ Thus, this relationship between human rights and political equality bridges the sterile opposition between the individual and the group.³¹ Under a purely status-based or a purely 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 (Tasioulas 2010b).

It is important to pause at this stage and clarify what is meant by political equality or inclusion into an organized political society.³² 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. This is in line with the republican idea of the political community qua locus of rights (Cohen 2008: 604 fn. 47).

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

³⁰ 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. Anderson (1999); Waldron (2002). See also Besson (2013a).

³¹ The proposed account comes very close to, but is distinct from Forst (1999: 48–50; 2007; 2010).

³² The following argument is a specific development of Cohen (2004: 197–198)'s argument.

as human rights, democracy enlivens and enables political equality. Their common grounding by reference to 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.

This brings me to the third element in the definition of human rights: human rights are entitlements we all have equally against each other, and hence against our 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 favour 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. 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.

3.2 *Legal 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 recognized by the law as sufficiently important to generate moral duties (Raz 1984a: 12; 2010). The same may be said of legal human rights: legal human rights are fundamental and general moral interests recognized by the law as sufficiently important to generate moral duties.

Generally speaking, moral rights can exist independently from legal rights, but legal rights recognize, modify or create moral rights by recognizing moral interests as sufficiently important to generate moral duties.

Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognizing 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. The same cannot be said of human rights more specifically, however.

First of all, it is true that not all universal moral rights have been or are legally recognized as legal human rights. Some are even expressly recognized as universal moral rights by the law even though they are not made into legal rights or modulated by the law. A distinct question is whether they ought to be legalized 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 recognize and protect human rights (Raz 2010). Based on the moral-political account of human rights presented previously, the law provides the best and maybe the only way of mutually recognizing the socio-comparative importance of those interests in a political community of equals.³³ 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' (Habermas 1998a: 183; 1998b: 310–312). 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.

Second, legal human rights necessarily also pre-exist as independent universal moral rights. However, the law can specify and weigh moral human interests further when recognizing them as legal human rights.

³³ Cohen (2008: 599–600); Forst (1999, 2010); see even Pogge (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.

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 recognizing them. The inherently legal nature of human rights and the role the law plays in recognizing 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 legalization as independent moral human rights, but only as independent universal moral rights.

The next question pertains to the locus of legalization of human rights, i.e. the legal recognition and modulation of universal moral rights qua human rights. It could *per se* take place at the domestic or at the international level: through national or international law. The locus of legalization of human rights ought to be domestic in priority, however. International human rights provide an external and minimal entrenchment for human rights legalized and hence recognized domestically.

Given what was said about the interdependence between human rights and political equality, indeed, the political process through which their legalization takes place ought to be democratic and include all those whose rights are affected. As a result, using international law to recognize 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 quality of its processes is not secured, at least not yet (Christiano 2010; Cohen 2008: 599–600). Unless international legal human rights refer to and correspond to existing domestic (moral-political and legal) human rights, therefore, they cannot be regarded as human rights for lack of a moral-political community. What this means is that so-called international human rights can at least be regarded as legally protected universal moral rights and most of the time as legal rights as well. One of those universal moral rights is the universal moral right to have rights, i.e. the right to equal membership in a moral-political community. According to Arendt, the 'right to have rights' is a right to political membership and includes the right to have all other human rights that make individuals equal members of the moral-political community (Arendt 1951; Cohen 2008: 604 fn. 47; Forst 2010). That right would prohibit submitting individuals to genocide, torture and other extreme forms of cruel treatment, through which a community would exclude individuals and not treat them as equal members (Cohen 2008: 587).

Qua legal rights, 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. In that sense, international human rights law's duties are international legal 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.

Interestingly, the normative considerations presented before about the locus of legitimation and hence of legalization of human rights are reflected in contemporary processes of legalization 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 and their common denominator (often referred to as 'consensus') to formulate a minimal threshold which they reflect and entrench internationally (Besson 2012a). 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. Although they share the same content and scope, 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. Domestic human rights law does more than merely implement international human rights therefore: it contextualizes and specifies them. One actually often talks of 'reception' within the domestic legal order in that respect (Stone Sweet & Keller 2008). 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. Gradually, as domestic human rights are fleshed out in similar fashions across the board, the minimal human rights consensus among states is becoming thicker and can feed back into international human rights law that will constrain domestic authorities in return.

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 which is complemented and not replaced or, strictly speaking, even restricted by the second pillar of international human rights law.³⁴ 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.

4. The legitimate authority of international human rights

Among the various key questions usually addressed in any autonomy-based account of legal authority, there are four main features that deserve particular attention in the international context. Those four questions pertain to: whose autonomy it is we are concerned about; how that autonomy can be said to be enhanced by authority; how consent relates to the best exercise of one's autonomy; and, finally, whether autonomy can sometimes be said to be best protected on its own. In international terms, the questions pertain to: the identity of the subjects of authority in international law and in particular the relationship between states and individuals; the justification of the authority vested in international horizontal law-making processes and in particular the democratic coordination justification; the role of additional reasons for respect for the law one encounters in international law and in particular the role of state consent; and, finally, the compatibility between the service conception of authority and state sovereignty.

4.1 *The subjects: double-binding*

One of the first difficulties facing an account of the authority of international human rights lies in the identification of its subjects, i.e. the

³⁴ See for a similar argument, Cohen (2008: 595–597); Macklem (2007: 577).

determination of those subjects in authority and of those submitted to their authority.

In the domestic context, the subjects of authority are usually taken to be the law and, more exactly, a centralized set of state institutions, on one side, and individuals or groups of individuals, on the other. Given the prevalence of the vertical model of political authority, the (state) institutions v. individuals model of authority is usually transposed without further thought in the legal context. While it matches the reality of legislative politics, the model has been criticized, however, for personifying law-making authority (Raz 1986: 70). It also obfuscates the identity between law-makers and legal subjects in a democratic legal order,³⁵ on the one hand, and eludes the coordinative relationship between law-making institutions,³⁶ on the other. The former inability to explain democratic authority is particularly problematic when accounting for the legitimate authority of human rights given the identity between right-holders and duty-bearers in a democracy.

In the international context, the vertical model has become an even more important source of confusion. To start with, there is no centralized and hierarchical law-making process, but many processes and without a hierarchical order between them, ranging from treaty-making and customary law-making to unilateral law-making by IOs (Boyle & Chinkin 2007; Lowe 2000).

Second, the law-makers are manifold and are implicated to different extents in those different processes; they range from states and IOs to individuals (Alvarez 2006; McCorquodale 2004). The same applies to the subjects of those laws, which are diverse; they range from natural persons to collective entities like states and IOs. Third, contrary to what applies at the domestic level, not all subjects of international law are direct subjects of authority, i.e. subjects to (legitimate) duties to obey international law; some are merely subjects of rights, while others may be subjects to duties to obey, but without the means to claim their rights and duties at the international level. This is the case, according to traditional approaches, of individuals in international law. Finally, at least in traditional international law-making processes such as treaties or customary law, given the overlap between states qua law-makers and states qua legal subjects, there is *prima facie* no clear separation between law-makers and legal subjects.

³⁵ See e.g. Hershovitz (2003). See, however, Raz (2006: 1031–1032).

³⁶ See e.g. Waldron (2003). See, however, Raz (2006).

As a result, the relationship seems horizontal as opposed to the vertical domestic relation of authoritative law-making.

This is why I have argued elsewhere that it is essential we lift the state veil to understand the scope of the authority of international law.³⁷ A state may or may not be conceived as an entity 'over and above' the people who constitute it, but if states can act, and be held in duty, this is only because there are people involved. This is true even if legal doctrine, in treating corporate entities such as states as legal persons, neglects the relationship those entities have to people. The potential moral effect of the law on people is in need of justification. This does not mean that all legitimate authority of international law is, in the end, authority over individuals. It means that practices of ascribing duties to collectives of people like states must make moral sense and this means that the moral position of individuals cannot be ignored.³⁸

In what follows, the relationship between international law-makers and international legal subjects is addressed in more detail. Of course, the coordination-based justification of authority defended here relies on a democratic model of law-making where legal subjects participate in a collective law-making exercise or, at least, where institutions (states or IOs) are both officials and proxies for legal subjects in that exercise. This is particularly important in the human rights context where states are bound towards other states in the international community to respect their human rights duties towards individuals: in short, they acquire an interstate duty to generate and then conform to a state-individual duty and are double-binding themselves as it were. More precisely, states' primary or first-order human rights duties are duties they owe to individual right-bearers within their jurisdiction, whereas states' secondary or second-order duties to abide by those primary duties are duties they owe to all other states as well (qua (subset of or entire) international community).³⁹ A second caveat is in order: the coexistence of different subjects of authority implies different authoritative reasons and this is in line with the piecemeal account of legitimate authority presented before. Although all subjects of authority are discussed here, scope precludes discussing the specific justifications of authority for each of them later on in the chapter, and I shall focus mostly on states and individuals hereafter.

³⁷ Besson (2009a). I owe this expression to Murphy (2010).

³⁸ See Murphy (2010). See also, albeit in the domestic context, Raz (1986: 72).

³⁹ See O'Neill (2005: 433) on international human rights and duties qua second-order duties.

4.1.1 Authority by whom

States are the original law-makers in international law. This is at least the case for the main sources of international law such as treaty law, customary law and general principles of international law. Traditionally, states are understood as being both the primary law-makers and the primary legal subjects in international law, and hence as making laws for themselves on a horizontal basis. This horizontal conception of international law-making fits the consensualist view of international law whose authority is allegedly based on state consent: states make laws like individuals enter into contracts and they are only bound by what they have acquiesced to. However, unlike individuals directly or indirectly involved in the domestic law-making context who act qua officials either as representatives or as citizens and not in their private capacity, this approach sees the involvement of states in international law-making qua individuals rather than qua officials.

Such an approach is deeply misleading on more than one count. First, and as Waldron rightly argues, states are not just makers of the international legal order as private individuals would be the makers of a web of contractual promises; they are also its officials (Waldron 2006: 23–25; 2011). Except in the cases where IOs' institutions are involved in international law-making, international law has few institutional resources of its own. It depends on states for the making, but also for the enforcement of its provisions. Governments are the officials or officers of the international legal system. Second, although states are free, rational agents, they are not themselves human individuals and cannot therefore act as those would. In the last resort, states are not the bearers of ultimate value. They exist for the sake of human individuals. In the international context, states are recognized by international law as trustees for the people committed to their care. Ultimately, international law is oriented to the well-being of human individuals, rather than to the freedom of states (Waldron 2011: 23 ff.). This, of course, becomes clear from international human rights law, but it is also the point of most norms of international law. Finally, states cannot be viewed as independent law-makers separately from the individuals they ought to care for as officials and whom they bind indirectly when binding themselves. The fact that states no longer make laws only for themselves but also directly for other international subjects, such as IOs or individuals, is further evidence of their role as officials. Unless states are conceived of as officials and as trustees in international law-making processes, this lack of congruence between international law-makers and legal subjects cannot be bridged.

This is particularly important in the human rights context where states are binding themselves in order to bind their own authorities in domestic law in order to protect individual interests. In a democracy where there is an identity between the right-holders and the duty-bearers of human rights, this amounts to binding all individuals in favour of all individuals in any given state. It contributes to enhancing political equality, but it also implies tinkering with the relationship of interdependence between human rights and democracy as this reinforcement of political equality is done from outside the national polity and from outside domestic democracy.

These considerations about the role of states as international law-makers have important normative consequences. First, states do not make international law just for themselves as free, rational agents, but as officials or representatives for their respective populations. Their role as officials constrains their competence not only in terms of internal accountability, but at the international level itself (Chayes 1965: 1410). States are bound by the rule of international law, i.e. the set of values and principles associated with the idea of international legality (Rawls 1971: 236–269; Raz 1979: 212–219; Waldron 2006: 15). Second, when acting as officials, whether in the law-making or law-enforcement process, states have to coordinate among themselves, the way officials in a democratic state would (Waldron 2003). However, this kind of coordination among officials differs from what applies in the domestic context. States act as law-making officials, but also, as will be shown, as proxy-subjects. As a result, both the coordination among officials and that between subjects are often merged and cannot easily be dissociated.

A ready objection is the lack of legal security this would imply in international relations. If states can only act as official authorities in international law-making when they are democratic and represent their citizens, this drastically reduces the number of states which can produce binding international laws.⁴⁰ Another objection in the human rights context would be that non-democratic states would have no means of contributing to the development of international human rights law from the outside and bind themselves internally on the basis of international human rights norms. Here again it is important to remember the interdependent relationship between human rights and political equality, and the counterproductive idea of committing to one without the other.

⁴⁰ See Christiano (2010) for a discussion of the representativity objection and potential remedies.

4.1.2 Authority over whom

States are the primary subjects of binding international norms. Most duties stemming from international legal norms directly constrain the action of states. Following the analogy between states and individuals entering private contracts discussed before, states are generally held as being able to bind themselves as free, rational agents.

This approach is misleading in this context as well, however. The service conception of authority adopted in this chapter contends that authority can only be justified if it facilitates its subjects' conformity with the (objective) reasons that already apply to them and hence respects their autonomy. Its application therefore has a prerequisite: the subject bound by a legal norm needs to be an autonomous subject, as it is only so that its freedom to choose from a range of options can be furthered by an authoritative directive.

The analogy between authority for states and individuals presupposes therefore that the value of autonomy extends to the choices and actions of states. At first sight, it seems plausible that it does, given the value of shared membership in a national political community and, as a result, of the collective self-determination of such communities (Christiano 2010). The problem is that the value of state autonomy can only be explained in terms of the autonomy of the individuals constituting it. States are quite unlike individuals when it comes to the value of their autonomy. Their autonomy cannot simply be equated with that of any of their domestic legal subjects, but is the product of those subjects' autonomy as a political entity (Waldron 2006: 21). As a result, states can only be bound by international legal norms when they represent those subjects as officials and hence can bind them as proxy subjects to international law. When a state is morally bound by a norm of international law, the duties imposed on it will require action that burdens individuals either indirectly, through international state action that is costly to national resources, or directly through the duty to enact domestic laws in order to transpose international law into domestic law (or implement the latter directly in the domestic sphere). This affects individuals' balance of reasons as a result and explains why the autonomy of states and its ability to be bound depends on its constituency's autonomy and hence on its ability to represent the latter.⁴¹

This is particularly important in the human rights context where by binding themselves, states bind all their authorities and hence all their legal subjects mutually, and hence bind them to an even greater extent

⁴¹ See also the discussion in Crawford & Watkins (2010: 283–298); and in Murphy (2010).

than in other fields of international law. The fact that it is done with other states, and from outside the democratic polity, makes it even more important that all individuals are adequately represented.

Of course, states remain free, rational (albeit artificial) agents and as such they can enter into binding agreements the way an individual would enter into a contract. This can be the case for many contract-like treaties and other international agreements, although consent does not necessarily bind in all cases (Raz 1986: 87–88). The opposite view would simply strip states of their right to bind themselves and hence from any of the meaningful implications of their quality as primary international legal subjects.⁴² Further, states' international legal obligations to obey would remain in place even if they are illegitimate, as they are often backed up by legal sanctions. And so would states' moral obligations to abide by morally correct directives which bind individuals (and states for them collectively) in any case. But populations unrepresented by those states would not be morally bound by those legal directives qua law. Nor could those states be bound in that way as a result.

Of course, this constitutes a risk and it could eventually weaken some states' credentials at the international level and hence the possibility for them to bind themselves even only as subjects. At the same time, however, it could also provide an important incentive to democratize states from within, thus eventually leading to an increase in the overall legitimacy of international law itself. This is particularly important in the case of human rights where benefiting from human rights without being able to take part in national and hence international decision-making is not only highly unlikely, but profoundly counterproductive. Human rights can only be truly respected in practice qua legal human rights if those they protect are self-governing and contributing to the identification of their equal rights.

One way around this difficulty may be to consider international human rights treaties as contract-like treaties generating second-order interstate duties that only bind states the way promises would and to condition the possibility for those second-order duties to give rise to first-order state duties towards their individual members within domestic law in respect of the democratic requirements of representativity mentioned before. This distinction between second-order and first-order human rights duties would actually explain the greater authority in practice of international human rights agreements in democratic states than in non-democratic ones.

⁴² See Buchanan (2008: 53) on the 'Vanishing Subject Matter Problem'.

4.2 *The justifications: piecemeal authority*

4.2.1 Coordinating authority

The next question one ought to address in any account of legal authority pertains to the justification of authority, and more precisely to how individual autonomy can be said to be enhanced by a given authority. The virtue of the service conception of authority used in this chapter is that it does not rely on the existence of a general duty to obey international human rights law; their legitimate authority can be piecemeal depending on the states and their reasons, on the one hand, and the international human rights norms at stake, their sources and their qualities, on the other.

First of all, and by virtue of the dependence condition, the reasons given by international law need to match the state's pre-existing reasons. If the state's duty to comply with an international legal norm implies a duty to abide by a duty, and e.g. a duty to abide by a human rights duty, then that state must have a matching pre-existing reason for action.

In the case of human rights, the justification of authority implies increasing the state's conformity with its own reasons to protect fundamental and universal human interests. In view of the diversity of those reasons between states, the legitimate authority of international human rights can be regarded as piecemeal. Given what was said before about the moral-political nature of human rights and their relationship to political equality, the legitimate authority of international human rights only makes sense if the state has human rights-based moral duties and therefore if it is democratically organized and guarantees human rights domestically (politically or legally). The justified authority of human rights corresponds to the justification of the correlative duties. As a result, human rights and their corresponding duties can only arise in a given political context where interests can be compared and balanced against each other and recognized as equally important and vulnerable. The legitimate authority of international human rights is therefore a function of that of the corresponding domestic human rights. The mutual legalization of international and domestic human rights law described in the previous section is reflected in their mutual legitimation and vice versa.

In a non-democratic state, by contrast, there would be at the most reasons to protect fundamental moral interests qua human rights and those reasons would be the only ones that could be matched by the reasons given by international human rights law. In those circumstances, international human rights would provide second-order reasons to adopt domestic human rights law rather than first-order reasons to comply with human

rights directly. In other words, the universal right to have rights would be the only international legal human right and corresponding duty that would meet a state's pre-existing moral duty, i.e. the duty to bear human rights duties. Importantly, that minimal content of international human rights and their inclusive and consensual development bottom-up helps placate an important critique, i.e. that of parochialism that targets the DC and the correspondence between the second-order reasons to generate first-order human rights duties and the states' existing reasons.

Second, and by virtue of the normal justification condition, the content-independent reasons that are given by international law ought to help the state better conform to its own reasons, and individuals within states to theirs. There are many different justifications that may be given in this context. Not only is democratic coordination the best justification in the proposed revised service conception of authority, but it is actually one of the best justifications of the authority of international law. And this also pertains in the context of international human rights law.

First of all, the horizontal nature of most relationships between subjects of international law makes justifications of authority based on a vertical ruling relationship between an authority and governed subjects less probable. The legitimacy of major international law-making processes, such as customary law-making, multilateral treaty-making or international institutional law-making, is therefore well accounted for by a coordinative justification of the authority of international law. Second, the lack of centralized and hierarchical law-making processes in international law confirms the need for various levels of coordination within the same regime, but also across regimes. Coordination can ensure coherence between sets of norms and across regimes, without hierarchy (Besson 2005b: 192–195; Waldron 1999). It can also account for the existence of a public authority and multilateral and multi-level law-making community despite the absence of a centralized law-making process and institution.⁴³ This distinction is made difficult in the international context given the dispersed nature of public authority. Coordination provides that very distinctive feature and justification. Furthermore, states are a small group in number and are as a result easy to coordinate over issues of common concern such as human rights.

Third, the coordination-based justification of authority fits the need for international regulation on difficult matters of common concern among subjects whose diversity of views creates pervasive and persistent

⁴³ See Waldron's (2003) critique of Raz's account of legal authority at the domestic level.

reasonable disagreements. This applies in cases of classic coordination problems such as: problems related to epidemic diseases, economic instability, environmental degradation, the proliferation of weapons of mass destruction, migration movements that cannot be addressed by individual states acting alone but only through coordination. It also applies, however, to conflict and partial conflict coordination cases where there is disagreement about issues of justice and common concern. On such issues, it is better that all coordinate over the same set of international norms rather than acting individually (even correctly) according to their own reasons. In a legal system characterized by deep divergence in ethical, religious and political beliefs and practices, democratic coordination provides one of the best justifications of authority to escape irreducible substantive controversies.

This third argument applies particularly well to international human rights. In circumstances of moral and social pluralism, where values are diverse and conflict with each other, and where their ranking can vary from one culture to the other, the fundamental interests protected by human rights are bound to conflict or at least vary and states to disagree reasonably over them. Based on their universal moral duty to protect human rights and the corresponding universal moral right to have human rights, states ought to coordinate on minimal interstate second-order duties to generate and protect full-blown first-order human rights duties in domestic law. External and minimal human rights protection can help them to avoid a levelling-down in domestic protection. This can only be done, however, if those minimal human rights guarantees are identified bottom-up on the basis of states' human rights practices. The coordinated minimal content of international second-order duties to adopt domestic first-order human rights duties can then evolve with the further development of domestic first-order human rights duties. Of course, for that to happen, further coordination ought to take place at the domestic level when identifying and specifying the state's first-order human rights duties in domestic law. The need to coordinate on one set of minimal external human rights duties that protect a right to have human rights in the domestic context explains how the NJC can be saved from the exceptionalist critique that claims that some states may have reasons corresponding to the ones given by international human rights law (DC) but can respect them better on their own.

Besides coordination, other justifications for the authority of international legal norms may also be mentioned. This is the case of the volitional, decisive and cognitive abilities of certain norms of international

law.⁴⁴ In most cases, however, as in the domestic context, the coordination justification of authority encompasses a lot of those other justifying grounds and it constitutes the most important justification of international law's authority. As a matter of fact, coordination captures precisely those other grounds that compensate for the predominant circumstances of epistemic limitations. This is likely to be even more pertinent in international law given the diversity of the objects of international law, of its subjects and of their relationships.

4.2.2 Democratic authority

As in the domestic context, the coordination-based justification of international law's authority is enhanced in circumstances of disagreement about justice if the coordination procedure and functioning is democratic (Buchanan 2008). This is particularly the case with coordination over international human rights given the interdependent relationship between human rights and political equality, and the legitimizing role of human rights in domestic democracy. Due to the interdependence between human rights and political equality, the democratic requirements on international law-making process are actually higher when the legitimacy of human rights norms is at stake than for other international law norms.

What democracy means in the international law-making context is a difficult issue and scope precludes fully addressing it here.⁴⁵ In a nutshell, and as I have explained elsewhere, global democracy does not equate either with indirect state democracy nor with a state-like global democracy at the international level (Besson 2009c: 213 ff.). On the contrary, it groups all democratic processes that occur within and beyond the state and whose outcomes affect individuals within that state, but in ways that link national democracies among themselves and to other transnational, international or supranational democratic processes (Besson 2006, 2009d).

Importantly, global democracy on that model can only strive if states are democratized from within at the same time; this is actually a key feature of the legitimate authority of international law for states, as discussed before. Indirect state democracy does not replace direct individual participation or representation in international processes, however, at least from the perspective of the authority of international law over individuals.

⁴⁴ See Waldron (2003) for a detailed discussion of those justifications in the context of international law.

⁴⁵ See, for an excellent discussion, Christiano (2010).

There are many reasons for this. To start with, their interests might diverge from those of their national polity, because they are members of a minority at the national level (Besson 2009c: 216; McCorquodale 2006). In fact, even in a democratic state, the international or external interests of that state might actually differ from those of the sum or the majority of that state's citizens, given the primary and increasing role of the executive in foreign policy and international negotiations. Furthermore, even when individual interests match their government's, the rule of international democracy, and in particular majoritarian rule in multilateral law-making (but also veto rights in the case of unanimous voting), cannot always guarantee international results that are in line with individual national will, or at least respect the principle of political equality in terms of the proportionality of votes to the size of the populations represented. Thus, indirect international democracy models face the famous dilemma between states defending their citizens' interests at the expense of other states and their citizens on the one hand, and following the rules of international democracy at the expense of their own citizens' interests, on the other (Archibugi 1993). Moreover, not all individuals subjected to international law are citizens of democratic states, and hence have a say in national democratic processes pertaining to international issues, or are represented by democratically elected representatives in international fora. This creates an inequality in legitimacy (Christiano 2010).

It is clear, however, that in current conditions of international law-making, the equal inclusion of all those subjected and the means to get an equal say even in an iteratively democratic process are simply not guaranteed yet.⁴⁶ One of the main shortcomings of international law-making processes at this time is the lack of respect for political equality and as a result for human rights themselves. It would be even more paradoxical, indeed, than at the domestic level to be enacting guarantees of international human rights and not to enable the beneficiaries of those rights to exercise them when deciding about those very rights and about their membership in the community of right-holders. At the same time, however, democratic coordination between states requires minimal guarantees of human rights to function properly and these should therefore be respected within international law-making processes themselves (Besson 2005b: 319–323).

Of course, this difficulty raises the same issues of apparent circularity one meets when contemplating the democratic legitimacy of human rights

⁴⁶ See Christiano (2010) on the democratic shortcomings of both his fair association of states model and his global democracy model.

at the domestic level and the role of human rights in that very legitimation. In those circumstances, it would certainly be vain to look for an alternative foundation for the legitimacy of international law in international human rights law, as some authors have suggested (Goodin 2007; Teson 1998, 2005). Rather, international law-making should be organized so as to both provide the enacting of human rights with deliberative and inclusive legitimacy and bolster that deliberative process by protecting minimal human rights.⁴⁷ This is a consequence of the mutual relationship between democracy and human rights that lies in their respective grounding by reference to political equality.

As a matter of fact, this legitimacy bootstrapping between human rights and democracy does not only occur at the international level itself and is actually less likely to occur at the international level than domestically. This is mainly due to the underdeveloped democratic features of international law-making presented before. The legitimation of international human rights actually mostly involves the domestic level where international human rights and domestic democracy can be understood as standing in a mutually reinforcing relationship. International human rights become vernacularized or contextualized through domestic democratic law-making processes and that outcome can in return become a source of international human rights law. As I have argued elsewhere, this mutual legitimation between domestic and international human rights or, more exactly, between citizens' rights and human rights, is particularly important in the case of international human rights and their corresponding domestic human rights: the recoupling between human rights and democracy that were decoupled in 1945 through the internationalization of the legal protection of human rights cannot operate horizontally (yet), but works vertically across legal orders and levels of governance (Besson 2011c).

As indicated in the previous section by reference to their legal sources, international human rights' guarantees are often abstracted bottom-up from domestic guarantees as general principles and then constrain those domestic practices in return. As a result, the legalization of human rights is a two-way street that is not limited to a top-down reception or a bottom-up crystallization, but is a retroactive process. And this corresponds to the way in which international human rights law is legitimized. Only those polities that respect international human rights are legitimate in

⁴⁷ See Besson (2010); Buchanan (2008, 2010a). See also Cohen (2008) on the human right to have rights.

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. This corresponds to what Allen Buchanan has referred to recently as 'reciprocal legitimacy'; it implies that international law may contribute to the legitimacy of corresponding domestic legal norms and vice versa (Buchanan 2004: 187–189; Buchanan 2011; Besson 2013b, 2013c).

4.3 Other reasons to comply: consent

Like in the domestic context, it may of course happen that some international legal norms are not legitimate on any of the grounds just mentioned or, at least, not for all states at once. This even more so with democracy: even defined as it is in this chapter, it is still limited and largely incremental in the international context. This is particularly problematic when the international norms to legitimize are human rights norms given the interdependence between human rights and political equality; the democratic requirements on international law-making process are higher when the democratic legitimacy of human rights norms is at stake than otherwise.

Of course, and although democracy is particularly relevant, other justifications for their authority may still be available (Besson 2009a). Moreover, it is important to emphasize that this conclusion does not affect the legal validity and as a result the legal authority of human rights norms under current international law. Nor does it impact the moral reasons there may be for states to adopt or recognize international legal guarantees of a given human right in the first place, whether those reasons are self-regarding or cosmopolitan (Buchanan & Powell 2008: 330 ff.). There may be other reasons than ones of legitimacy for states to actually respect and comply with international human rights, some instrumental (e.g. democratic peace) and other justice- or fairness-related. While those reasons are no justifications for the authority of a legal human right, they are reasons for compliance that coexist and are important in international law.

So, the hiatus between the general scope of the claim to legitimacy laid by international human rights law and the effective scope of its legitimacy in practice is likely to be more significant than in the domestic context, in the absence of a single centralized set of law-making institutions and processes. This need not be a source of concern, however, in view of the widespread *de facto* authority of international human rights law and of the coexistence of other reasons to respect international law (and not to obey

it) (Raz 1986: 88 ff.; 1995: 80–94; 2006: 1028–1029). These reasons might, as a matter of fact, explain how international law's claim to general legitimacy may seem entirely granted in practice, although international law does not and cannot have general legitimate authority over all its subjects at any given time.

One of the complementary reasons for respect of international law is consent. Interestingly, consent theory is the dominant account of legitimacy among international lawyers and this is traditionally captured by the general principle of international law *pacta sunt servanda*. The popularity of consent in accounts of the legitimacy of international law may partly be explained by the widespread failure to distinguish between the normative and sociological senses of legitimacy: at least on the basis of an individual analogy, there seems to be some empirical connection between believing a norm is binding and having previously consented to it (Raz 1995: 360 ff.; 2006: 1037 ff.; Tasioulas 2010a). In normative terms, however, consent fails to provide independent authoritative reasons to obey the law (Hart 1994: 224 ff.; Raz 1995: 355–369). Scope precludes rehearsing the many shortcomings of the consent-based justification of political authority,⁴⁸ whether consent is thought of as express or tacit, and as actual or hypothetical.

Following Raz, therefore, one may argue that consent to a legal authority is effective as a source of obligations only if the authority respects autonomy and hence satisfies an independent test of legitimacy.⁴⁹ Of course, consent can still have some impact on legitimacy; it can strengthen obligations to obey and can express a citizen's trust in their public authorities (Raz 1986: 90; 1995: 368–369). However, consent cannot generate legitimacy.

In international law, there are further specific reasons why (democratic)⁵⁰ state consent is neither a sufficient nor a necessary condition of legitimacy (Buchanan 2004: 301–304; Buchanan 2008). Despite similar or even greater limitations of consent qua source of legitimate authority to those applying in the domestic context, consent is paradoxically even more important as a source of recognition and respect of the authority of international law than in the domestic context.⁵¹ This has to do with the fragmentation of international law and institutions and the absence of a centralized legal order and of central political institutions. In the current

⁴⁸ For a general discussion of the shortcomings of the consent-based justification of political authority, see Simmons (1979).

⁴⁹ See Raz (1986: 89; 1995: 355–369). See the discussion in Herskovitz (2003: 201, 215).

⁵⁰ On the limitations of democratic state consent, see Besson (2009c: 214–217); Buchanan (2004).

⁵¹ See Lefkowitz (2005) for a similar argument; Christiano (2012).

and non-ideal circumstances of international law-making, the equality of states qua referential political entities through which self-determination can be exercised is particularly important and that equality expresses itself through state consent. Moreover, since individual political equality is not yet fully secured in current international law-making processes and in view of their inherent democratic limitations, the equality of states and the state consent of democratic states are the best approximation that may often be secured (Christiano 2010, 2012).

To start with, due to the plurality of subjects involved in international law-making and their manifold roles, as is particularly clear from the role of states qua subjects and officials, consent can clarify the existence of justifications for the authority of international law for specific subjects. Furthermore, consent can often be used as a normative strengthener when states consent to abide by duties of justice⁵² or to authoritative international legal norms. This is particularly important in international law, as consent can ease coordination by clarifying participants' intentions to coordinate and their trust in public authority, and hence can further legitimize authority. Finally, the pre-eminence in traditional international law, but also in certain areas of international law today, of contract-like promises between states, and the difficulty in distinguishing obligations stemming from those promises from obligations to obey the law qua law, explains how consent could usually account for widespread cases of de facto authority of international law. For instance, qua rational collective agents, states can bind themselves legally through consent and promises under certain conditions (Raz 1986: 87–88), even when they cannot be deemed authoritatively and morally bound by those obligations because they do not act as officials for their constituency. And even if they do act as officials for their constituency, it is difficult in practice to distinguish cases of legitimate authority from cases where they are bound through mutual promises.

Of course, there are conditions to be respected before consent can be deemed to strengthen or even extend independent authoritative reasons – conditions which may themselves overlap with justifications of authority itself (Lefkowitz 2005). First, consent cannot be used to bind oneself to immoral acts. Second, state consent ought to be free and unconstrained, on the one hand, and duly informed, on the other.⁵³

⁵² Estlund (2008: 127) on normative consent.

⁵³ See Christiano (2012) on the conditions of fair state consent.

In the human rights context, states may consent to international human rights norms that do not bind them legitimately. Their consent cannot make up for the lack of legitimate authority of those norms, but it can reinforce those rights' sociological legitimacy or confirm other reasons a state may have to comply with those rights, and in particular self-regarding or even other-regarding justice-based reasons (Simmons 2009). Moreover, in cases described before where the existence of second-order interstate human rights duties of non-democratic states cannot be justified except by reference to contract-like promises, consent does play an important role.

5. The exceptions: sovereignty

One of the main challenges to the legitimacy of international law is that it allegedly fails to respect the autonomy of states, intruding upon domains in which they should be free to make their own decisions. State sovereignty is often understood in international law as a competence, immunity or power, and in particular as the power to make autonomous choices (so-called sovereign autonomy). The legitimate authority of international law is as a result often opposed to state sovereignty.

Based on the service conception of authority discussed before, authority can only be justified if it facilitates its subjects' conformity with the (objective) reasons that already apply to them and hence if it respects their autonomy. There is per se no conflict between justified authority and autonomy. Regarding some matters, however, it is more important that a person reaches and acts on his or her own decision, rather than take a putative authority's directives as binding, even if doing the latter would result in decisions that, in other respects, better conform to reason (Raz 1995: 365–366; 2006: 1014). This is what Raz has referred to as the independence condition (Raz 2006). It is difficult, however, to distinguish those cases from cases where legitimate authority can apply, the incompatibility being at the most contingent and relative to certain circumstances (Tasioulas 2010a).⁵⁴

The contingency of the independence condition is even more clearly the case in international law. If states are deemed as officials both qua law-makers and qua proxy-subjects of authority in the international legal order, their autonomy cannot simply be equated with that of any of their domestic legal subjects. It is the product of those subjects' autonomy as a political entity and the value of that autonomy itself depends on that of the

⁵⁴ Tasioulas (2010a). See, however, the discussion in Raz (2006: 1015 ff.).

individuals of which it is constituted. Considered in both its internal and external dimensions, a state's sovereign autonomy is a purely legal construct, as a result, and not something whose value is to be assumed as a first principle of normative analysis. In its internal dimension, the state works as a legal organization – it is the outcome of organizing certain rules of public life in a particular way (Waldron 2006: 21–22). Its sovereignty is artificial and it is legally constructed for the benefit of those whose internal interests it protects. In its external dimension, the sovereignty and the sovereign autonomy of the individual state are equally artefacts of international law (Murphy 2010). There can be no international legal order without sovereign states, but equally there can be no sovereign states without international law (Endicott 2010; Hart 1994: 223). What a state's sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international legal order. Those rules define state sovereignty so as to protect the internal and external interests of the political community qua sovereign equal to others, but also to protect the interests of other subjects of international law.

If this is correct, the potential cases of incompatibility between the service authority and state freedom are likely to be even more contingent in the international legal order than in the domestic context. The only possible incompatibility under the independence condition therefore would be that between service authority, on the one hand, and the individual autonomy of a state's subjects and their collective autonomy qua democratic polity as they are represented by those states at the international level, on the other. As a result, provided states act qua officials and proxy-subjects when making international law and the other conditions of the democratic authority of international law discussed before to protect individual subjects' autonomy are fulfilled, state sovereignty seems to be necessarily compatible with justified international legal authority.

True, sovereign states are collective entities and as such their relationships are likely to be even more riddled with disagreement than individuals'. Moreover, one of the values of sovereignty being self-determination, it is clear that decisional independence is of value in the case of sovereign states as well. Finally, given the circumstances of social and cultural pluralism that prevail globally, it is likely that state autonomy can be exercised valuably in very different manners. All this makes self-determination over certain matters just as important to sovereign states as it is to individuals, albeit for different reasons. This is clearly the case when deciding over constitutive standards in a democracy such as human rights and democracy itself.

In sum, state sovereignty is not necessarily compatible with the authority of international law. It is only the case when the latter has legitimate authority, i.e. furthers state autonomy and the reasons that underlie state autonomy. Those can be understood by reference to the values that make a good state or more generally a good political entity such as self-determination, democracy and human rights, but also the values that make a good international community of equal sovereign entities. However, this should not be taken to mean that state sovereignty is only incompatible with international law's authority when the latter is illegitimate. There may be cases where autonomy requires legitimate authority, but others where self-direction is valuable despite the *prima facie* justification of international law's authority. Too much international regulation would empty sovereign autonomy from its purpose (Endicott 2010). In short, it would be wrong to explain sovereignty only by reference to the legitimacy of international law, but also, conversely, to account for the legitimacy of international law only by reference to sovereignty. It is with respect to the values they both serve that the authority of international law can be justified in some cases, together with the *prima facie* restrictions to state autonomy this implies.

Of course, the absence of independent state autonomy distinct from that of the sum of its legal constituents does not mean that states cannot be deemed as collective agents and hence relate as free, rational agents. In that context, however, as discussed earlier, states do not act to promote their constituency's autonomy and cannot therefore be deemed as authoritatively bound by their actions in moral terms. But this does not preclude legal obligations, as well as moral reasons to abide by morally correct directives. Furthermore, as discussed before, complementary sources of non-authoritative reasons for action such as consent or trust usefully complement those legal duties. To that extent, their sovereignty may have to be protected, but not against the legitimate authority of international law.

What the relationship between international legal authority and state sovereignty means in the human rights context is primarily that the traditional *prima facie* opposition between state sovereignty and human rights is a false one (Besson 2012c). State sovereignty cannot be dissociated from the protection of the political equality and human rights of the individuals constituting that state, and cannot be invoked against them as a result.

Of course, this is not to say that state sovereignty cannot be in tension with international human rights law. Importantly, international sovereignty

protects a collective entity of individuals – a people – and not individual human beings per se. True, their fates are connected, the way democracy and human rights are correlated. But sovereignty, and sovereign equality in particular, protects democratic autonomy in a state's external affairs and remains justified for this separately from international human rights. Thus, the tensions between international human rights and state sovereignty are reminiscent of those between popular sovereignty and human rights in the domestic context. The difference is that one of them is international while the other remains domestic.

In short, state sovereignty cannot be dissociated from the protection of the political equality and human rights of the individuals constituting that state, and cannot per se be regarded as incompatible with the values it is meant to help pursue. However, given the value of both individual and collective autonomy in the human rights context and their potential contradictions, two different consequences follow depending on the kind of international human rights norms at stake.

First of all, sovereignty cannot be invoked to escape the legitimate authority of the universal moral right to have rights at domestic level. Sovereignty can only protect political autonomy when it exists in a normative sense; it cannot therefore be opposed to the legitimate authority of the right to have rights. In such a case, self-determination is undermined and sovereignty forfeited. Second, this also means, however, that, with respect to international human rights more generally, states may not commit to and abide by more than their constituency could and what that right to have rights or self-government authorizes. When the legal norms at stake pertain to the basic rules of political legitimacy at domestic level and the details of human rights protection, both state sovereignty and international human rights law have met their intrinsic limitations. Deciding on what makes us members of a political community and how to protect our equal rights as such is the least likely issue to leave the scope of collective self-government and hence of sovereignty.

This in turn explains why international human rights norms are usually minimal, abstract and indeterminate so as to grant states a lot of autonomy in their specification and implementation. Even when minimal international human rights duties are fleshed out on the basis of states' practice, a given state may still invoke its margin of appreciation or the principle of the maximization of protection in controversial cases despite the prima facie legitimate authority of those human rights duties. This confirms that (the limits of) domestic legitimate authority ought not necessarily be conflated with (the limits of) national sovereignty.

6. Conclusion

International human rights may be facing grave enforcement problems and even specification problems, but their most important problem, I have argued, is legitimacy. Focusing on the former before addressing the latter is putting the cart before the horse and risks looking for solutions to failing enforcement and deep indeterminacy where they cannot be found. Nor is the problem of the legitimacy of international human rights simply a matter of settling the conflict between their claim to legitimacy and that of domestic human rights law. Settling that question is important, but it requires understanding of how international human rights' authority is justified in the first place and this implies understanding their complementarity to domestic human rights.

International human rights cannot be fully grasped without referring to their corresponding duties and this requires taking the normative side of human rights more seriously. This is even more important if what is at stake is their legitimacy. To know whether international human rights norms have a justified claim to authority over states, one needs to start by assessing what kind of duties and hence what kind of reasons for action states have by virtue of recognizing human rights. This implies determining whether those norms can be described as legal human rights in the first place with the respective moral duties they imply. Then only can one turn to the different conditions of their legitimate authority and of how the reasons given by international law not only match corresponding states' reasons but also contribute to improving conformity to those reasons. By virtue of their correlative duties, human rights are such that their legal validity and legitimacy are more closely related than they are in the case of other legal norms.

More specifically and given their close relationship to political equality, I have argued that human rights are moral and legal in nature. Their legalization ought to take place at domestic level in priority and international human rights norms can only be regarded as human rights if they match an existing set of domestic human rights. International human rights are best understood, therefore, as international law second-order duties to adopt and abide by first-order human rights duties in domestic law. Those second-order duties correspond to the universal moral right to have rights, i.e. the right to political membership with all the human rights that right requires for its realization. In turn, the moral and legal reality of human rights affects their legitimacy: not all states can be bound to respect all human rights duties for lack of pre-existing reasons in the absence of

first-order domestic human rights duties or democratic representation; while democratic coordination is the best justification one may give for the legitimacy of international human rights in circumstances of pervasive social and moral pluralism, it is not necessarily sufficiently democratic to justify the authority of rights that are central to democratic legitimation at the domestic level; finally, even though the value of state sovereignty and autonomy is defined by reference to human rights, sovereignty can constitute an exception to the legitimate authority of human rights when the boundaries of self-government are met.

Unsurprisingly, as a result, international human rights' legitimate authority, like that of other international law norms, is piecemeal: it varies from one state to the other, and from one human right source or norm to the other. In fact, the legitimate authority of international human rights is doubly piecemeal by virtue of the indeterminate nature of human rights and the dynamic and specifiable nature of their corresponding duties: states' duties to create human rights duties will also vary as a result by reference to the latter. Those state to state and right to right variations are even higher in the case of human rights than for other international legal norms which have no functional domestic equivalent or corresponding norms: given their reciprocal legal sources in domestic and international law, the legitimacy of international human rights and that of corresponding domestic human rights are closely related and somehow reciprocal.

If the forum of realization of moral-political rights and as a consequence the locus of human rights legalization are situated at the domestic level, this is also where the legitimation of international human rights ought to be sought for and promoted. Recurrent and seemingly banal human rights practices such as the domestic reception and specification of international human rights, the exhaustion of domestic remedies as a condition of admission before international human rights bodies, the margin of appreciation in the interpretation of international human rights or the domestic determination of the best means of enforcement of international human rights decisions seem therefore to have found their moral justification. There is nothing vacuous or, worse, politically worrying as a result in international human rights minimalism and their piecemeal authority. Quite the contrary: it corresponds not only to the legality of international human rights, but also to their moral reality.

Importantly, those conclusions about the legitimacy of international human rights should not be mistaken with a denial of the existence of other self-regarding or cosmopolitan reasons for states to ratify and respect international human rights law. Those reasons are actually very important

and may help enhance the sociological legitimacy of international human rights law and compliance with those rights. So should democratic states' consent that constitutes an important reason for them to respect international human rights law even if it cannot palliate the absence of legitimate authority of those norms. After all, those international human rights norms are valid legal duties, whose validity and legal authority remain, at least in the short run, unaffected by the absence of generalized legitimate authority. Nor should one underestimate states' and individuals' imperfect duties of global justice; human rights do not exhaust the field of moral duties in international relations as one too often tends to forget.

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