

claiming a right to democracy seems to carry the promotion of the undisputed benefits of democratic governance to excess. The assumption of a single right to democracy confounds rights and constitutional principles about the organisation of government, blurs the boundaries between international and national constitutional law, and reproduces an imperial legal paradigm. It is therefore necessary to refrain from a naïve 'universal' concept of democracy and acknowledge that, if at all, democracy as an international legal principle must be understood as an essentially contested concept that assumes peculiar meanings according to different settings and contexts.

This fundamental ambivalence goes far beyond the long-established North–South and West–East divides. It has become apparent that those oppositions capture only a fraction of the varieties of democratic government. Diverging conceptions of democracy have existed for more than 200 years, not only in Europe and the United States, but also in Latin America, India, East Asia, the Islamic World, Africa and Oceania. As the discourse on what constitutes democracy evolves on a global level, it still seems important to 'decolonise' the traditional research on democracy that, for a long time, disregarded non-Western conceptions of democracy as incomplete and deficient. The historical evolution of the Western democracies shows that these have evolved under completely different circumstances and, most importantly, in many cases in a different order. And the rise of illiberal democracies all over the world speaks to the fact that rule of law and democracy do not always go hand in hand.

Against this background, democracy cannot be seen as a human right among others with a similar conceptual structure and analogous legal effects. In lieu thereof, it embodies the quintessential notion that those human rights themselves have a collective and, hence, political meaning. It is important to underline, though, that – as Hilary Charlesworth has pointed out – negating a right to democracy neither 'undermine[s] the symbiotic relationship between the two concepts', nor does it mean to dispute the intensely political function of human rights law.¹⁰⁴ If this analysis argues for a more cautious concept of democracy, as put forward by Marks and Clapham, as 'an argument, a critical tool, and a set of principles for political life in all its multifarious settings',¹⁰⁵ it does so on the basis of a relationship of 'mutual dependence'.¹⁰⁶ In this perspective, we are not looking for 'cosmic changes'¹⁰⁷ but for a concept of democracy in international law that – refraining from universalising Western concepts – contents itself with a supporting role and fosters national structures of democratic governance.

¹⁰⁴ Charlesworth, 'Is There a Human Right to Democracy?', p. 281.

¹⁰⁵ Marks and Clapham, 'Democracy', p. 70.

¹⁰⁶ Ibid., p. 70.

¹⁰⁷ Franck, 'The Emerging Right to Democratic Governance', 47.

The Human Right to Democracy in International Law

Coming to Moral Terms with an Equivocal Legal Practice

Samantha Besson*

37.1 INTRODUCTION

This reply to Sigrid Boysen proceeds in four steps: (1) it maps international law practice in order to identify whether it protects a principle of democracy (PoD) or even a human right to democracy (HR2D); (2) it surveys the philosophical discussions pertaining to that right to see how they relate to it; (3) it explains why and how exactly our legal discussions would benefit from drawing on philosophical justifications; and (4) it argues that the equivocal state of international legal practice pertaining to the HR2D may actually be justified morally, and that we would be better off endorsing the existing international customary principle of democracy without looking for a corresponding legal human right that cannot be morally justified.

37.2 MAPPING INTERNATIONAL LAW PRACTICE AND DEBATES ABOUT THE HR2D

The question whether international law requires states to adopt a democratic regime has been an object of unabated controversy among international lawyers since 1945.¹ Of course, like the corresponding practice itself, academic interest in democracy and the corresponding international law discussions have not been continuous since then. One may distinguish roughly three phases in the debate.²

- (1) The preliminary discussions that pervaded the 1960s and 1970s, up to the 1980s, especially following the *Nicaragua* case,³ pertained to the content of both the principle of self-determination in general international law on the one hand, and of individual civil and political rights in international human rights law (IHRL), whether universal or regional,

* Many thanks to Anna Coppel, Claus Beisbart and Markus Stepanians for comments.

¹ This is, at least, the case in English, French or German legal scholarship, and in European and Western international law literature. On the East/West and North/South divides, see H. Charlesworth, 'Is There A Human Right to Democracy?', in C. Holder and D. Reidy (eds.), *Human Rights – The Hard Questions* (Cambridge: Cambridge University Press, 2013); B. S. Chimni, 'Legitimizing the International Rule of Law', in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012).

² See also, albeit with a different chronology, J. d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 *European Journal of International Law* 549 at 552–565, 570; S. Marks, 'What Has Become of the Emerging Right to Democratic Governance?' (2011) 22 *European Journal of International Law* 507.

³ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, p. 14, para. 263.

on the other. They were focused on whether or not that principle and those human rights included a *democratic principle* and even an individual or collective right to democracy.⁴

- (2) The most lively debates, however, started after the end of the Cold War and lasted from the 1990s to the late 2000s, in reaction to both the development of the corresponding liberal foreign policy of the United States and also US-led interpretative trends in various UN bodies, and in particular the General Assembly, the Human Rights Commission and human rights treaty bodies such as the Human Rights Committee.⁵ Those debates addressed the existence or emergence of an international customary norm of democracy and its consolidation as an interpretation of IHRL or of other regimes of international law, such as international development law or international territorial administration law. They were mostly concerned with whether or not that norm amounted to an actual *human right to democracy* on the one hand, and with its enforceability (e.g. through military intervention) on the other.⁶
- (3) The most recent post-2010 discussions have been much less voluminous. They pertain to the resilience or not of the *international democratic customary norm* in the face of the spread of global capitalism and the rise of authoritarianism and populism. They focus mostly on what should become of the PoD in international law in the light not only of an eroding state practice of democracy, but also of growing criticism against imperialistic international interventions in domestic matters.⁷ To some extent, current scholarship about the HR2D pertains as much to a self-analysis of the scholarship as to a critical discussion of a practice, and maybe even more so as the latter has become increasingly difficult to ascertain.⁸

⁴ See e.g. H. J. Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77.

⁵ See UN Human Rights Committee, General Comment No. 25: Article 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7.

⁶ See e.g. F. R. Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53; G. H. Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539; A.-M. Slaughter, 'Towards an Age of Liberal Nations' (1992) 33 *Harvard International Law Journal* 393; T. M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; J. Crawford, 'Democracy and International Law' (1993) 64 *British Yearbook of International Law* 113; C. Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' (1995) 27 *New York University Journal of International Law and Politics* 289; B. Bauer, *Der völkerrechtliche Anspruch auf Demokratie – Zur Rolle internationaler Organisationen im weltweiten Demokratisierungsprozess* (Frankfurt: Peter Lang, 1998); B. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 1999); S. Marks, *The Riddle of All Constitutions – International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 2000); R. Ben Achour, 'Le droit international de la démocratie' (2000) 4 *Cursos Euromediterráneos Banca de Derecho Internacional* 325; G. H. Fox and B. R. Roth, 'Democracy and International Law' (2001) 27 *Review of International Studies* 327; J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 *New York University Journal of International Law and Politics* 877; J. d'Aspremont, *L'état non démocratique en droit international: étude critique du droit international positif et de la pratique contemporaine* (Brussels: Bruylant, 2008); H. J. Steiner, 'Two Sides of the Same Coin? Democracy and International Human Rights' (2008) 41 *Israel Law Review* 445.

⁷ See e.g. N. Petersen, 'The Principle of Democratic Teleology in International Law' (2009) 34 *Brooklyn Journal of International Law* 33; S. Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart, 2010); Marks, 'What Has Become of the Emerging Right to Democratic Governance?'; d'Aspremont, 'The Rise and Fall of Democracy Governance'; C. Pippan, 'Democracy as a Global Norm: Has it Finally Emerged?', in M. Happold (ed.), *International Law in a Multipolar World* (London and New York: Routledge, 2012); F. Ehm, *Das völkerrechtliche Demokratiegebot: Eine Untersuchung zur schwindenden Wertneutralität des Völkerrechts gegenüber den staatlichen Binnenstrukturen* (Tübingen: Mohr Siebeck, 2013); J. Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Oxford: Hart, 2013); A. Magen, 'The Democratic Entitlement in an Era of Democratic Recession' (2015) 4 *Cambridge Journal of International and Comparative Law* 368; K. A. Alfadhel, *The Right to Democracy in International Law: Between Procedure, Substance and the Philosophy of John Rawls* (London: Routledge, 2017).

⁸ See also d'Aspremont, 'The Rise and Fall of Democracy Governance', 565.

Each of these discursive waves did not only have their international democracy champions such as, most famously, Fernando Tesón, Gregory H. Fox and Tom Franck in the second era, with their seminal 1992 and 1993 writings, but also their challengers.

- (1) In the 1980s most critics were defenders of state sovereignty and of the neutrality of international law with respect to internal matters such as political regimes.⁹
- (2) In the 2000s they amounted to critics of the democratic or liberal peace project and grew out of anti-imperialist and post-colonialist postures.¹⁰
- (3) Current critics disparage the international human rights project altogether, but they also express post-modern scepticism about international liberalism more generally.¹¹

Based on this cursory survey of the practice, what is most striking is that, despite the longevity of the debate and, at times, its intensity, five dimensions of the requirement of democracy in international law remain entirely undetermined. Those five contested features of the international PoD are:

- (1) its normative existence: i.e. is it still an emerging norm that has failed to establish itself;¹² is it established *qua* international law norm, but in danger of erosion;¹³ or is it a stable norm of international law? Alternatively, is it just a soft law norm,¹⁴ or even a mere goal¹⁵ or preference?
- (2) its normative type: i.e. is it a principle, an individual entitlement or right, a human right¹⁶ or an imperfect duty?¹⁷
- (3) its sources: i.e. does it derive from international treaties, international customary law,¹⁸ general principles or institutional law of an international organisation (e.g. European Union primary law)? If it is a customary norm, is it only emerging; or is it established, and have there been any persistent objectors that would affect its personal and territorial scope?¹⁹
- (4) its content: i.e. does it protect only the entitlement to free and fair elections, or a thicker notion of democracy as well?²⁰ Is that notion of democracy, whatever it is, sufficiently minimal to be universal?²¹
- (5) its consequences: i.e. does violating it constitute a ground for international intervention under Article 41 or 42 of the UN Charter²² (e.g. through sanctions, peace enforcement missions, election-monitoring missions or even military interventions) for the

⁹ See e.g. I. Brownlie, *Principles of Public International Law*, 4th ed., (Oxford: Clarendon Press, 1990).

¹⁰ See e.g. M. Koskeniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World' (2003) 35 *New York University Journal of International Law and Politics* 471.

¹¹ See e.g. I. Wuerth, 'International Law in the Post-Human Rights Era' (2017) 96 *Texas Law Review* 279.

¹² See Marks, 'What has Become of the Emerging Right to Democratic Governance?'

¹³ See d'Aspremont, 'The Rise and Fall of Democracy Governance', 554, 564; Magen, 'The Democratic Entitlement'.

¹⁴ See d'Aspremont, 'The Rise and Fall of Democracy Governance', 565. See also M. Lister, 'There Is No Human Right to Democracy: But May We Promote It Anyway?' (2012) 48 *Stanford Journal of International Law* 257.

¹⁵ See Petersen, 'The Principle of Democratic Teleology'.

¹⁶ See Steiner, 'Political Participation as a Human Right'; Franck, 'The Emerging Right to Democratic Governance'.

¹⁷ See Ehm, *Das völkerrechtliche Demokratiegebot*.

¹⁸ See Magen, 'The Democratic Entitlement'.

¹⁹ See d'Aspremont, 'The Rise and Fall of Democracy Governance', 553–554.

²⁰ See Marks, *The Riddle of All Constitutions*, pp. 50ff.

²¹ See Marks, 'What has Become of the Emerging Right to Democratic Governance?'; Charlesworth, 'Is There A Human Right to Democracy?'

²² Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 15 UNCTIO 335.

non-recognition of either government or state, or for the suspension of membership rights to the organisation in question?

In short, then, were one to ask current international lawyers about the novelty of the HR2D, and in particular whether there is such a (new) human right, the answer would be just as ambiguous today as it was thirty years ago.

What is clear, however, is that there is a regime of international law currently in place, however thin and fragile, that protects the PoD as a *customary international law principle* bearing on states, whether that principle corresponds to an individual right or not and, especially, to a human right or not.

By reference to its counterpart IHRL, that regime may be described as international democracy law (IDL).²³ Like IHRL, it protects the basic principle of individual equality, that is another customary international law principle.²⁴ Whereas IHRL protects individual equality as a public status (constituted of equal individual rights), IDL protects it as a public relation (of equal decision-making). The PoD in IDL may be considered sufficiently universal in its justification to the extent that it captures that minimally egalitarian understanding of democracy *qua* collective decision-making procedure that includes equally all those subjected to a decision.²⁵ In circumstances of reasonable disagreement, being treated equally in the public decision-making process, i.e. democratically, is the only way to protect the international customary and hence universal principle of individual equality.

Of course, because of its relationship to basic individual equality, and hence to the human rights that constitute that equality as our basic status,²⁶ democracy also amounts to a central dimension of IHRL, just as human rights correspondingly constitute a central dimension of IDL.²⁷ This is the case both as the value underpinning many civil and political human rights in IHRL whose protection is required in a democracy, like the right to political participation, the right to free and fair elections, freedom of association, freedom of speech or the right not to be discriminated against on the one hand, and in democracy's other normative capacities in human rights reasoning in IHRL on the other. For instance, democracy plays a role in the justification of human rights restrictions, as a dimension of positive procedural or institutional human rights duties, and as a justification for the application of the principle of subsidiarity, to mention only a few of the pivotal functions of democracy in international human rights reasoning. However, neither of those two normative instantiations of democracy in IHRL, either to protect certain specific democratic interests such as human rights or to constrain other human rights, should be conflated with an actual HR2D.

²³ See e.g. F. Ehm and C. Walter (eds.), *International Democracy Documents: A Compilation of Treaties and Other Instruments* (Leiden: Brill 2015); G. H. Fox, 'Democracy, Right to. International Protection', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2013), Vol. III, p. 15.

²⁴ See J. Crawford, 'Chance, Order, Change: The Course of International Law', (2013) 365 *Collected Courses of The Hague Academy of International Law* 9 at paras. 487 et seq. with reference to ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports 1970, p. 3, para. 34.

²⁵ See T. Christiano, 'Self-Determination and the Human Right to Democracy', in R. Cruft, M. Liao, and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), p. 461.

²⁶ See S. Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 *Archiv für Sozial- und Rechtsphilosophie* 19.

²⁷ See S. Besson, 'Human Rights and Democracy in a Global Context – Decoupling and Recoupling' (2011) 4 *Ethics and Global Politics* 19.

37.3 SURVEYING THE PHILOSOPHICAL DISCUSSIONS OF THE HR2D

During the late 1990s moral and political philosophers, and human rights theorists in particular, started discussing the international PoD as well.²⁸ That debate arose later than discussions among international lawyers and was prompted by the publication of John Rawls' *The Law of Peoples*.²⁹ Contrary to legal debates, however, it has not weakened since 2010; quite the contrary.

Unlike legal debates in IDL, philosophical discussions of the international PoD have focused mostly on the HR2D. Besides the connected albeit distinct issues of the co-original relationship between human rights and democracy,³⁰ or of Arendt's 'right to have rights',³¹ those debates have revolved around three central questions: (1) the nature of the HR2D, and in particular whether it is a human right and why;³² (2) the justification of the HR2D, whether it is instrumental (e.g. to peace, justice or economic prosperity)³³ or inherent (e.g. related to dignity³⁴, equality³⁵ or other moral values); and (3) various critiques, such as the difficulty of justifying the (alleged) implications of the HR2D in terms of military enforcement and intervention,³⁶ its questionable universality in light of the thick notion of equality it (allegedly) relies on,³⁷ and its compatibility with the principle of self-determination (of non-democratic states).³⁸

Curiously, the respective discussions of the HR2D by lawyers and philosophers have rarely come into contact with one another.³⁹ Human rights theorists usually start their discussions with a short reference to the equivocal state of the HR2D in international law and merely refer, in an (unintentionally) formalistic but (truly) deceptive way, given what I have said earlier, either to written guarantees of civil and political rights in IHRL, as if they did amount to the HR2D itself, or to the lack of a HR2D therein.⁴⁰ International lawyers, by contrast, mostly rely on one or

²⁸ Again, this is at least true in English, German and French scholarship, and in the Anglo-American and European continental philosophical tradition.

²⁹ J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

³⁰ See e.g. C. C. Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004).

³¹ See e.g. F. I. Michelman, 'Parsing a "Right to Have Rights"' (1996) 3 *Constellations* 200.

³² See D. A. Reidy, 'On the Human Right to Democracy: Searching for Sense without Stilts' (2012) 43 *Journal of Social Philosophy* 177; Lister, 'There Is No Human Right to Democracy'.

³³ See T. Christiano, 'An Instrumental Argument for a Human Right to Democracy' (2011) 39 *Philosophy and Public Affairs* 142.

³⁴ See P. Gilabert, 'The Human Right to Democracy and the Pursuit of Global Justice', in T. Brooks (ed.), *The Oxford Handbook of Global Justice* (Oxford: Oxford University Press, forthcoming).

³⁵ See T. Christiano, 'An Egalitarian Argument for a Human Right to Democracy', in C. Holder and D. Reidy (eds.), *Human Rights: The Hard Questions* (Cambridge: Cambridge University Press, 2013).

³⁶ See C. R. Beitz, 'Democracy and Human Rights' (2007) 7 *Human Rights & Human Welfare* 100; S. Benhabib, 'Is There A Human Right to Democracy? Beyond Interventionism and Indifference', in C. Corradetti et al. (eds.), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Dordrecht: Springer, 2012).

³⁷ See J. Cohen, 'Is There a Human Right to Democracy?', in C. Sypnowich (ed.), *The Egalitarian Conscience: Essays in Honour of G. A. Cohen* (Oxford: Oxford University Press, 2006).

³⁸ See Reidy, 'On the Human Right to Democracy'. See also F. Peter, 'A Human Right to Democracy?', in R. Cruft, S. M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015); D. Miller, 'Is There A Human Right to Democracy?', in R. Celikates et al. (eds.), *Transformation of Democracy: Crisis, Protest and Legitimation* (London and New York: Rowman and Littlefield International, 2015).

³⁹ See, however, S. Besson, 'The Human Right to Democracy: A Moral Defence, with a Legal Nuance', in Council of Europe, *Definition and Development of Human Rights and Popular Sovereignty in Europe*, Science and Technique of Democracy No. 49 (Strasbourg: Editions du Conseil de l'Europe, 2011); Lister, 'There Is No Human Right to Democracy'.

⁴⁰ See e.g. C. C. Gould, 'The Human Right to Democracy and Its Global Import', in C. Holder and D. Reidy (eds.), *Human Rights: The Hard Questions* (Cambridge: Cambridge University Press, 2013); Reidy, 'On the Human Right to Democracy'.

other of the conceptions of democracy in democratic theory, without paying much attention to the debates animating political theorists about the many potential conceptions and justifications of democracy, but also, quite surprisingly, without much concern for the discussions about the nature and justification of human rights.

37.4 RELATING DISCUSSIONS ABOUT LEGAL AUTHORITY OF THE HR2D TO ITS MORAL JUSTIFICATIONS

If we are to account morally for the equivocal state of the legal practice pertaining to the international PoD, the legal and philosophical conversations should meet. This does not only imply looking deeper into the correct interpretation of the legal concept of democracy, as Boysen does very aptly in her chapter,⁴¹ but also at addressing the potential moral justification of the HR2D *qua* human right in itself and at explaining how it could relate to current international law.

Importantly, while such a moral justification of IDL and IHRL would be 'nice to have', the proposed argument is distinct in its endeavour and should not be conflated with a philosopher-king argument. Resorting to human rights theory and to the advice of philosophers when identifying new human rights was something that was actually tried in 1947 with the creation of the UNESCO Human Rights Committee. It was quickly abandoned thereafter, and rightly so.⁴² Identifying new international human rights, but also, generally, ascertaining the existence or validity of a right under international law, is a matter of sources of law and not of moral justification. One should identify the procedures and institutions that make international (human rights) law rather than derive them from human rights morality.

True, once the existence of a human right is established as a valid norm under international law, its moral justification may eventually matter for its legitimacy or legitimate authority, to the extent that the grounds for the justification of the authority of a given legal right *qua* right are moral. So even if the grounds for the legitimate authority of a potential human right to democracy under international law are content-independent and should not be conflated with its moral justification as a moral human right, the latter can contribute to the former in order for the legitimate authority it claims for itself to match the reasons we have independently from the law (so-called 'dependence thesis').⁴³ Of course, not all universal moral rights necessarily translate into legal human rights, and not all existing legal human rights existed previously as universal moral rights, and merely amount to moral principles or goals. What is clear, however, is that for legal human rights to give rise not merely to legal duties but also to moral ones, and hence to bind as rights *stricto sensu*, they should correspond to universal moral rights and should therefore, at least, contribute to creating them (as universal conventional moral rights) when they do not merely recognise or specify them (as universal natural moral rights).⁴⁴

In short, then, elucidating the legitimate authority, as opposed to the validity, of the HR2D under international law becomes, at least in part, a matter of either inherent or instrumental justification of a corresponding universal moral right. Of course, there could be other instrumental moral justifications for the authority of an international HR2D *qua* legal norm, but none of

them can account for the legitimate authority of the HR2D *qua* moral and legal right, and this is what I take the claim about the existence of the HR2D to be about.

37.5 ACCOUNTING MORALLY FOR THE EQUIVOCAL LEGAL PRACTICE AROUND THE HR2D

Because current international law is equivocal about the existence of a HR2D in practice, it is that ambiguity that one should account for morally. In a nutshell, my argument is that there can and should be no universal moral human right to democracy and hence no legitimate HR2D in international law, even if such a human right were to be validated legally (and even if it were to be justified on other instrumental moral grounds).⁴⁵

As mentioned before, human rights and democracy are normative implications of the basic principle of individual equality. Both human rights and democracy are needed to protect individual equality, and neither of them should take priority over the other, nor be grounded in the other, as a result.

If this conception of the relationship between equality and democracy on the one hand, and human rights on the other, is correct, there can and should be no ultimately legitimate democratic decision about the justification of human rights and no ultimately legitimate human right to democracy. We should not make the mistake of either 'over-proceduralising' democracy at the expense of human rights protection or of 'over-essentialising' human rights at the expense of respecting democracy. In turn, this explains why there cannot and, as a result, should not be a human right to democracy itself *qua* value, but only human rights for the protection of certain political interests, whose protection as human rights can contribute to the protection of equality and hence of democracy as values.⁴⁶

What this means for international law is that, were a HR2D created and validated in IHRL and IDL, that right could and should not be justified as a human right in a moral sense, whether as a natural right or a conventional one, and could not be regarded as having legitimate authority. What could and should be protected in international law, however – and this is actually the case already – is the principle of individual equality, and also the corresponding principle of democracy in IDL and specific individual rights to democratic participation in IHRL.

Of course, one may in turn derive from the principle of individual equality both a moral right to have human rights and a matching moral right to have a democracy. This corresponds to a potential interpretation of Arendt's moral right to have political human rights.⁴⁷ However, for fear of circularity, this moral right to have human rights and democracy under a given political and legal order cannot and should not be protected as a justified moral and legal human right in itself in that order. This may explain, as alluded to before, why some authors merely refer to the HR2D as an individual 'entitlement' in IDL or, worse, to an imperfect and non-directed positive duty of states under IHRL.

⁴⁵ For a full argument, see Besson, 'The Human Right to Democracy'.

⁴⁶ To the extent that the HR2D fails to convince on grounds of *moral logic* and of the relationship between human rights, democracy and basic moral equality on the one hand, and of the relationship between moral and legal human rights, one does not need to consider whether the *structural elements* of a human right are given. I have argued elsewhere that they are not: Besson, 'The Human Right to Democracy'. On the latter (which differ from those proposed by Alston, 'Conjuring Up New Human Rights'), see S. Besson, 'La structure et la nature de droits de l'homme', in M. Hottelier and M. Hertig (eds.), *Introduction aux droits de l'homme* (Brussels: Bruylant, 2014).

⁴⁷ See also S. Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back', in M. Goldoni and C. McCorkindale (eds.), *Hannah Arendt and the Law* (Oxford: Hart Publishing, 2012).

⁴¹ S. Boysen, in this volume, pp. 475f.

⁴² See P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607 at 617.

⁴³ See S. Besson, 'Justifications of Human Rights', in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2013).

⁴⁴ See S. Besson, 'International Human Rights Law and Mirrors' (2018) 7 *ESIL Reflections*.

The proposed interpretation fits and justifies the state of the practice in international law. It accounts morally for the current regime of IDL and for the fact that democracy is protected both as a general principle in international law on the one hand, and as a set of specific or derived human rights under IHRL on the other, but not as a human right in itself.

At this stage, two objections may be raised. First of all, as Boysen does in her chapter,⁴⁸ it may be asserted that even the proposed moral and international legal PoD would contradict the allegedly competing *principle of self-determination*, both morally and in international law.⁴⁹

Following Thomas Christiano, the reply may be that the principle of self-determination is best understood as being derived from the international PoD⁵⁰ – rather than the other way around, as most promoters and challengers of the HR2D argue. In order to protect individual equality in public decision-making, that process should be democratic and, for this to be the case, political communities should be able to determine themselves autonomously. Of course, just as any moral right includes the right not to be used or to be misused, self-determination may either not be used or be used non-democratically, even though it derives from the protection of democracy itself. The only moral limit to its not being used or being misused, as with any human right, is the protection of individual equality. This interpretation of the international principle of self-determination accounts well for the practice of IDL where fascism and apartheid, and other forms of authoritarianism, belong to the political regimes prohibited by international law precisely because they threaten individual equality itself.⁵¹

A second objection made by Boysen⁵² and others against the international PoD pertains to the erosion of the democratic practice of states worldwide and, to the extent that the democratic principle amounts to an international customary norm, to the threat that erosion poses for it and its claimed *universality*. The evidence authors usually put forward are the rise of authoritarian governments,⁵³ but also global individualism and the corresponding disaffection of domestic, including democratic, politics.

While the observation may well be correct empirically and in terms of customary international law-making, one may doubt the generality of this erosion process. For the customary international PoD to erode, the generality and regularity of state practice of disrespecting individual equality in public decision-making would have to be established, and we have not reached that stage yet. Moreover, the argument's normative implications are problematic. There is no better alternative for securing political legitimacy, domestically and internationally, than the preservation of democratic states, at least for now. First, democracy amounts to the ground of political legitimacy that best protects the universal principle of individual equality in circumstances of reasonable disagreement about the law. And, second, democratic legitimacy requires a state, or at least features like jurisdiction over a permanent population and a territory in particular, that only states have been able to secure so far. This is because it is only by sharing the same territory

⁴⁸ Boysen, in this volume, pp. 473ff.

⁴⁹ See also Cohen, 'Is There a Human Right to Democracy?'; Reidy, 'On the Human Right to Democracy'; d'Aspremont, 'The Rise and Fall of Democracy Governance', 556.

⁵⁰ Christiano, 'Self-Determination and the Human Right to Democracy', 476–479.

⁵¹ See e.g. International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, in force 18 July 1976, 1015 UNTS 243; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195, Art. 3.

⁵² Boysen, in this volume, p. 466.

⁵³ See d'Aspremont, 'The Rise and Fall of Democracy Governance'; Marks, 'What Has Become of the Emerging Right to Democratic Governance?'

with others that we can share sufficiently equal and interdependent stakes with them and hence fulfil the conditions for the justification of democracy as a political regime.⁵⁴

As I explained before, IDL and IHRL entrench two complementary normative instantiations of the principle of individual equality, i.e. democracy and human rights. Their role is therefore to enforce the pre-commitment of states to individual equality from the outside and through international law, especially when domestic politics are under strain. However parochial its historical origins, this minimal international egalitarian pre-commitment against the vagaries of politics is one of the most important legacies of our post-1945 international legal order. And one we should not let go too easily in the name of political realism, anti-imperialist conscience or post-colonialist qualms.

37.6 CONCLUSION

In sum, even though Boysen and I differ partly in our analysis of IDL and the HR2D – to the extent that she focuses on the thickness of the concept of democracy,⁵⁵ whereas I have concentrated on the moral justification of an actual human right to it – we agree in our conclusions: first, about the absence of a HR2D in current international law and, second, about its lack of moral justification.

As should have become clear, however, I disagree, for egalitarian reasons, with Boysen's rejection of the universality of the PoD,⁵⁶ first, and with her justification of non-democratic forms of self-determination,⁵⁷ second. As I have argued, there is, under current international law, not only a customary principle of individual equality, but also of democracy, and those two principles may be considered both as morally justifiable and potentially universally legitimate. Those are the principles that we, international lawyers, should now urgently be tending to and aim at justifying through comparison and negotiation across legal cultures, albeit outside IHRL and beyond the obsolete and largely sterile discussion of the existence, emergence or erosion of the HR2D.

⁵⁴ See T. Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010).

⁵⁵ Boysen, in this volume, pp. 475–479.

⁵⁶ Ibid., pp. 473–475.

⁵⁷ Ibid., pp. 476–479.