and are not themselves to become dominated through the institutional means by which they dominate others.

Given the many international forms of private and public authority today that are potential and actual sources of domination, the republican project must be to extend the rule of law to the global level so that it too can be organised in terms of the right to freedom, which now includes a universal legal status that comes with external freedom in Kant's sense. Indeed, in a world of extensive social, economic and political interaction across borders, citizens may come to be dominated by distant others with whom they are not in an extant political community. Because domination and non-domination are not all-or-nothing properties in such a situation, the best way to attain a global legal and political order is neither in a unitary set of institutions, nor through the functional division of institutional labour. Rather, there must be a set of overlapping and intersecting institutions, each with its own distinctive powers and capabilities. Such a form of cosmopolitanism continues that cosmopolitan strand of republican theory that has always seen all political communities as transnational, pluralistic and complex, and yet for that very reason better able to attain the instrumental benefits of non-domination and to fulfill the constitutive demands of the rule of law. Such an institutional order would provide not merely a minimal legal status, but also a variety of means to secure, if not political status, at least the right to freedom for persons transnationally. Since no constitution would be able to fulfill the demands of the rule of law without some cosmopolitan components concerned with the universal status and protections, the prospect of a world in which all persons have basic freedoms and underived legal status is a realistic extension of current constitutional practices.

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

I. INTRODUCTION

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

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


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


organised across a (self-imposed) divide between so-called ethical or traditional accounts of human rights and political or functional accounts of human rights. Recent attempts have been made to bridge this divide through moral-political accounts of human rights, or, more recently in the field of legal theory, through a moral-legal approach to human rights. Despite their differences, which will become clear in the course of this essay, the latter proposals share a republican conception of politics and hence of international human rights. In that context, they draw their original inspiration from Hannah Arendt's 1949 idea of 'the right to have rights', and usually flag a reference to her argument about the relationship between (universal) human rights and (particular) democratic membership. In this essay, I should like to take a closer look at this argument. It is important indeed at the outset of, and as groundwork to, a republican account: of international human rights, to assess more precisely how human rights and democratic membership—or, as I understand it here, democratic citizenship—relate. This is essential to the understanding of the nature and legitimacy of international human rights, both aspects being connected. If democracy and human rights are

Tasiousalas, 'Are Human Rights Essentially Triggers?', above n 2; Tasiousalas, 'Taking Rights out of Human Rights', above n 2; Beitz, above n 2; Raz, 'Human Rights without Foundations', above n 2; Raz, 'Human Rights in the Emerging World Order', above n 2. See also the special issue of Ethics (2010) 120(4) edited by Allen Buchanan on Griffin's book (Griffin, On Human Rights); and CR Beitz and RGoodin (eds), Global Justice and Global Inequality (Oxford, Oxford University Press, 2009), an edited collection assessing the impact of Shue's Shue, Basic Rights' 30 years after the publication of its first edition.

6 Eg Griffin, above n 2; Tasiousalas, 'Taking Rights out of Human Rights', above n 2. For an excellent critique, see Forst, above n 2.


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


12 My starting point in this essay, and my angle of approach to the 'right to have rights', is not citizenship theory (unlike S Beahibe, "The right to have rights": Hannah Arendt on the contradictions of the nation-state in 'The Rights of Others: Aliens, Residents, and Citizens' (Cambridge, Cambridge University Press, 2004) 49) but human rights theory.

13 In the rest of the essay, I shall be using 'citizenship' to mean democratic membership. Of course, one could also consider a non-democratic State or a non-democratic post-national political community more generally, but this will not be my concern here.

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

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

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

16 See, eg, J Klubbers, ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt’
(2007) 20 Leiden Journal of International Law 1; P Owens, Between War and Politics: International

17 See, eg, J Cohen, Rights, Citizenship, and the Modern Form of the Social: Dilemmas of Arendtian
Republicanism (1996) 3 Constellations 164; F Michelman, ‘Parsing “A Right to Have Rights”’
a Hypothesis by Hannah Arendt’ (1996) 3 Constellations 190; S Benhabib, The Reluctant Modernism of
Hannah Arendt (New York, Rowman & Littlefield, 2000); Benhabib, above n 12; P Birmingham,
Hannah Arendt and Human Rights: The Predicament of Common Responsibility (Bloomington, Indiana University
Press, 2006); S Gosepath, ‘Hannah Arendt’s Critic of the Menschenrechte und ihr “Recht, Rechte zu haben”
in Heinrich Boll-Stiftung (ed), Hannah Arendt: Verborgene Tradition—Unzeitgemässe Aktualität (Berlin,
Akademie Verlag, 2007) 279; J Cohen, ‘ Sovereignty and Rights: Thinking with and beyond Hannah Arendt’
in Heinrich Boll-Stiftung (ed), Hannah Arendt: Verborgene Tradition—Unzeitgemässe Aktualität
(Berlin, Akademie Verlag, 2007) 291; C Menke, ‘The “aporias of human rights” and the “one human
right”: regarding the coherence of Hannah Arendt’s argument’ (2007) 74 Social Research 739, available
at <http://findarticles.com/p/articles/mi_m2267/is_34747/ai_n24943363/print>; S Parekh,

18 Arendt, above n 1, 177.

19 Ibid, 299.

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

21 See, eg, R Forst, ‘Republikanismus der Freiheit und der Begriff der Aktualität: Zur Aktualität der politischen
Theorie Hannah Arends’, in Heinrich Boll-Stiftung (ed), Hannah Arendt: Verborgene Tradition—
Unzeitgemässe Aktualität (Berlin, Akademie Verlag, 2007) 229.

22 H Arendt, Eichmann in Jerusalem (London, Penguin, 1965) ch 1, Epilogue and Postscript. See,
eg, S Benhabib, ‘International Law and Human Plurality in the Shadow of Totalitarianism: Hannah
Arendt and Raphael Lemkin’ (2009) 16(2) Constellations 331; T Mertens, ‘Memory, Politics and
Law—The Eichmann Trial: Hannah Arendt’s View on the Jerusalem Court’s Competence’ (2005) 6
German Law Journal 407.
From a contemporary perspective, one may quibble with Arendt’s aporia and disagree in particular with her grim views about the inherent limitations of domestic politics and the absolute nature of sovereignty, on the one hand, and the underdeveloped political nature of international law and the international community, on the other.  

However, her groundbreaking analysis of the problem raised by the idea of universal human rights retains its original force more than 50 years after its first statement. Expressed at the dawn of the modern international human rights system, her argument even has the potential to lead us well beyond the intrinsic limitations of that system and provide an interesting reference in view of the development of democratic structures beyond the State.

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

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


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

II. HUMAN RIGHTS: MORAL AND LEGAL

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

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

A. The Morality of Human Rights

Human rights are a 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) public institutions (iii). Those three elements will be discussed in turn.

To start with, a human right exists qua moral right when an interest is a sufficient ground or reason to hold someone else (the duty-bearer) under a categorical and exclusionary duty to respect that interest vis-à-vis the right-holder. For a right to be recognised, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context. Rights are, on this account, intermediaries between interests and duties. Turning to the second element in the definition, human rights are moral rights of a special intensity, in that the interests protected are regarded as fundamental and general human interests that all human beings have by virtue of their humanity and not of a given status or circumstance. They include individual interests when these constitute part of a person’s well-being in an objective

26 See Besson, ‘Human Rights—Ethical, Political . . . or Legal’, above n 9.

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


29 Ibid 206, 209.

30 Ibid 208.
In short, the proposed account of the nature of human rights follows a modified interest-based theory: it is modified by reference to considerations of equal moral-political status in a given community. Under a purely status-based or interest-based model, the manichean opposition between the individual and the group, and between his private and public autonomy would lead to unjustifiable conclusions. It is important to pause at this stage and clarify what is meant by political membership or inclusion into an organised political society. This will then enable me to clarify how it is neither a parochial nor an exclusive criterion, and can account for both the universality and the generality of human rights.

Political membership is a normative idea according to which a person’s interests are to be treated equally and taken into consideration in a given political group’s decision. Human rights protect those interests tied to membership and disrespect of which would be tantamount to treating them as outsiders. Of course, some human rights, such as civic and political rights, are more closely tied to actual membership, while others, such as the right to life, are closer to basic demands of humanity and hence to access to political membership. Even the latter rights, however, constrain what equal membership can mean if it is to be legitimate and the kind of interests it must protect. This is in line with the republican idea of the political community qua locus of rights. 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.

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

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33 The proposed account comes very close to Forst, above n 2; Forst, ‘The Basic Right to Justification’, above n 32, 48–50; and Forst, above n 4. My account differs ultimately as Forst’s is based on a reflexive right to political justification, whereas the present account is based on political equality and its mediation through human rights (see also Christiano, above n 32, 156). Both accounts, of course, rely on Habermas’s idea of co-origi nality between democratic sovereignty and human rights (J Habermas, Faktizität und Geltung (Frankfurt am Main, Suhrkamp, 1998) ch III), although they provide different variations of that idea, notably by referring to an external right or value as a foundation for their co- originality. See C Brettschneider, Democratic Rights—The Substance of Self-government (Princeton, NJ, Princeton University Press, 2007) 29–38 for a similar interpretation of Habermas’s co-originality.
35 See Cohen, above n 34, 197–98; Cohen, above n 7, 585–86.
36 For the original idea of mediating duties, see H Shue, Mediating Duties (1988) 98 Ethics 687, 703. See also C Reus-Smit, ‘On Rights and Institutions’ in CR Beitz and RE Goodin (eds), Global Basic Rights (New York, Oxford University Press, 2009) 25, on human rights and power mediation. On liberal rights and the exercise of power in general, see Christiano, above n 32, 134.
37 Arends, above n 1, 301.
39 The following argument is a development of Cohen’s argument, above n 34, 197–98.
40 See Cohen, above n 7, 604, fn 47.
41 As a result, it is not possible to distinguish, among human rights, between those that are connected to political equality and to democracy, and those that are not.
This brings me to the third element in the definition: human rights are entitlements against public institutions (national, regional or international). They generate duties on the part of public authorities to protect not only equal individual interests, but also individuals' political status qua equal political actors. Public institutions are necessary for collective endeavour and political self-determination, but may also endanger them. Human rights enable the functioning of those institutions in exchange for political equality and protection from abuse of political power. This is why one can say that human rights both are protected by public institutions and provide protection against them; they exist because of collective endeavour in order both to favour and constrain it. 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 the primary duty-bearers.

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

B. The Legality of Human Rights

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

42 See A Buchanan, 'Equality and Human Rights' (2005) 4 Politics, Philosophy & Economics 69, 74; Buchanan, above n 32.
43 See Shue, above n 5, on the different types of negative and positive duties corresponding to a human right, including duties to prevent other agents from violating them.
44 This normative argument actually corresponds to the state of international human rights law that only directly binds States and/or international organisations to date and no other subjects (eg individuals and groups of individuals). The universality of human rights obligations does not imply the generality of the duty-bearers of the corresponding duties, in a personal scope that reaches beyond institutional agents whether domestic or international (contra O'Nell, 'The Dark Side of Human Rights' (2005) 81 International Affairs 427; C Lafont, 'Accountability and global governance: challenging the state-centric conception of human rights' (2010) 3 Ethics & Global Politics 193, 203).
45 See also Forst, above n 2; Forst, above n 32, 48–50.

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

Generally speaking, moral rights can exist independently from legal rights, but legal rights recognise, modify or create moral rights by recognising moral interests as sufficiently important to generate moral duties. Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognising them as legal 'rights'. Conversely, some legal rights may not actually protect pre-existing moral rights or create moral rights, thus only bearing the name of 'rights' and generating legal duties at the most. The same cannot be said of human rights more specifically, however. True, universal moral interests and rights may be legally protected without being recognised as legal 'rights'. But, as we shall see, human rights stricte sensu can only exist as moral rights qua legal rights. Conversely, one may imagine legal norms referred to as human rights that do not correspond to moral human rights. In such a case, the legal norms named 'human rights' would give rise only to legal duties and not to moral (rights-based) duties. Legal human rights, however, can be regarded as rights stricte sensu only when their corresponding duties are not only legal, but also moral.

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

Not all moral rights are legally recognised as legal rights, on the one hand. There are many examples of moral rights which have not been recognised as legal rights. Neither should all moral rights be recognised and protected legally, respect for them should be a matter of individual conscience in priority.

The same cannot be said about human rights, however. True, not all universal moral rights have been or are legally recognised as legal human rights. Some are even expressly recognised as universal moral rights by the law even though they

48 Legal recognition of human rights can therefore be taken to mean, depending on the context, both the legal recognition of an interest qua human right and the legal recognition of a pre-existing human right.
49 Note that this duty is the primary moral duty to protect the interest that founds the legal human right, and not the secondary moral duty to obey the legal norm 'human right'; see S Besson, 'The Democratic Authority of International Human Rights' in A Follesdal ed, The Legitimacy of Human Rights (Cambridge, Cambridge University Press, 2012) forthcoming.
are not made into legal rights or modulated by the law. A distinct question is whether they ought to be legalised and hence protected by law. Again, respect for universal moral rights ought to be voluntary in priority, and this independently from any institutional involvement. However, the universal moral rights that will become human rights create moral duties for institutions, and hence for the law as well, to recognise and protect human rights. Based on the moral-political account of human rights presented previously, the law provides the best and perhaps the only way of mutually recognising the comparative importance of those interests in a political community of equals. It enables the weighing of those interests against each other and the drawing of the political equality threshold or comparative line. In short, the law makes them human rights *stricto sensu*. As a result, in the moral-political account of human rights propounded here, the legal recognition of a fundamental human interest, in conditions of political equality, is part of the creation of a moral-political human right. In other words, while being independently justified morally and having a universal and general scope, human rights *qua* subset of universal moral rights are also of an inherently legal nature.

To quote Jürgen Habermas, ‘they are conceptually oriented towards positive enactment by legislative bodies’. Thus, while legal rights *stricto sensu* are necessarily moral in nature (*qua* rights), human rights (*qua* rights) are not only necessarily moral but also legal, and they are as a result both moral and legal rights.

Neither, on the other hand, do legal rights necessarily always pre-exist as independent moral rights. Most do, and are legally recognised moral rights, but others are legally-created or legally specified moral rights. In some cases, law and politics may affect a person’s interests, thus in a sense enhancing the moral interest and/or its moral-political significance which are necessary for that interest to be recognised as a source of duties and hence as a right. One may think of zoning rights in the context of land planning, for instance, or of government bond-holders’ rights.

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50 One may think here of the moral rights mentioned by the 9th Amendment to the US Constitution.
52 See, eg., Cohen, above n 7, 599–600; Forst, above n 2; Forst, above n 32, 48–50. See even T Pogge, ‘Human Rights and Human Responsibilities’ in A Kuper (ed.), *Global Responsibilities: Who Must Deliver on Human Rights* (New York, Routledge, 2005) 3, in 26, who concedes this point in the case of civil and political rights. It seems, however, that the egalitarian dimension of human rights, and hence their inherently legal nature, would apply even more to the case of social and economic rights.
53 J Habermas, ‘Die Legitimation durch Menschenrecht’ in *Die postnationale Konstellation. Politische Essays* (Frankfurt am Main, Suhrkamp, 1998) 183. See also Habermas, above n 33, 310–12.
56 Both examples are given by Raz, *ibid.*

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

III. HUMAN RIGHTS: INTERNATIONAL AND DOMESTIC

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

A. The Right to Have Rights

Theoretically, the legalisation of human rights, ie the legal recognition and modulation of universal moral rights *qua* human rights, could take place at the domestic or at the international level: through national or international legalisation.

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

57 The argument presented in this section is a summary of a lengthier argument developed in Besson, ‘Human Rights—Ethical, Political ... or Legal?’, above n 9.
quality of its processes is not yet secured. To be democratic, the primary locus of legitimation and accordingly of legalisation of human rights ought therefore to be domestic.

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

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

By contrast, it is pertaining to the second group of human rights that guarantee membership in the political community, i.e., most human rights, that the locus of legalisation becomes most sensitive. As we saw before, they can be recognised only by those whose political equality they contribute to create and guarantee. Following the categories of rights presented before, this second group of international human rights as they stand under current international law can at least be regarded as legally protected universal moral rights, and most of the time as legal rights as well. However, unless they refer to and correspond to existing domestic (moral-political and legal) human rights, they cannot (yet) be regarded as human rights stricto sensu for lack of a moral-political community.

Que legal rights, those international human rights norms guarantee rights to individuals under a given State's jurisdiction, on the one hand, and to other States (or arguably international organisations) international human rights are usually guaranteed ex aequo, on the other, to have those rights guaranteed as 'human rights' within a given domestic community. They correspond to States' (and/or arguably international organisations) duties to secure and ensure respect for those rights as 'human rights' within their own jurisdiction. In that sense, international human rights duties are second-order duties for States (and/or arguably international organisations) to generate first-order human rights duties for themselves under domestic law, i.e., international duties to have domestic duties. What those international human rights norms do, in other words, is protect legally the universal moral right to have rights, i.e. the right to equal membership in a moral-political community, with all the other human rights this status implies. Unlike most readings of Arendt's right to have rights, however, this reading understands those rights as universal moral rights which may also be protected as international legal rights. They are not human rights themselves but are rights to have human rights, the latter being at once moral and legal rights and not only positive legal rights.

In short, there are two groups of universal moral rights: the first group (that may be termed 'rights to membership'), which may and ought to be legalised internationally without yet being guaranteed domestically; by contrast, rights belonging to the second group ('members' rights') have to be legalised in domestic law in a given political community before they can be recognised as human rights stricto sensu under international law. In the meantime, international law's human rights norms that protect rights in the latter category guarantee rights to have human rights protected under domestic law. Those two groups of moral rights can be matched under Arendt's notion of rights to have (human) rights.

Of course, the situation would be altogether different if the moral-political community bound by legal human rights was an international one: the right-holders and duty-bearers would be the equal members, political actors and law-makers of that international community. In that case, all international human rights could be

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34 See, eg., T. Christiano, 'Democratic Legitimacy and International Institutions' in S. Besson and I. Tsioulas (eds), The Philosophy of International Law (Oxford, Oxford University Press, 2010) 119–37, on the lack of representativeness and the asymmetry of international law-making processes from a democratic theory’s perspective. See also Cohen, above n 7, 599–600; Besson, above n 49.
35 See Cohen, above n 7, 587.
37 On the bootstrapping between international human rights law-making and their democratic reception and interpretation at domestic level, see Buchanan, above n 3; A. Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 Legal Theory 39. See also section II.B. below.
38 See, eg., Cohen, above n 7; Benhabib, above n 12, 56–61.
39 There is, in other words, a form of political parochialism or legalcentingy of human rights that conditions their recognition as international legal human rights, well before parochialism arises as a problem for the scope of legitimacy of an existing legal human right. See also Raz, 'Human Rights in the Emerging World Order', above n 2.
40 See O'Neill, above n 44, 433, on the distinction between the first-order human rights duties at domestic level and second-order human rights duties generated by international human rights law.
41 See, eg., Benhabib, above n 12; Gosepath, above n 17.
regarded as human rights *stricto sensu*. True, this would require a minimal level of
democratic organisation of that community, which to date is not yet given.67

The European Union (EU) constitutes an interesting example of a supranational
political community where human rights and democracy have developed hand-in-
hand beyond the State in reaction to the increasingly direct impact of EU law over
individuals.68 There, EU institutions, and EU Member States when they apply EU
law and act as indirect EU institutions as a result, are bound by human rights duties
under EU law. And EU decision-making processes may be considered by and large
democratic in terms of representative inclusion of all those normatively affected in
their fundamental interests by and subject to EU laws and decisions. However, those
supranational communities, whether European or international, are not what is usu-
ally aimed at in the context of international human rights law: most international
human rights instruments existing to date bind national authorities exclusively, and
only vis-à-vis individuals under their (territorial and extra-territorial) jurisdiction.

One may not exclude, of course, further institutional developments, whether at
a regional or functional level. The idea of a worldwide political community, and
hence of a global democracy *stricto sensu*, however, is not only implausible, but
normatively undesirable.69 One may as a result share Arendt’s fears about an
unchecked global sovereign. And given what has just been said about the exter-
nally-guaranteed international legal rights to have human rights on the inside,
and the beneficial tensions between those international rights and duties and
the corresponding internal ones, conceiving of the international community as a
political one with its own human rights-holders and human rights duties-bearers
would undermine the productive tension between human rights and political
membership, and the equilibrium that may be reached between the universalising
process of the particular and the particularisation of the universal.70

B. International and Domestic Human Rights Law

Interestingly, the normative considerations presented before about the locus of
legitimation and legalisation of human rights are reflected in actual processes of
legalisation of human rights under domestic and international law.

71 This is confirmed by the way in which democratic States usually ratify human rights instruments
and hence generate international human rights duties for themselves only once they have recognised
minimal international human rights standards in domestic law (e.g. Switzerland and the European
Convention on Human Rights in the 1970s, and currently in the context of the ratification of the
additional Protocol to the International Covenant on Economic, Social and Cultural Rights of the
European Social Charter).

72 It is important to note that the contextualisation of human rights ought to take place through the
form of domestic legal rights according to this essay’s moral-political argument. Of course, this does
not yet mean that it will be the only way to make them effective (see, e.g. SE Merry, *Human Rights
and Gender Violence: Translating International Law into Local Justice* [Chicaco, Ill.: University of Chicaco
Press, 2000]; SE Merry and M Goodale (eds), *The Practice of Human Rights: Tracing Law Between the
Global and the Local* [Cambridge, Cambridge University Press, 2007]).

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

74 On this term, see A Stone Sweet and H Keller, ‘Introduction’ in *A Europe of Rights. The Impact of

75 Contra Raz, ‘Human Rights without Foundations’, above n 2, section IV.
C. From Human Rights to Citizens’ Rights and Back

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

International human rights guarantees usually also benefit non-citizens domestically, however, and have a broader personal scope therefore than the rights that belong to citizens or members of a domestic or regional polity. This cleavage between citizens and non-citizens is problematic. Obviously, the nexus between human rights and citizens’ rights is not respected as long as political rights pertain to the holding of nationality; all resident non-nationals are excluded from political participation, despite these people being potentially equally affected by the laws and regulations of their host State. Needless to say, in circumstances of globalisation, increased mobility and constant migration, the exclusion of non-nationals from the polity they actually live in is ever harder to justify. At the same time, however, whether the criterion for citizenship remains nationality or shifts towards residence, and whether certain political rights are granted to members of the political community without naturalisation and full citizenship, it should be clear that boundaries still have to be drawn between members of any given political community and non-members. As a matter of fact, the effect of human rights is not so much to exclude those boundaries but to make sure those boundaries are constantly being questioned and potentially pushed further to include more stakeholders among decision-makers. This is the result of the fruitful albeit irresolvable tension that exists between human rights and citizens’ rights.

This constant interaction between human rights and citizens’ rights is reminiscent of Arendt’s universal right to have particular rights, and the to-ing and fro-ing between the universal and the particular. Human rights are specified as citizens’ rights, but citizens’ rights progressively consolidate into human rights in return. Thus, the legalisation of human rights is a two-way street that is not limited to a top-down reception or a bottom-up crystallisation. Only those policies that respect international human rights (of both kinds discussed before) are legitimate in specifying the content of those rights qua citizens’ rights, and hence in contributing to the recognition and existence of those rights qua international human rights that constrain polities in return.

This virtuous circle can actually be exemplified by recent human rights practice, whether it is of a customary, conventional or even judicial nature. On the one hand, citizens’ rights contribute to the development of the corresponding international human rights’ judicial or quasi-judicial interpretations. This is clearly so in the case law of the European Court of Human Rights, where common ground is a constant concern and is sought after when interpreting Convention rights. Consolidations of national best practices and benchmarking also occur, for instance, through general comments issued by the United Nations human rights committees. Within the EU, this actually occurs through the recognition of common constitutional traditions qua non-written general principles of EU law. More broadly, one observes in international law the gradual development of general principles of law derived from domestic and regional human rights.

One should also mention, on the other hand, mechanisms of transnational consolidation of human rights. This takes place, for instance, through comparative constitutional borrowings in national courts and legislatures.

IV. CONCLUSION

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


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

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

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

More specifically, and following Arendt’s original republican intuition about human rights, and based on the relationship between democracy and individual rights, I have argued that human rights are inherently moral and legal: the law cannot create universal moral rights but it can recognise or even modulate them, and turn them into human rights stricto sensu. Of course, there can be universal moral rights that are not matched by legal rights, and legal norms that go by the name of human rights which are not human rights. However, there cannot be human rights which are not à la fois universal moral rights and legal rights.

By virtue of human rights’ close relationship to democracy, I have argued further that the legalisation of human rights ought to take place in each given political community, and hence, for the time being, at domestic level in priority. International human rights norms can be regarded as human rights only if they match, in a minimal way, an existing set of domestic human rights. This occurs through the mutual relationship of reception and consolidation I have described between international legal human rights norms and citizens’ rights. In the absence of such a set of domestic human rights, international human rights are legal rights that correspond at the most to the universal moral rights to have human rights in every given jurisdiction. To those rights to have human rights correspond second-order State duties to have human rights duties under domestic law and procedures. The only human rights that may and ought to be recognised legally at the international level only and in the absence of corresponding domestic rights are a second group of human rights: human rights to membership and to all the human rights those rights require for their realisation in a given political community. Those human rights may be guaranteed only from outside a political community, and through inclusive and representative mechanisms of international law-making. Those two kinds of human rights are two complementary interpretations of Arendt’s right to have rights that go beyond a sterile opposition between moral and legal rights.

These rather modest and sobering conclusions about the nature and the existence of international human rights need not be a source of concern, however. International democratisation is developing fast, following the development of common fundamental interests and the need to address them together in an inclusive fashion. In those conditions, the recognition of human rights in international law will be required by the expansion of political equality and new ways of political inclusion in international law-making, and hence legitimised at the same time. The European Union is a good example of these democratic developments at regional level, with EU human rights and EU citizenship reinforcing each other mutually. Those political developments within regional or functional international organisations trigger difficult questions though. It yet remains unclear, for instance, how the combination of multi-level citizenship and human rights standards beyond the State will and ought to impact on States’ democratic and human rights regimes. But that will have to be the topic for another essay.81

81 See, eg, Besson, above n 15.