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Samantha Besson*

The Egalitarian Dimension of Human Rights

Abstract: Recently, some authors have tried to link international human rights to equality and equal status in particular, and hence to fill a gap that was left open by human rights theorists and equality specialists alike. Neglect for that connection is attributable both to the lack of interest for international law and politics beyond domestic boundaries that has long plagued theories of egalitarianism, but also to the resilience of foundationalist and especially monist approaches to the justification of human rights. Even though the egalitarian dimension of international human rights has now been uncovered, more work is needed on what that normative ideal means in the human rights context and from the perspective of human rights theory, and in particular on how it may be combined with a universal justification of human rights. My argument in the chapter is three-pronged. A first section of the chapter presents a conception of equal moral status and uncovers its intimate relationship to political equality. There, I delineate the notion of equal moral status from that of dignity and argue that while the latter plays a meaningful role *qua* requirement of respectful treatment, it should not be confused with the former and only plays a limited role in the human rights context. In the second section, I argue that human rights are grounded in interests and that political equality works as threshold in the recognition of the importance of certain interests *qua* human rights. In turn, the egalitarian dimension of human rights explains how human rights are both moral and legal rights, on the one hand, and both domestic and international legal rights, on the other. The third section of the argument is dedicated to exploring the implications of the egalitarian dimension of human rights for some vexed issues in international human rights law, such as the relationship between human rights, non-discrimination rights and the equality principle in international law. The tensions between ideal and non-ideal political theory, on the one hand, and between international and domestic equality, on the other, that often obscure the connections between those different themes are unpacked and made the most of in the course of the argument.

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‘A remarkable feature of the robust and nuanced contemporary philosophical literature on egalitarianism is its lack of engagement with the theory and practice of human rights. This disconnect is puzzling because the modern human rights movement is arguably the most salient and powerful manifestation of a commitment to equality in our time. Perhaps philosophers writing on equality have not articulated the implications of their work for human rights because they have operated within the strictures of a problematic, but largely unquestioned, assumption: that it is possible to develop a political philosophy for the individual state, considered in isolation. [...] The lack of engagement between the egalitarianism literature and the human rights literature is mutual. For the most part, international lawyers and others professionally concerned with human rights, to the extent that they have examined the theoretical grounding of human rights at all, have not utilized the rich philosophical literature on egalitarianism.’

(Buchanan, A., ‘Equality and Human Rights’, (2005) 4 *Politics, Philosophy and Economics* 69–90, 69–70)

Introduction

Curiously, the gap between international human rights¹ and equality has long been left open. Of course, the relationship between domestic human rights and equality, and especially political equality, has been explored in depth by political and legal theorists, especially from the German tradition.² The implications of that relation-

- 1 I am concentrating on international human rights in this chapter and not only on domestic human rights. However, that distinction is not one of content or structure (Besson, S., ‘Human Rights and Democracy in a Global Context – Decoupling and Recoupling’, (2011) 4:1 *Ethics and Global Politics* 19–50; Gardbaum, S., ‘Human Rights as International Constitutional Rights’, (2008) 19:4 *European Journal of International Law* 749–68), but one of function and hence of locus of legalization and legitimation (Besson, ‘Decoupling and Recoupling’, *supra* note 1). As a matter of fact, international and domestic human rights are in a relationship of mutual reinforcement, relationship that may precisely be explained by reference to political equality and democratic law-making. See also Besson, ‘Decoupling and Recoupling’, *supra* note 1; Benhabib, S., *Dignity in Adversity. Human Rights in Troubled Times*, Cambridge: Polity Press, 2011, 16 and 126.
- 2 See e.g. in the Habermasian and co-original tradition, Gosepath, S., *Gleiche Gerechtigkeit: Grundlagen eines liberalen Egalitarismus*, Frankfurt am Main: Suhrkamp, 2004; Menke, Ch. and Pollmann, A., *Philosophie der Menschenrechte. Zur Einführung*, Hamburg: Junius Verlag, 2007; Forst, R., ‘The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach’, (2010) 120:4 *Ethics* 711–40; Habermas, J., ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, (2010) 41:4 *Metaphilosophy* 465–80. Again, there is a noticeable difference between the state of development of German and Anglo-American human rights theories in this respect, a difference I have elaborated on elsewhere: see Besson, S., ‘Human Rights – Ethical, Political ... or Legal? First Steps in a Legal Theory of Human Rights’, in Childress, D. (ed.), *The Role of Ethics in International Law*, Cambridge: Cambridge University Press, 2011, 211–45. See, however, Dworkin, R., *Justice for*

ship once either human rights or equality, or both, are internationalized remain to be assessed, however.

This disconnect between international human rights and equality is actually evident in the work of human rights theorists and equality scholars alike.³

Among egalitarian theorists, on the one hand, neglect for human rights is attributable to the lack of interest for international law and for politics beyond domestic boundaries.⁴ This may largely be explained by the apparent, albeit largely unreflected upon, incompatibility between the defence of a universal equal moral status that fits the universality of international human rights, on the one hand, and a robust approach to equality of welfare or resources or to equality of outcome or opportunity of the kind that requires a well-organized political and social community and does not fit the universality of international human rights that well, on the other.⁵

Human rights theorists, on the other hand, have been just as guilty of neglecting the egalitarian dimension of human rights. This is due in part to the resilience of foundationalist, but also to monist approaches to the justification of human rights; those approaches either exclude any reference to other values, including equality, or concentrate on one of them exclusively. Another explanation lies in the lack of reference to the institutional and political practice, history and function of human rights in many traditional human rights theories; those theorists look at international and domestic human rights law merely as a way to implement a moral reality, but without any impact on that moral reality in return.⁶ This kind of separation between the morality and the legality of human rights has a price, however: it severs links to the collective and political role of human rights and to their egalitarian dimension in particular. This is even more surprising as equality and non-discrimination are not only preeminent traits of international and domestic human rights law and practice, but

Hedgehogs, Harvard: Belknap, 2011; Buchanan, A., 'The Egalitarianism of Human Rights', (2010) 120:4 *Ethics* 679–710; Christiano, T., *The Constitution of Equality*, Oxford: Oxford University Press, 2008; Buchanan, A., 'Equality and Human Rights', (2005) 4 *Politics, Philosophy and Economics* 69–90.

3 See the egalitarian challenge raised against current human rights theories by Buchanan, 'Equality', *supra* note 2, Buchanan, A., 'Moral Status and Human Enhancement', (2009) 37:4 *Philosophy and Public Affairs* 346–81 and Buchanan, 'Egalitarianism', *supra* note 2. See for a short reply, Griffin, J., 'Human Rights: Questions of Aim and Approach', (2010) 120:4 *Ethics* 741–60.

4 See e.g. Gosepath, *Gleiche Gerechtigkeit*, *supra* note 2, and Gosepath, S., 'Equality', in Zalta, E. N. (ed.), *Stanford Encyclopedia of Philosophy (2007 Edition)*, available at: ><http://plato.stanford.edu/entries/equality><; Scheffler, S., 'What is Egalitarianism?', (2003) 31 *Philosophy and Public Affairs* 5–39; Pojman, L., 'On Equal Human Worth: A Critique of Contemporary Egalitarianism', in Pojman, L.P. and Westmoreland, R. (eds), *Equality: Selected Readings*, Oxford: Oxford University Press, 1997, 282–298; Arneson, R., 'Equality and Equal Opportunity for Welfare', (1989) 56 *Philosophical Studies* 77–93; Roemer, J., 'Equality of Resources Implies Equality of Welfare', (1986) 101 *The Quarterly Journal of Economics* 751–84; Cohen, G.A., 'On the Currency of Egalitarian Justice', (1989) 99 *Ethics* 906–44; Dworkin, R., 'What is Equality? Part 1: Equality of Welfare', (1981) 10 *Philosophy and Public Affairs* 185–246 and Dworkin, R., 'What is Equality? Part 2: Equality of Resources', (1981) 10 *Philosophy and Public Affairs* 283–345. See, however, Dworkin, R., *Is Democracy Possible Here?*, Princeton: Princeton University Press, 2006 and Dworkin, *Justice*, *supra* note 2, who now has an account of (international) human rights and their relationship to his domestic 'political rights' and their criterion of 'equal concern and respect'. Note that this may be a lesser problem in the German discussions of equality: see e.g. Gosepath, *Gleiche Gerechtigkeit*, *supra* note 2; Menke/Pollmann, *Philosophie der Menschenrechte*, *supra* note 2, section IV.

5 See e.g. Gosepath, 'Equality', *supra* note 4, section 4.

6 See for those two critiques, Buchanan, 'Egalitarianism', *supra* note 2; Besson, 'Human Rights', *supra* note 2. Contra: Griffin, 'Human Rights', *supra* note 3; Tasioulas, J., 'Are Human Rights Essentially Triggers for Intervention?', (2009) 4:6 *Philosophical Compass* 938–50, and Tasioulas, J., 'Taking Rights out of Human Rights', (2010) 120:4 *Ethics* 647–78.

often source of intriguing legal complexities in that context. A final explanation may be that all contemporary human rights theories are struggling with the parochialism objection and the difficulties it raises for their claim about the universality of human rights. The fact that most egalitarians defend robust theories of equality of some kind would actually make the case against human rights parochialism even more powerful if those theories were somehow to be more deeply connected to human rights.

Recently, however, some human rights theorists have tried to link international human rights more closely to equality, and hence to fill the gap between them.⁷ Even though the egalitarian dimension of international human rights has now been slowly uncovered, more work is still needed on what that normative ideal means in the human rights context. Often, indeed, human rights theorists gesture at equality as being related to human rights, for instance in the latter's justification, without, however, explaining what kind of equality is at stake and the exact nature of its justificatory relationship to human rights.⁸ That is the project this chapter takes up, albeit modestly and from the perspective primarily of human rights theory. The concept of equality and its justifications being one of the most complex fundamental questions in contemporary moral and political philosophy, its relationship to human rights is bound to constitute an even more complex issue. As a result, any attempt at clarifying that relationship has to thread cautiously.⁹

Importantly, from a methodological perspective, the tensions between ideal and non-ideal theory that often obscure the connections between those different themes will be unpacked and made the most of in the course of the argument. Human rights theory ought to provide a critical reconstruction of human rights practice,¹⁰ both international and domestic. This implies, and this is the topic of this chapter, accounting for the egalitarian dimension of human rights one observes in human rights practice and in the history of human rights since the 18th Century.¹¹

My argument unravels in three consecutive stages. A first section of the chapter presents a conception of equal moral status and its relationship to political equality,

7 See Buchanan, 'Equality', *supra* note 2, Buchanan, 'Moral Status', *supra* note 3 and Buchanan, 'Egalitarianism', *supra* note 2; Gérard, P., *L'esprit des droits. Philosophie des droits de l'homme*, Brussels: St Louis, 2007, 184 ff. See also Dworkin, *Democracy*, *supra* note 4 and Dworkin, *Justice*, *supra* note 2, 327 ff. on political and human rights. See, more generally, in the Habermasian and co-original tradition, Gosepath, *Gleiche Gerechtigkeit*, *supra* note 2; Menke/Pollmann, *Philosophie der Menschenrechte*, *supra* note 2; Forst, 'Justification of Human Rights', *supra* note 2; Habermas, 'Concept of Human Dignity', *supra* note 2.

8 Thus, Tasioulas, J., 'Justice, Equality and Rights', in Crisp, R. (ed.), *The Oxford Handbook of the History of Ethics*, (2012) forthcoming, discusses the justifications of equality and human rights as two 'broad contemporary philosophical concerns with equality and rights' and hence with justice but without, however, linking them or their respective justifications in any way except by mentioning equal rights as the entitlements stemming from equality and by considering that human rights 'have become the most influential way of giving substance to the basic equality of human beings'. He does venture the idea that human rights could be what basic moral equality consists in, but does not associate this idea to any author in particular and does not pursue the idea any further.

9 For instance, this chapter's focus on equality in the notion and justification of human rights is not meant to exclude their other ties to justice and other principles of justice. On this question, see e.g. Tasioulas, 'Justice, Equality', *supra* note 8.

10 See also Raz, J., 'Human Rights without Foundations', in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press, 2010, 321–37 and Raz, J., 'On Respect, Authority, and Neutrality: A Response', (2010) 120:2 *Ethics* 279–301; Beitz, C.R., *The Idea of Human Rights*, Oxford: Oxford University Press, 2009; Besson, 'Human Rights', *supra* note 2.

11 See also Buchanan, 'Egalitarianism', *supra* note 2.

on the one hand, and a delineation from dignity, on the other. In the second section, I argue that human rights are grounded in interests, but that political equality works as threshold in the recognition of the importance of certain interests *qua* human rights. In turn, this explains how human rights are both moral and legal rights, on the one hand, and both domestic and international legal rights, on the other. The third section of the argument is dedicated to exploring the implications of the egalitarian dimension of human rights for some vexed issues in international human rights law, such as the relationship between human rights, non-discrimination rights and the equality principle in international law.

1. Equality

The first task in the elucidation of the relationship between human rights and equality is clarifying the concept of equality that is at stake in the human rights context. This requires, first of all, an analysis of the most basic notion of equality: that of equal moral status. In a third step, the discussion moves to a more robust notion of equality: that of political equality. I argue that the latter is an elaborate form of equal moral status in the political context, explain how one can move from equal moral status to political equality and elaborate on the relationship between the two.¹² In a second step, however, I argue that dignity is not a required passage in the reasoning.

a. From Equal Moral Status ...

Basic moral equality is usually referred to as equal moral status or basic equal status. It is useful to distinguish between the concept of equal moral status, on the one hand, and its justification, on the other.

The concept of equal moral status, first of all, is best explained by dissociating the notion of moral status from that of equal moral status. In a nutshell, *moral status* pertains to the way in which a being is subject to moral evaluation, how it ought to be treated, whether it has rights, and what kind of rights it has.¹³ Moral status goes further therefore than mere moral considerability: the latter is a standing that may be shared with many other sentient animals and even with things, whereas moral status only belongs to human beings.¹⁴ When it is *equal*, moral status refers to the idea that 'all people are of equal worth and that there are some claims people are entitled to make on one another simply by virtue of their status as persons'¹⁵.

12 Parts a and c of this section are revised versions of Besson, S., 'International Human Rights and Political Equality. Some Implications for Global Democracy', in Erman, E., and Näsström, S. (eds), *Equality in Transnational and Global Democracy*, London: Palgrave Macmillan, 2012, forthcoming.

13 On moral status, see Nussbaum, M., *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge Mass.: Belknap, 2006; McMahan, J., *The Ethics of Killing: Problems at the Margin of Life*, Oxford: Oxford University Press, 2002. See also Buchanan, 'Moral Status', *supra* note 3, more generally. Note that it is an understanding of status that pre-exists the position the individual occupies in the political group.

14 Of course, that difference does not preclude applying human rights theory *mutatis mutandis* to animal rights: see Buchanan, A., 'Do we Need a Philosophical Theory of Human Rights?', (2012) forthcoming; Buchanan, 'Moral Status', *supra* note 3, 358 ff.

15 See e.g. Scheffler, 'What is', *supra* note 4, 22.

There are two core ideas in this understanding of equal moral status: the idea that all persons should be regarded as having the same moral worth (i) and the idea that this equal moral status is relational and the basis for mutual moral claims (ii). Those two aspects of equal moral status are indissociable.¹⁶

First of all, the idea of equal moral worth of all persons pertains to the intrinsic and non-instrumental value of personhood. According to that idea, no person may be deemed inferior morally to another: all those who have the characteristics that are sufficient for being a person and hence the capacity for rational and moral agency have the same moral status.¹⁷ Equal moral status is of course compatible with important inequalities on other counts such as health, beauty, luck, etc. It is important to stress that what matters here is personhood and not human nature.¹⁸ The former captures what ought to be protected morally in human beings *qua* moral agents, and it escapes the naturalistic fallacy and many other misconceptions that come with the notion of human nature.¹⁹

The second core idea in equal moral status pertains to its inherently relational dimension.²⁰ One is at once a person valuable in herself and a person equal to others, i. e. a person whose status and moral worth is defined by one's moral relations to others. The relational or, as Elizabeth Anderson calls it, the social nature of equal moral status explains why the latter amounts to more than mere autonomy or rational capacity that is covered by the first core idea.²¹ The denial of equal status amounts to a judgement of exclusion and inferiority *to others* where this kind of judgement is 'thought to disqualify one from participation as an equal in important social practices or roles'.²²

As a result, equal moral status does more than simply entitle persons to mutual claims. It is actually defined by reference to those mutual claims. This is why it is often deemed as consisting in those mutual moral entitlements.²³ The mutual entitlements inherent in equal moral status are usually described as mutual basic moral

16 See also Rosen, M., *Dignity: Its History and Meaning*, Harvard: Harvard University Press, 2012, 26 about a similar articulation between autonomy or moral worth, on the one hand, and respect or treatment, on the other, in Kant's moral philosophy.

17 Buchanan, 'Moral Status', *supra* note 3, 347. There are ways to palliate the inherent limitations of this rational and moral agency dimension of equal moral status and its consequences for the personal scope of human rights that may no longer look general enough, in particular with respect to the mentally impaired, the children or the elderly. See, however, Feinberg, J., 'The Nature and Value of Rights', (1970) *Journal of Value Inquiry* 243–57, about the idea of rights in trust and ways of accommodating the increase or decrease of moral agency and competence in a human rights account. Moreover, dignity implies duties to respect that are independent from human rights and may be invoked in this context (e.g. Rosen, *Dignity*, *supra* note 16).

18 See Buchanan, 'Moral Status', *supra* note 3. This is particularly important as one often reads explanations of non-discrimination rights and principles that refer to natural inequalities and not to inequalities of (social) status. See Anderson, E., *The Imperative of Integration*, Princeton: Princeton University Press, 2010, on racialization and the socially constructed nature of racism.

19 See Buchanan, 'Moral Status', *supra* note 3, 348–9: this is also why human rights are better described as persons' rights. That term avoids naturalistic conclusions and confusing debates about human nature.

20 See Anderson, E., 'What is the point of equality?', (1999) 109:2 *Ethics* 287–337, 289 and 313.

21 See Anderson, 'Point of Equality', *supra* note 20, 288–9. See also Anderson, *Imperative of Integration*, *supra* note 18 on non-discrimination law and integration.

22 See Buchanan, 'Egalitarianism', *supra* note 2, 708–10.

23 See Buchanan, 'Moral Status', *supra* note 3, 378–9; Buchanan, A., *Beyond Humanity?*, Oxford: Oxford University Press, 2011, 233. See also Waldron, J., 'Dignity, Rank and Rights', 2009 Tanner Lectures at UC Berkeley', (2009) *New York University Public Law and Legal Theory Working Papers* 151, on dignity referring both to a status and to the corresponding entitlement that it be respected.

rights.²⁴ Those basic moral rights are equal rights.²⁵ They are also universal moral rights. As we will see, human rights are among those basic moral rights that constitute one's equal moral status, although they do not exhaust them. Those mutual moral entitlements include indeed other basic moral rights than human rights: rights that may bind other individuals and not institutions like human rights, on the one hand, and rights that do not need to be institutionalized and legalized unlike human rights, on the other.²⁶

What those basic moral rights or entitlements amount to are rights or entitlements to equal treatment or respect in a broad sense. Of course, it is one of the interesting features of equal moral status that it amounts both to a normative status, on the one hand, and to the entitlements stemming from that status and actually constituting that status in return, on the other.²⁷ This seeming circularity will become more patent when explaining how human rights are grounded in interests but only those that can give rise to mutual entitlements that are themselves constitutive of equal moral status, with that status itself amounting to those mutual entitlements in return. This dialectical relationship actually explains why human rights cannot be said to be 'grounded' in political equality, even though the latter can be a 'ground' for the recognition of more human rights²⁸ and human rights a 'ground' for the recognition of equal political status.

Secondly, the next question is the justification of persons' equal moral status. Curiously given its pivotal role in morality, but maybe because of that pivotal or even liminal role, the concept of equal moral status remains a largely unquestioned notion in much of contemporary moral theory.²⁹ So, the problem with the justification of equal moral status is not so much that moral philosophers are divided but that they rarely provide a justification of the equal moral status of persons.³⁰ Some authors, like Jeremy Waldron, actually see this lack of justification as a shortcoming of current moral theory on basic moral equality.³¹ Others like Bernard Williams saw that absence of justification as a virtue of the idea of equality.³²

Schematically, one may distinguish between two kinds of justification of basic moral equality: a Christian one that refers to God and that is mostly based on

24 See Buchanan, *Beyond Humanity?*, *supra* note 23, 233.

25 This is compatible with people having other moral rights that are different from one another as long as they are neither basic moral rights nor human rights. See Buchanan, 'Moral Status', *supra* note 3, 378–9.

26 As I will argue later on, while equal moral status constitutes the threshold in the recognition of universal moral rights based on fundamental interests, it is political equality that constitutes the threshold in the recognition of human rights.

27 See also Rosen, *Dignity*, *supra* note 16, 25 ff about a similar articulation between autonomy and respect in Kant's moral philosophy. See also Waldron, 'Dignity', *supra* note 23, on dignity being both something to describe and something normative to evaluate and to require.

28 See for a similar argument albeit on dignity: Waldron, 'Dignity', *supra* note 23, on dignity as a 'ground' for the recognition of human rights, and not a 'foundation' or 'grounding' of human rights.

29 See also Tasioulas, 'Justice, Equality', *supra* note 8; Gosepath, 'Equality', *supra* note 4, section 2.3.

30 See Tasioulas, 'Justice, Equality', *supra* note 8, for a more detailed discussion.

31 See Waldron, J., *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*, Cambridge: Cambridge University Press, 2002, reviewed by Fabre, C., 'Review: *God, Locke and Equality: Christian Foundations in Locke's Political Thought* by Jeremy Waldron', (2003) 66:3 *Modern Law Review* 470–73. See also Tasioulas, 'Justice, Equality', *supra* note 8; Buchanan, 'Equality', *supra* note 2, Buchanan, 'Moral Status', *supra* note 3, and Buchanan, 'Egalitarianism', *supra* note 2.

32 Williams, B., 'The Idea of Equality', in Hawthorn, G. (ed.), *In the Beginning was the Deed: Realism and Moralism in Political Argument*, Princeton: Princeton University Press, 2005, 97–114.

Locke³³ and a non-religious one that refers to shared rational nature and that is mostly based on Kant.³⁴

The difficulty with the former is its religious and hence non-inclusive and teleological nature.³⁵ But the latter also suffers from important shortcomings. One of them is its metaphysical, and non-naturalistic or empirical inclination.³⁶ A way of rebutting this objection may actually be found in the second core idea to equal moral status, however: its relational or social nature. The social nature of basic moral equality implies making a certain number of empirical assumptions about people and their relationship in society.³⁷ It provides a third way of justifying equal moral status and the one used in this chapter. This feature of equal moral status and its justification is actually something that will prove crucial in the context of the justification of human rights and their defence against the parochialism critique.

Contrary to what has been the case for a long time in theories of equality, and following Anderson,³⁸ it is important therefore to understand equality by reference to equal moral status. This avoids focusing too narrowly on a specific form of equality, such as distributive equality, for instance, and its various kinds depending on the respect to which distributive equality is granted (the ‘equality of what’ question). The recognition of equality in that primary form does not yet imply, in other words, more robust notions of equality such as distributive equality which have to be justified and defended separately once basic moral equality has been defined and justified. This explains also in turn why equal moral status is compatible with a wide range of differences and their social recognition in the form of material inequalities.³⁹

b. ... Without Dignity ...

Dignity is sometimes used as another way of referring to equal moral status, or at least to the way in which equal moral status has been used so far in this chapter. This is especially the case in the human rights context.⁴⁰ Besides being an extremely indeterminate and historically complex concept,⁴¹ often used as placeholder in morality,⁴²

33 See e.g. Waldron, *God, Locke and Equality*, *supra* note 31, Ch. 3.

34 See e.g. Habermas, ‘Concept of Human Dignity’, *supra* note 2.

35 See Fabre, ‘Review’, *supra* note 31; Buchanan, ‘Moral Status’, *supra* note 3, for a critique of the religious justification of moral equal status.

36 See Tasioulas, ‘Justice, Equality’, *supra* note 8; and Williams, ‘Idea of Equality’, *supra* note 32, 102 for this critique.

37 See e.g. Buchanan, ‘Equality’, *supra* note 2, 77–8. See also Wingert, L., ‘Was ist und was heisst “unverfügbar”? Philosophische Überlegungen zu einer nicht nur ethischen Frage’, in Forst, R. et al. (eds), *Sozialphilosophie und Kritik*, Frankfurt am Main: Suhrkamp, 2009, 384–408. See also Margalit, A., ‘Human Dignity between Kitsch and Deification’, (2011) manuscript on file with author, for a similar third way between kitsch and deification (including Kantianism) in the context of dignity. See even Waldron, ‘Dignity’, *supra* note 23, in relation to dignity *qua* legal concept.

38 See e.g. Anderson, ‘Point of Equality’, *supra* note 20, 313 who opposes her relational theory of equality to distributive theories of equality; Buchanan, ‘Egalitarianism’, *supra* note 2, 688.

39 See Waldron, *God, Locke and Equality*, *supra* note 31, Ch. 3; Buchanan, ‘Egalitarianism’, *supra* note 2, 685.

40 See e.g. Waldron, ‘Dignity’, *supra* note 23; Habermas, ‘Concept of Human Dignity’, *supra* note 2; Forst, ‘Justification of Human Rights’, *supra* note 2; Habermas, J., *Zur Verfassung Europas. Ein Essay*, Berlin: Suhrkamp, 2011; Tasioulas, ‘Justice, Equality’, *supra* note 8.

41 See e.g. Rosen, *Dignity*, *supra* note 16, 48: ‘The concept of dignity has developed into an amalgam of humanist, liberal, Christian, socialist and Kantian ideas.’

it is not clear that dignity does some work in the human rights context that equal moral status cannot do.⁴³

To start with, authors use dignity to refer to what is unique in human beings and shared by all of them: their personhood and capacity for rational and moral agency.⁴⁴ This is, however, the very idea captured by the concept of equal moral status.⁴⁵ In this sense, the way dignity is used by a majority of authors, i. e. dignity *qua* status or rank albeit equalized to all human beings,⁴⁶ does not add anything to the proposed model of equal moral status and human rights. Another important element about dignity as it is used in the human rights context is its socio-comparative dimension.⁴⁷ Here again, however, the fact that authors usually refer to ‘equal dignity’⁴⁸ to refer to that socio-comparative or relational dimension shows how the question of equality cannot be escaped by gesturing to dignity or, alternatively, to inviolability⁴⁹. There are in any case grounds, in the intellectual history of the concept of dignity, for concern about how egalitarian dignity really was for those endorsing dignity as a ground for human rights.⁵⁰ Confirmation of the redundancy of equal dignity with equal moral status *qua* equal universal moral rights may actually be found in Art. 1 of the Universal Declaration of Human Rights (UDHR) that refers to human beings being ‘equal in dignity *and* rights’ (emphasis added).

Of course, there are other invocations of dignity in the human rights context that are not redundant with the notion of equal moral status. One of them is the reference to dignity as the ultimate value of human beings and hence as the foundation of human rights. Another is the reference to a human right to dignity itself. The latter is easy to disparage as there cannot be rights to values and dignity is a value. Of

42 For famous philosophical critiques, see e.g. Pinker, S., ‘The Stupidity of Dignity’, *The New Republic*, 28 May 2008. See also Ladwig, B., ‘Menschenwürde als Grund der Menschenrechte’, (2010) 1:1 *Zeitschrift für Politische Theorie* 51–69, 65 on dignity as status-indicator and not as a status-justificator.

43 On this redundancy between dignity and status, see also Waldron, ‘Dignity’, *supra* note 23, by reference to Dworkin on the use of redundant terminology. Both concepts have a lot in common: they are both threshold concepts and are concepts one may use to ground human rights, or as goods or interests one has a human right to.

44 Albeit maybe with a theological twist as most moral philosophers and human rights theorists currently referring to dignity in this context seem to be religious or seem to think that religious justifications of human rights are acceptable: see e.g. McCrudden, C., ‘Dignity and Judicial Interpretation of Human Rights’, (2008) 19:4 *European Journal of International Law* 655–724, 673; Waldron, ‘Dignity’, *supra* note 23; Habermas, ‘Concept of Human Dignity’, *supra* note 2; Bielefeldt, H., *Auslaufmodell Menschenwürde? Warum sie in Frage steht und warum wir sie verteidigen müssen*, Freiburg: Herder, 2011. See also Rosen, *Dignity*, *supra* note 16, 3 on dignity in faith-based ethical discourse.

45 This becomes clear when one looks at Habermas, ‘Concept of Human Dignity’, *supra* note 2, 468–9 and 472 as much of his argument can actually be read as one of equal moral status.

46 See e.g. Waldron, ‘Dignity’, *supra* note 23; Margalit, ‘Human Dignity’, *supra* note 37; Hennette-Vauchez, S., ‘A human *dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence’, (2011) 9:1 *International Constitutional Law Review* 32–57.

47 See e.g. Buchanan, ‘Egalitarianism’, *supra* note 2, 690–1, 702.

48 See e.g. Gosepath, ‘Equality’, *supra* note 4, 27; Waldron, ‘Dignity’, *supra* note 23, 20; Habermas, ‘Concept of Human Dignity’, *supra* note 2; Forst, ‘Justification of Human Rights’, *supra* note 2; Tasioulas, ‘Justice, Equality’, *supra* note 8. The egalitarian use of dignity may also be exemplified in Waldron, ‘Dignity’, *supra* note 23, 57 when he refers to political equality and equality before the law.

49 By contrast to those authors, I argue that the idea of inviolability amounts to something else than dignity. It is an idea that may be accounted for by reference to equal moral worth and the egalitarian dimension of human rights. In practice, this understanding is often captured by the notion of fundamental or minimal core of human rights. See below section 2.

50 See e.g. Rosen, *Dignity*, *supra* note 16, 47 ff. on the clearly inegalitarian agenda of the Catholic *milieux* endorsing dignity as foundation for the international human rights project.

course, human rights can be of value, but that is a different question. The former reference to dignity is more widespread, especially in the legal discourse,⁵¹ and more difficult to circumvent. There is no need to get into a discussion of the relative merits of status-based and interest-based accounts of moral rights here, as the chapter endorses an interest-based account of human rights that ties them, however, to equal moral status and sees human rights as constitutive of equal moral status as a result and not as one of its consequences. I will argue that this prevents them from being founded only in moral status, and hence either in equal moral status or in dignity as a matter of fact.

In a nutshell, however, and in place of a full argument,⁵² what makes it the case that human rights should be grounded in interests, and not in status, is the latter's pluralism at every time and place, the dynamism of the rights that protect them across time and place, and their non-speciesist quality.⁵³ First of all, unlike status, interests can be multifarious and this accommodates moral pluralism better. Secondly, interests need not be protected similarly against standard threats and this explains how, despite the interests remaining the same, the content of human rights can change. Finally, interests are compatible with many different kinds of moral statuses and in particular with the moral status of non-human animals, thus leaving the door open for an interest-based account of non-human animal rights and not connecting human rights tightly to human nature as a result.

If this counter-argument against dignity *qua* foundation of human rights and as a placeholder for equal moral status holds morally, one still needs to explain why dignity⁵⁴ is omnipresent within major international and domestic legal guarantees of human rights adopted post-1945.⁵⁵ There are historical explanations for this, how-

51 It is allegedly the one used in the German Constitutional Court's case-law, although dignity is also used with other meanings such as something there is a human right to, an interpretive principle of all other human rights, a 'limit on the limits' to other human rights, etc. (see e.g. BVerfGE 45, 187 [227]; 39, 1 [59]; 115, 118). See the discussion in Rosen, *Dignity*, *supra* note 16, 77 ff., 114 ff.; Bielefeldt, *Auslaufmodell Menschenwürde?*, *supra* note 44; Möllers, C., 'Democracy and Dignity in German Constitutional Law', (2009) 42 *Israel Law Review* 416–39, 423–4; Baer, S., 'Menschenwürde zwischen Recht, Prinzip und Referenz. Die Bedeutung der Enttabuisierung', (2005) *Deutsche Zeitschrift für Philosophie* 571–88.

52 There is, of course, a kind of circularity in dignity accounts that define it by reference to human rights without a distinct understanding of human rights (e.g. McCrudden, 'Dignity', *supra* note 44, who disparages certain understandings of dignity because they cannot justify human rights, but without giving a full account of human rights and hence begging the question about dignity; see also Ladwig, 'Menschenwürde', *supra* note 42, 62), or in human right accounts that define them by reference to dignity without a distinct understanding of dignity (e.g. Feinberg, 'Nature', *supra* note 17; Kateb, G., *Human Dignity*, Cambridge, Mass.: Harvard Belknap, 2011). On that circularity, see e.g. Waldron, 'Dignity', *supra* note 23; Rosen, *Dignity*, *supra* note 16, 54 ff., 57. The best way, and the one chosen here, is to start from human rights practice and its specificities (e.g. mutual perfection, systematicity, correlativity, universality, equality, etc.) and then see how dignity fits or not.

53 See Buchanan, A., 'Moral Progress and Human Rights', in Holder, C. and Reidy, D. (eds), *Human Rights: The Hard Questions*, Amsterdam: Springer, 2012, forthcoming.

54 Note that I am concerned here with both the moral and legal concepts of dignity as they are used by domestic and international lawyers indistinctively. See also Waldron, 'Dignity', *supra* note 23. For the same argument in the human rights context, see section 2 below.

55 See e.g. Art. 1 German Basic Law and Art. 1 UDHR, but also all Preambles to the UN human rights conventions post-1945. See for a brilliant exposition of dignity in domestic and international human rights law, McCrudden, 'Dignity', *supra* note 44. Of course, there are also counter-arguments in international and domestic human rights practice, as not all constitutional traditions know of dignity. Further, some that did have now abandoned it: see e.g. the decision by the Canadian Supreme Court of 27 June 2008, *R. c. Kapp*, [2008] 2 R.C.S. 483, 2008 CSC 41.

ever. One of them, of course, is the political coming together after the Second World War of two extremely powerful traditions that had very little in common morally: Christian theology and Kantian philosophy.⁵⁶ However, historical compromises do not necessarily make for good moral interpretations of law, and historical understandings do not necessarily stick therefore in judicial interpretations of the text of legal norms.⁵⁷ They may, but then it would have to be on the basis of a full legal and moral argument and not merely an historical one. And originalism is not one of the methods of interpretation of international law that is favoured by the international law of treaties; this applies even more to international human rights law.

True, there is a resurgence of interest for dignity these days, both legally and morally. Explanations are easy to find, however. Legal reasons may lie in the development of comparative constitutional law, and the German constitutional influence in that context,⁵⁸ but also within EU fundamental rights law and international human rights law. Morally, one may find reasons in the return of the religious,⁵⁹ as well as in the coming under threat of Kantian moral philosophy within moral philosophy in general. Furthermore, as Michael Rosen argues, the historical alliance between Christian personalism and Kantian rationalism seems to have imploded. More particularly, the controversies in which dignity is increasingly invoked, in particular in the bioethics realm and debates surrounding technology, show the limits of the former when nature becomes increasingly rationalized. At the same time, of course, those debates ensure that the fascination for dignity can endure. And this may not necessarily be a regrettable state of affairs given the role such essentially contestable concepts play in a democratic legal order.⁶⁰ Besides, if dignity works as a moral placeholder and status-indicator, to borrow Bernd Ladwig's terms,⁶¹ then its resilience may be good news for the protection of equal moral status and human rights.

56 See Rosen, *Dignity*, *supra* note 16, 53, 80 ff and 90 ff. See also Moyn, S., 'Personalism, Community and the Origins of Human Rights', in Hoffmann, S.L. (ed.), *Human Rights in the Twentieth Century*, Cambridge: Cambridge University Press, 2011, 85–106, on the religious background to the adoption of international human rights law treaties post-1945. See, more generally, Morsink, J., *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, 1999; Glendon, M.A., *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York: Random House, 2001. For a slightly different take on the religious background of the first interpreters of the German Basic Law as opposed to its drafters, see Möllers, 'Democracy and Dignity', *supra* note 51; Goos, C., *Innere Freiheit. Eine Rekonstruktion des grundgesetzlichen Würdebegriffs*, Bonn: Bonn University Press, 2011; Rosen, *Dignity*, *supra* note 16, 102.

57 See Möllers, 'Democracy and Dignity', *supra* note 51, for a similar argument about why one should actually refer to Kantian moral philosophy when interpreting Art. 1 of the German Basic Law. See also Rosen, *Dignity*, *supra* note 16, 1 ff. on why we should refer to *imago dei* or Pico's notion of dignity and not others.

58 German constitutional law was very influential, for instance, when drafting the Japanese Constitution or the South African one.

59 See on the choice between kitsch and deification of dignity, e.g. Margalit, 'Human Dignity', *supra* note 37. Of course, some may argue that the redundancy is not entirely useless given the religiously loaded or, at least, sacred and hence religion-compatible nature of the concept of dignity (see e.g. Joas, H., *Die Sakralität der Person. Eine neue Genealogie der Menschenrechte*, Berlin: Suhrkamp, 2011; Habermas, J., *Die Zukunft der menschlichen Natur Auf dem Weg zu einer liberalen Eugenik?*, Frankfurt am Main: Suhrkamp, 2001; Dworkin, R., *Life's Dominion*, New York: Vintage Books, 1994) and its benefits in inter-religious dialogue: see e.g. Bielefeldt, *Auslaufmodell Menschenwürde?*, *supra* note 44.

60 See e.g. Waldron, J., *Law and Disagreement*, New York: Oxford University Press, 1999; Besson, S., *The Morality of Conflict. Reasonable Disagreement and the Law*, Oxford: Hart Publishing, 2005. For a similar idea in the dignity concept, see also Möllers, 'Democracy and Dignity', *supra* note 51.

61 See Ladwig, 'Menschenwürde', *supra* note 42, 65. On dignity as trigger for the recognition of political-moral status, see also Habermas, *Zur Verfassung*, *supra* note 40, 26.

All this is not to say, of course, that dignity does not have a moral existence of its own besides equal moral status, but merely that it is redundant to equal moral status in its relationship to human rights. Among the other moral meanings and roles dignity has, and that may matter outside of human rights, one should mention the most important one. It is the third understanding of dignity besides equal moral status, on the one hand, and moral value, on the other: dignity as a way to be treated, i. e. the idea of being treated with dignity or dignified respect (as opposed to respect for dignity).⁶² It usually takes the shape of a duty to dignified treatment, as opposed to a right. Some authors also explain this understanding of dignity by reference to self-respect and a self-referential moral duty.⁶³ This understanding of dignity is actually one that is present in certain parts of anti-discrimination law that cannot be explained by reference to the entitlements of equal moral status, such as the prohibition of harassment for instance. It may even explain, according to some authors, some resolutely non-egalitarian streaks in parts of anti-discrimination law.⁶⁴ Curiously, this self-referring understanding of someone's dignity is sometimes used as a moral justification for the restriction of that very person's other human rights.⁶⁵ Finally, one may also find traces of this understanding of dignity *qua* dignified respect in international humanitarian law.⁶⁶

c. ... To Political Equality

Equal moral status holds an intermediary ground between moral considerability, on the one hand, and more specific or robust notions of equality, on the other. Based on the equal moral or basic status of individuals, however, one may want to justify more robust egalitarian and especially distributive ideals such as equality of resources or equality of welfare, or such as equality of opportunities or equality of outcomes. Scope precludes entering into a highly contested debate over those different robust forms of equality, and distributive equality in particular.⁶⁷ What I would like to do, however, is focus on one of them in particular without excluding the others nor attempting to link it to the others, and that is public or political equality. Political equality is indeed the kind of robust equality that matters in a legal order and, accordingly, in the context of human rights law.

62 See Rosen, *Dignity*, *supra* note 16, 58, 114 ff. and 125 ff. on this third understanding of dignity. See also Hennette-Vauchez, 'A human *dignitas* ?', *supra* note 46.

63 See e.g. Schaber, P., 'Menschenwürde und Selbstbetrachtung: Ein Vorschlag zum Verständnis der Menschenwürde', (2004) 63 *Studia Philosophica* 93–106; Hennette-Vauchez, 'A human *dignitas* ?', *supra* note 46.

64 See Hennette-Vauchez, 'A human *dignitas* ?', *supra* note 46; Rosen, *Dignity*, *supra* note 16, 63 ss.

65 See e.g. the dwarf case: UN Human Rights Committee, *Manuel Wackenheim v. France*, Communication No. 854/1999, 15 July 2002, UN Doc CCPR/C/75/D/854/1999. See also the controversial use of dignity in justifying restrictions to Art. 8 ECHR in ECtHR, *SH and others v. Austria*, Application No. 57813/00, 3 November 2011, par. 113. Many thanks to Roger Brownsword for drawing my attention to these self-referential dignity-based forms of human rights restrictions that are not based on the rights of others, but on the dignity of the right-holders themselves and therefore come very close to the Dworkinian "Sarah-lovers"-critique of double-counting of preferences.

66 See Rosen, *Dignity*, *supra* note 16, 58 ff.

67 See e.g. Gosepath, 'Equality', *supra* note 4; Scheffler, 'What is', *supra* note 4; Pojman, 'Equal Human Worth', *supra* note 4; Arneson, 'Equality', *supra* note 4; Roemer, 'Equality of Resources', *supra* note 4; Cohen, 'Currency', *supra* note 4; Dworkin, 'What is Equality', Part 1 and 2, *supra* note 4.

Before discussing political equality itself, it is important to explain how one can get to political equality from equal moral status and elaborate on the relationship between the two. That passage and relationship are actually reflected, I will argue, in the recognition of universal moral rights as human rights (moral and legal), and the passage from the ones to the others.

First of all, from equal moral status to political equality. The relational or social nature of equal moral status alluded to before implies that, to borrow Allen Buchanan's words, 'the proper acknowledgement of a person's moral status requires some sort of fundamental public recognition of equality'.⁶⁸ Equality is distinctly public or political as result.⁶⁹ In a nutshell, public or political equality implies that people can see that they are being treated as equals by others and this takes the form of its recognition by the law and institutions.⁷⁰

The inherently political dimension of equality implies reconciling the moral universality of equality with both the relativity and contingency of political life. With respect to the relativity of politics, first of all, political equality depends on the existence of a political community, but corresponding political communities are not (yet) universal. Here it is important to emphasize the normative nature of political equality and the fact that is used both to refer to a state of affairs and to how it should be. As to the contingency of politics and its implications for political equality, secondly, the tension may be alleviated by reference to the conditions or circumstances of political equality. If it is true that the public recognition of equal moral status requires public institutions and processes and hence a political community, the existence of the latter depends on other elements. Those further conditions of existence of a political community and hence of political equality are, on the one hand, the common subjecthood to decisions and laws, and the interdependence of stakes and the rough equality of those stakes among the members of the future community, on the other.⁷¹ If those conditions are given, the equal moral status of the members in that community implies their political equality.

What this means is that there are pre-political circumstances in which individuals merely benefit from a social form of equal moral status.⁷² It also means that not all individuals may claim political equality in a given political community on grounds of their equal moral status; their political equality will follow their full membership in the community, i. e. their being subjected to the community's decisions and law, and their sharing interdependent and roughly equal stakes with others. This is particularly interesting in the context of post-national political communities, such as the European Union (EU) or other international communities of states.

Secondly, political equality. Once the political conditions are such that political equality may be required on the grounds of equal moral status, the next question to arise is how political equality can be vindicated.

68 See Buchanan, 'Moral Status', *supra* note 3, 379; Anderson, 'Point of Equality', *supra* note 20, 288–9. See also Habermas, 'Concept of Human Dignity', *supra* note 2, 472.

69 See Anderson, 'Point of Equality', *supra* note 20, 288–9. See also Williams, 'Idea of Equality', *supra* note 32.

70 See Christiano, T., 'Democratic Legitimacy and International Institutions', in Besson, S., and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press 2010, 119–37, 121.

71 See Christiano, *Constitution of Equality*, *supra* note 2, 2; Christiano, 'Democratic', *supra* note 70, 121–2.

72 See also Erman, E., 'Should All Political Contexts be Democratic? Contours of a Two-Faced Theory of Legitimacy', in Erman, E., and Näsström, S. (eds), *Political Equality and Global Democracy*, London: Palgrave Macmillan, 2012, forthcoming.

The political dimension of equal moral status together with its rights-based nature lead to a further process: the struggle for equal participation rights is based on the idea of equal moral status.⁷³ And this in turn implies struggling for the establishment of a democratic regime that includes all those subjected to a decision into the decision-making process. Democracy is indeed the way 'of publicly realizing equality when persons who have diverse interests need to establish rules and institutions for the common world in which they live'⁷⁴ and this in spite of persistent and widespread reasonable disagreement.⁷⁵ Democracy enlivens and enables political equality. The idea of equal political status or membership may also be referred to as democratic membership therefore.⁷⁶ Of course, democracy implies more than political equality. Scope precludes discussing it extensively, but democracy *qua* political regime also requires egalitarian deliberation and decision-making procedures. There may be political communities as a result where there is political equality but where other elements necessary to democracy are missing.⁷⁷ One may think of the EU, for instance.

In conclusion, when the political circumstances are given and when individuals are not only subjected to the same decisions and laws, but also share interdependent and roughly equal stakes, equal moral status implies political equality. In turn, as a person's equal moral status implies mutual moral rights and duties, political equality gives rise to equal participation rights and is therefore best served by a democratic regime where individuals are recognized those equal participation rights. Of course, one may object to the parochial dimension of democratic equality. It is here that the proposed minimalist approach to political equality *qua* principle of transnational justice becomes most interesting. Its institutional and political dimension and its need for contextual specification enable it to escape over-specification and parochialism.⁷⁸

2. Equality and Human Rights

The next step in the argument is dedicated to clarifying how equality fits into the concept of human rights.⁷⁹ This is what one may refer to as the egalitarian dimension of human rights.

73 See Buchanan, 'Moral Status', *supra* note 3, 380 by reference to Waldron, *God, Locke and Equality*, *supra* note 31, Ch. 3 and the liberal political tradition. See also Anderson, 'Point of Equality', *supra* note 20, 317–8.

74 See Christiano, 'Democratic', *supra* note 70, 121–2.

75 On the connection between equality and democracy, see also Anderson, 'Point of Equality', *supra* note 20, 289.

76 See Christiano, *Constitution of Equality*, *supra* note 2, 2; Christiano, 'Democratic', *supra* note 70, 121–2.

77 See Erman, 'Political Contexts', *supra* note 72, for a more complete distinction between political equality and democracy.

78 For such a minimalist and non-parochialist approach to equal status as a component of international human rights, see e.g. Buchanan, 'Egalitarianism', *supra* note 2; and Buchanan, 'Equality', *supra* note 2, 78–80. See also Buchanan, A., 'Human Rights and the Legitimacy of the International Order', (2008) 14 *Legal Theory* 39–70 for an institutional proposal.

79 This section is a revised version of a section of previously published work: see Besson, 'Decoupling and Recoupling', *supra* note 1.

a. The Morality and the Legality of Human Rights

To start with, the relationship between human rights and equal moral status, and political equality more specifically, explain the inherently moral-political but also legal nature of human rights.

i. *The Morality of Human Rights*

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

First of all, a human right exists *qua* moral *right* when an interest is a sufficient ground or reason to hold someone else (the duty-bearer) under a (categorical and exclusionary) duty to respect that interest against certain standard threats vis-à-vis the right-holder.⁸⁰ For a right to be recognized, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context.⁸¹ Once the abstract right is recognized, specific duties will be determined in each concrete case by reference to the specific circumstances and potential duty-bearers. Rights are, on this account, intermediaries between interests and duties.⁸²

Turning to the second element in the definition, *human* rights are universal moral rights of a special intensity that belong to all human beings by virtue of their humanity. Human rights are universal moral rights because the interests they protect belong to all human beings. *Qua* general moral rights, they protect fundamental human interests that human beings have by virtue of their humanity and not of a given status or circumstance (unlike special rights). Human rights are universal and general rights that protect fundamental interests. Those interests constitute part of a person's well-being in an objective sense; they are the objective interests that, when guaranteed, make for a decent or minimally good individual life.

Of course, there has to be a threshold of importance at which a given interest is regarded as sufficiently fundamental to give rise to duties and hence to a right. True, the fundamental nature of the protected interests has to be determined by reference to a context and time rather than established once and for all.⁸³ More specifically, however, what makes it the case, that a given individual interest is regarded as sufficiently fundamental or important to generate a duty and that, in other words, the threshold of importance and point of passage from a general and fundamental interest to a human right is reached, may be found in the normative status of each individual *qua* equal member of the moral-political community, i. e. their political equal-

80 Raz, J., 'On the Nature of Rights', (1984) 93 *Mind* 194–214, 195.

81 *Ibid.*, 200, 209.

82 *Ibid.*, 208.

83 See on the ahistorical and synchronic universality of human rights: Tasioulas, J., 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps', (2002) 10 *European Journal of Philosophy* 79–100; Tasioulas, J., 'The Moral Reality of Human Rights', in Pogge, T. (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, Oxford: Oxford University Press, 2007, 75–101, 76–7. See also Raz, J., 'Human Rights in the New World Order', (2010) 1:1 *Transnational Legal Theory* 31–47. Contra: Griffin, J., 'First Steps in an Account of Human Rights', (2001) 9:3 *European Journal of Philosophy* 306–27.

ity or equal political status.⁸⁴ Only those interests that are recognized as socio-comparatively important by members of the community can be recognized as sufficiently fundamental to give rise to duties and hence as human rights. A person's interests merit equal respect in virtue of her status as member of the community and of her mutual relations to other members in the community. The recognition of human rights is done mutually and not simply vertically and top-down, and as a result human rights are not externally promulgated but mutually granted by members of a given political community.⁸⁵ This is particularly important as it allows for the mutual assessment of the standard threats on certain interests that deserve protection, on the one hand, and of the burdens and costs of the recognition of the corresponding rights and duties, on the other.

As a matter of fact, human rights are not merely a consequence of individuals' equal political status, but also a way of actually earning that equal status and consolidating it. Without human rights, political equality would remain an abstract guarantee; through mutual human rights, individuals become actors of their own equality and members of their political community.⁸⁶ Human rights are power-mediators, in other words:⁸⁷ they enable political equality. Borrowing Arendt's words: 'we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.'⁸⁸ Human rights protect those interests tied to equal political membership and whose disrespect would be tantamount to treating them as outsiders.⁸⁹ Of course, some human rights, such as civic and political rights, are more closely tied to actual political membership, while others such as the right to life, for instance, are closer to basic demands of humanity and hence to access to political membership. Even the latter rights, however, constrain what equal membership can mean if it is to be legitimate and the kind of interests it must protect. By submitting individuals to genocide, torture and other extreme forms of cruel treatment, a community excludes them and no longer treats them as equal members, thus violating the threshold of recognition of human rights: political equality.⁹⁰ This is in line with the republican idea of the political community *qua* locus of rights.⁹¹

Although there may seem to be a contradiction in arguing both that human rights require political equality as a constitutive threshold and, in the previous sec-

84 See Forst, 'Justification of Human Rights', *supra* note 2; Forst, R., 'The Basic Right to Justification: Toward a Constructivist Conception of Human Rights', (1999) 6:1 *Constellations* 35–60, 48; Christiano, *Constitution of Equality*, *supra* note 2, 138, 156.

85 See Cohen, J., 'Minimalism about Human Rights: The Most We Can Hope For?', (2004) 12:2 *The Journal of Political Philosophy* 190–213, 197–8; Forst, 'Justification of Human Rights', *supra* note 2; Baynes, K., 'Towards a Political Conception of Human Rights', (2009) 35:4 *Philosophy and Social Criticism* 371–90, 382.

86 See Cohen, 'Minimalism', *supra* note 85, 197–8; Cohen, J.L., 'Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization', (2008) 36:4 *Political Theory* 578–606, 585–6.

87 For the original idea of mediating duties, see Shue, H., 'Mediating Duties', (1988) 98 *Ethics* 687–704, 703. See also Reus-Smit, C., 'On Rights and Institutions', in Beitz, C. and Goodin, R. (eds), *Global Basic Rights*, Oxford: Oxford University Press, 2009, 25–48. On liberal rights and the exercise of power in general, see Christiano, *Constitution of Equality*, *supra* note 2, 134.

88 Arendt, H., 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism*, London: Penguin, 1951, 147–82; reprinted in Goodale, M. (ed.), *Human Rights: An Anthropological Reader*, Oxford: Blackwell, 2009, 32–57, 147–82.

89 The following argument is a specific development of Cohen, 'Minimalism', *supra* note 85, 197–8's argument.

90 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.

91 See Cohen, 'Rethinking', *supra* note 86, 604 fn. 47.

tion, that political equality amounts to the mutual entitlements that are human rights, the contradiction is only apparent. Like basic moral rights and equal moral status, human rights and political equality are synchronic and mutually reinforcing: *à la fois* the moral entitlements that are constitutive of a status and the status made of those entitlements. Again, this explains why, if human rights are constitutive of equal moral-political status, they are not themselves grounded in that status. All this does not prevent, of course, human rights from being in conflict with more robust forms of equality, such as equality of welfare or even equality of opportunity for welfare, or vice-versa.⁹²

In short, the proposed account of the nature of human rights follows a modified interest-based theory: it is modified or complemented by reference to considerations of equal moral-political status in a given community.⁹³ Considerations of political equality are not simply considered as objective interests, but are distinct from them, albeit articulated with those interests in the process of grounding human rights. Nor would political equality be a sufficient ground for human rights without objective interests in a decent or minimally good individual life; there are cases in which a person's political or public equality is threatened without this affecting its decent or minimally good life. The relationship between human rights and political equality bridges the sterile opposition between the individual and the group, on the one hand, and the good and the right, on the other.⁹⁴ Under a purely status-based or a purely interest-based model, the manichean opposition between the individual and the group, and between his private and public autonomy would lead to unjustifiable conclusions that are tempered in the proposed account.⁹⁵

Evidence of the egalitarian threshold of human rights may actually be found in the relational and socio-comparative nature of human rights. This comes out in many of the facets of human rights in practice. One may think of their systematic nature, for instance.⁹⁶ Human rights belong to everyone equally and mutually so, and, accordingly, their systematicity is a testimony to their relational nature. Another confirmation may be found in the non-inherently individualistic nature of human rights that protect basic individual interests deemed comparatively important within the political community. Of course, some human rights protect individual interests

92 On this question, see section 3 below.

93 The role of equal moral-political status as a threshold is echoed in Buchanan, 'Egalitarianism', *supra* note 2, 707's idea of 'articulating' equal status with human rights but it is more specific than his idea of inclusion 'at the deepest level in one's grounding of human rights'.

94 The proposed account comes very close to Forst, 'Justification of Human Rights', *supra* note 2; Forst, 'Basic Right', *supra* note 84, 48–50; and Forst, R., *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit*, Frankfurt am Main: Suhrkamp, 2007. 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, *Constitution of Equality*, *supra* note 2, 156). Both accounts, of course, rely on Habermas' idea of co-originality between democratic sovereignty and human rights (Habermas, J., *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 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 foundation for their co-originality. See Brettschneider, C., *Democratic Rights – The Substance of Self-government*, Princeton: Princeton University Press, 2007, 29–38 for a similar interpretation of Habermas' co-originality.

95 See Tasioulas' critique of Griffin, *On Human Rights*: Tasioulas, 'Taking Rights', *supra* note 6.

96 See e.g. Waldron, J., 'Taking Group Rights Carefully', in Huscroft, G. and Rishworth, P. (eds), *Litigating Rights: Perspectives from Domestic and International Law*, Oxford: Hart, 2002, 203–220, on the difficulties of group rights in this respect.

in collective goods or individual interests whose social importance is part of the reason to protect them as rights.⁹⁷ Those rights reflect the very egalitarian dimension of all human rights, albeit maybe more strongly than others. One may think of anti-discrimination rights, in particular. All other human rights, however, also have a socio-comparative dimension through their egalitarian threshold. Finally, the egalitarian dimension of human rights may also be echoed in the idea of a fundamental or inviolable core of a human right as a limit on human rights' restrictions.⁹⁸ That dimension corresponds to the notion of inviolability as it captures what is inviolable in every individual right whatever the justifications. Contrary to the standard inviolability approaches,⁹⁹ each human right is grounded exclusively in an interest and not in a status, but in one that is deemed socio-comparatively fundamental and constitutive of one's political equality. What is inviolable is not the interest, as a result, but the fact that everyone without exclusion ought to benefit from its protection and hence from the right to have rights that protect it:¹⁰⁰ the discriminatory exclusion from the protection of the rights of certain people (usually due to their belonging to a sub-group that is vulnerable and structurally disadvantaged), as opposed to their mere restriction is what is precluded by inviolability.¹⁰¹

The relationship between human rights and political equality explains how closely tied human rights are to democracy.¹⁰² If democracy is required by political equality and human rights and political equality are mutually constitutive, democracy is a requirement of human rights and implies human rights in return. Of course, one may object to the parochial dimension of a human rights account based on democratic equality. The parochialism objection is that international human rights law embodies a 'parochial' set of values or ordering of the same values that it unjustifiably imposes, through its quasi-universal or universal scope, on people and societies who do not share it. The proposed minimalist approach to political equality *qua* principle of transnational justice can escape this objection, however. Its institutional and po-

97 See e.g. Waldron, 'Taking Group Rights', *supra* note 96; Tasioulas, 'Human Rights', *supra* note 6.

98 It corresponds arguably to the German or Swiss notion of *Kerngehalt* and the idea of the inviolability of the fundamental core of every human right, including against democratic restrictions (e.g. popular constitutional initiatives in Switzerland; see e.g. Swiss Federal Council, *Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne*, 31 March 2011, FF 2011 3401–47).

99 See e.g. Kamm, F., *Intricate Ethics: Rights, Responsibilities and Permissible Harm*, Oxford: Oxford University Press, 2007, 254; Kamm, F., 'Rights', in Coleman, J. and Shapiro, S. (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford: Oxford University Press, 2002, 476–513; Nagel, T., 'La valeur de l'invocabilité', (1994) 99:2 *Revue de métaphysique et de morale* 149–66; Tasioulas, 'Justice, Equality', *supra* note 8. See also Wingert, 'Was ist', *supra* note 37.

100 See also Ladwig, 'Menschenwürde', *supra* note 42, 64 albeit in the dignity context.

101 This may actually explain, for instance, why direct forms of discrimination on prohibited grounds such as gender or race may not be justified in many legal orders. See Besson, S., 'Never Shall the Twain Meet? Gender Discrimination under EU and ECHR Law', (2008) 8.3 *Human Rights Law Review* 647–682.

102 See Christiano, *Constitution of Equality*, *supra* note 2; Gosepath, *Gleiche Gerechtigkeit*, *supra* note 2, 322 and 345. The proposed account differs from Gosepath's, however, in two important ways: first of all, it is meant as an account of vertical recoupling between *international* human rights and *domestic* democracy (see Besson, 'Decoupling and Recoupling', *supra* note 1) and, secondly, it understands human rights as *moral-political and inherently legal* and hence does not see a difference between moral human rights directly related to equal moral status and political democracy only indirectly related to equal moral status. See also Menke/Pollmann, *Philosophie der Menschenrechte*, *supra* note 2, 178 for this critique.

litical dimension and its need for contextual specification enable it to escape over-specification and parochialism.

This brings me to the third element in the definition of human rights: human rights are entitlements against *public institutions* (national, regional or international). Human rights are rights individuals have against the political community, i. e. against themselves collectively. They generate duties on the part of public authorities not only to protect equal individual interests, but also individuals' political status *qua* equal political actors. Public institutions are necessary for collective endeavour and political self-determination, but may also endanger them. Human rights enable the functioning of those institutions in exchange for political equality and protection from abuse of political power. This is why one can say that human rights both are protected by public institutions and provide protection against them; they exist because of collective endeavour in order both to favour and constrain it. Of course, other individuals may violate the interests protected by human rights and ought to be prevented from doing so by public institutions and in particular through legal means.¹⁰³ This ought to be the case whether those individuals' actions and omissions may be attributed to public authorities or not *qua de jure* or *de facto* organs. However, public institutions remain the primary addressees of human rights claims and hence their primary duty-bearers.¹⁰⁴

Of course, there may be many overlapping political communities (e.g. international organizations (IOs), regional organizations and states) at stake and the present argument is not limited to the national polity and to the state – although we will see later how it excludes a world state. Nor is the argument limited to formal citizens¹⁰⁵ only or at least to those citizens who are also nationals; membership ought to include at varying degrees all those normatively subjected to the activities of political authorities and who are therefore subjects to the laws or decisions of the community.¹⁰⁶ This includes asylum seekers, economic migrants, stateless persons and so on. As we will see, human rights work as political irritants and mechanisms of gradual inclusion that lead to the extension of the political franchise and in some cases of citizenship itself to new subjects in the community. Nor, finally, does the argument

103 See Shue, H., *Basic Rights: Subsistence, Affluence and US Foreign Policy*, 2nd edn, Princeton: Princeton University Press, 1996, on the different types of negative and positive duties corresponding to a human right, including duties to protect and hence to prevent other agents from violating them.

104 This normative argument actually corresponds to the state of international human rights law that only directly binds states and/or international organizations to date and no other subjects (e.g. individuals and groups of individuals). The universality of human rights obligations does not imply the generality of the duty-bearers of the corresponding duties, i.e. a personal scope that reaches beyond institutional agents whether domestic or international (contra: O'Neill, O., 'The Dark Side of Human Rights', (2005) 81:2 *International Affairs* 427–39; Lafont, C. 'Accountability and Global Governance: Challenging the State-centric Conception of Human Rights', (2010) 3:3 *Ethics and Global Politics* 193–215, 203). See also Besson, 'Decoupling and Recoupling', *supra* note 1 on this question.

105 I am using 'citizenship' to mean democratic membership. Of course, one may be a citizen of a non-democratic state or a non-democratic post-national political community more generally, but this will not be my concern here.

106 Scope precludes not only addressing the question of the boundaries of democracy in this article, but also providing a full defence of the all-subjected principle endorsed here. See for a discussion of the all-affected or the all-subjected principles, e.g. Goodin, R., 'Enfranchising All Affected Interests, and Its Alternatives', (2007) 35 *Philosophy and Public Affairs* 40–68; Näsström, S., 'The Challenge of the All-Affected Principle', (2011) 59 *Political Studies* 116–34. See on the boundaries of democracy debate, Abizadeh, A., 'Closed Borders, Human Rights and Democratic Legitimation' in Hollenbach, D. (ed.), *Driven from Home: Human Rights and the New Realities of Forced Migration*, Washington DC: Georgetown University Press, 2010, 147–66.

imply that human rights apply within national borders only; if national political authorities subject the fundamental interests of individuals to norms and decisions outside its borders, those individuals deserve equal protection both in the decision-making process and the application of those decisions. This includes individuals and groups subjected to law-making and decision-making abroad.¹⁰⁷

The institutional nature of human rights' duty-bearers is the main ground for the distinction between universal moral rights and human rights that are a subset of universal moral rights. Human rights are the universal moral rights of the individual members of a given political community. This explains their mutual relation to political equality. Universal moral rights also have an egalitarian dimension, of course, but it is one that pertains to the basic equal moral status of all persons as it was discussed in the previous section. As discussed, their equal moral status gives rise to mutual entitlements that one may refer to as universal moral rights. Those rights may be held against individuals and do not require institutions for the protection. This also explains, as we will see, the difference between human rights and universal moral rights regarding legalization.

ii. The Legality of Human Rights

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

Just as moral rights are moral propositions and sources of moral duties, legal rights are legal propositions and sources of legal duties. They are moral interests recognized by the law as sufficiently important to generate moral duties.¹⁰⁸ The same may be said of legal human rights: legal human rights are fundamental and general moral interests recognized by the law as sufficiently important to generate moral duties.

Generally speaking, moral rights can exist independently from legal rights, but legal rights recognize, modify or create moral rights by recognizing moral interests as sufficiently important to generate moral duties.¹⁰⁹ Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognizing them as legal 'rights'. Conversely, some legal rights may not actually protect pre-existing moral rights or create moral rights, thus only bearing the name of 'rights' and generating legal duties at the most.¹¹⁰ The same cannot be said of human rights more specifically, however. True, universal moral interests and rights may be legally protected without being recognized as legal 'rights'. But, as we will see, human rights

107 See also Besson, S., 'The Extra-territoriality of the European Convention on Human Rights', (2012) 25:4 *Leiden Journal of International Law* forthcoming.

108 Raz, J., 'Legal Rights', (1984) 4:1 *Oxford Journal of Legal Studies* 1–21, 12. For a recent restatement of his theory of moral and legal rights and their relationship, see Raz, 'New World Order', *supra* note 83.

109 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 preexisting human right.

110 Note that this duty is the primary moral duty to protect the interest that founds the legal human right, and not the secondary moral duty to obey the legal norm 'human right': see Besson, S., 'The Democratic Authority of International Human Rights', in Follesdal, A. (ed.), *The Legitimacy of Human Rights*, Cambridge: Cambridge University Press, 2012, forthcoming.

can only exist as moral rights *qua* legal rights. Conversely, one may imagine legal norms referred to as human rights that do not correspond to moral human rights. In such a case, the legal norms named 'human rights' would only give rise to legal duties and not to moral (rights-based) duties. Legal human rights, however, can only be regarded as rights *stricto sensu* when their corresponding duties are not only legal, but also moral.

Two additional remarks on the relationship between moral and legal rights and the relationship between moral and legal human rights are in order. The differences between rights and human rights, on the one hand, and between their respective moral and legal dimensions, on the other, can be quite important given the moral-political nature of human rights and what this implies in turn for their inherently moral and legal nature.¹¹¹

Not all moral rights are legally recognized as legal rights, on the one hand. There are many examples of moral rights which have not been recognized as legal rights. Nor should all moral rights be recognized 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 recognized as legal human rights. Some are even expressly recognized as universal moral rights by the law even though they are not made into legal rights or modulated by the law.¹¹² A distinct question is whether they ought to be legalized and hence protected by law. Again, respect for universal moral rights ought to be voluntary in priority, and this independently from any institutional involvement. However, the universal moral rights that will become human rights create moral duties for institutions,¹¹³ and hence for the law as well, to recognize and protect human rights.¹¹⁴ Based on the moral-political account of human rights presented previously, the law provides the best and maybe the only way of mutually recognizing the socio-comparative importance of those interests in a political community of equals.¹¹⁵ It enables the weighing of those interests against each other and the drawing of the political equality threshold or comparative line. Further, the law provides the only institutional framework in which the necessary pre-human rights recognition assessment of the abstract feasibility of human rights can take place, and in particular the abstract assessment of a feasible identification and egalitarian allocation of human rights duties and duty-bearers.

111 Contra Wellman, C.H., *The Moral Dimensions of Human Rights*, Oxford: Oxford University Press, 2011; Tasioulas, 'Taking Rights', *supra* note 6; Griffin, J., *On Human Rights*, Oxford: Oxford University Press, 2008, I argue that human rights are necessarily legal and not only moral.

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

113 Of course, as alluded to in section 1, mutual moral entitlements stemming from equal moral status also include other basic moral rights than human rights (which are a specific subset of universal moral rights), rights that may bind other individuals and not institutions like human rights, on the one hand, and rights that do not as a result need to be legalized unlike human rights, on the other.

114 See Raz, 'New World Order', *supra* note 83.

115 See e.g. Cohen, 'Rethinking', *supra* note 86, 599–600; Forst, 'Justification of Human Rights', *supra* note 2; Forst, 'Basic Right', *supra* note 84, 48–50. See even Pogge, T., 'Human Rights and Human Responsibilities', in De Greiff, P. and Cronin, C. (eds), *Global Justice and Transnational Politics*, Cambridge Mass.: The MIT Press, 2002, 151–196; reprinted with revisions in Kuper, A. (ed.), *Global Responsibilities: Who Must Deliver on Human Rights?*, New York: Routledge, 2005, 3–35, 3, fn. 26 who concedes this point in the case of civil and political rights. It seems, however, that the egalitarian dimension of human rights and hence their inherently legal nature would apply even more to the case of social and economic rights than to others.

In short, the law makes universal moral rights into human rights, just as politics turn equal moral status into political equality. 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.'¹¹⁶ Thus, while legal rights *stricto sensu* are necessarily moral in nature (*qua* rights), human rights (*qua* rights) are also necessarily legal and they are as a result both moral and legal rights.

Nor, on the other hand, do legal rights necessarily always pre-exist as independent moral rights. Most do and are legally recognized moral rights,¹¹⁷ but others are legally created or legally specified moral rights.¹¹⁸ 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 recognized 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.¹¹⁹

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

116 Habermas, J., 'Die Legitimation durch Menschenrechte', in *Die postnationale Konstellation. Politische Essays*, Frankfurt am Main: Suhrkamp, 1998, 170–92, 183. See also Habermas, *Faktizität*, *supra* note 94, 310–12; Habermas, 'Concept of Human Dignity', *supra* note 2, 470; Habermas, *Zur Verfassung*, *supra* note 40, 22 who now distinguishes between the *moral content* and the *legal form* of human rights, even though he talks of legal 'creation' (*Erzeugung*) in the corresponding footnote 19.

117 The legalization of preexisting moral rights is rarely a mere translation; it usually specifies and somehow changes the moral rights. See Meckled-Garcia, S. and Cali, B., 'Lost in Translation: The Human Rights Ideal and International Human Rights Law', in Cali, B. and Meckled-Garcia, S. (eds), *The Legalization of Human Rights, Multidisciplinary perspectives on human rights and human rights law*, London: Routledge, 2006, 11–31; and Cali, B. and Meckled-Garcia, S., 'Introduction: Human Rights Legalized – Defining, Interpreting and Implementing an Ideal', in Cali, B. and Meckled-Garcia, S. (eds), *The Legalization of Human Rights, Multidisciplinary Perspectives on Human Rights and Human Rights Law*, London: Routledge, 2006, 1–8.

118 See Raz, 'Legal Rights', *supra* note 108, 16–17. See also Raz, 'New World Order', *supra* note 83.

119 Both examples are given by Raz, 'Legal Rights', *supra* note 108, 16–17; and Raz, 'New World Order', *supra* note 83.

b. The Domestic and International Legality of Human Rights

The next question pertains to the political community that ought to be recognizing the existence of human rights legally, and hence whose members' political equality is in the making, and hence to the level of legalization of those rights.¹²⁰

i. *The Right to Have Rights*

Per se, the legalization of human rights, i. e. the legal recognition and modulation of universal moral rights *qua* human rights, could take place either at the domestic or at the international level: through national or international legalization. Given what was said about the interdependence between human rights, political equality and democracy, however, the political process through which their legalization 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 as main instrument to recognize fundamental and general human interests as sufficiently important to generate state duties at the domestic level is difficult. Not only does international law-making include many other states and subjects than those affected by the laws and decisions of the polity bound by human rights, but the conditions of political equality and the democratic quality of its processes are not yet secured at the international level.¹²¹

To solve this riddle and succeed in recoupling human rights and democracy across levels of governance, it is important to distinguish between two categories of rights: rights that pertain to the access to membership in a political community (rights to membership) and those that pertain to actual membership in the political community (membership rights). Interestingly, this distinction corresponds to two competing readings of Hannah Arendt's 1949 idea of the 'right to have rights' depending on whether one understands them as being moral or legal rights, first, and as being domestic or international rights, second.¹²²

Starting with the former category, rights to equal political membership contribute to the constitution of an equal political status, as opposed to the second category of rights that protect that very equal political status. Rights to membership prohibit, for instance, submitting individuals to genocide, torture and other extreme forms of

120 The argument presented in this section is a summary of a lengthier argument developed in Besson, 'Human Rights', *supra* note 2. See also Besson, 'Decoupling and Recoupling', *supra* note 1.

121 See e.g. Christiano, 'Democratic', *supra* note 70, on the lack of representativity and the asymmetry of international law-making processes from a democratic theory's perspective. See also Cohen, 'Rethinking', *supra* note 86, 599–600; Besson, 'Democratic Authority', *supra* note 110.

122 Arendt, 'Decline', *supra* note 88, 177–8. For her first essay on the topic, see Arendt, H., "'The Rights of Man': What Are They?", (1949) 3:1 *Modern Review* 24–37. For Arendt's views on human rights, see e.g. Benhabib, S., "'The right to have rights": Hannah Arendt on the contradictions of the nation-state', in *The Rights of Others: Aliens, Residents, and Citizens*, Cambridge: Cambridge University Press, 2004, 49–70; Gosepath, 'Hannah Arendt's Kritik der Menschenrechte und ihr ‚Recht, Rechte zu haben,' in Heinrich-Böll-Stiftung (ed), *Hannah Arendt: Verborgene Tradition – Unzeitgemäße Aktualität?*, Berlin: Akademie Verlag, 2007, 253–62; Cohen, J., 'Sovereignty and Rights: Thinking with and beyond Hannah Arendt', in Heinrich-Böll-Stiftung (ed.), *Hannah Arendt: Verborgene Tradition – Unzeitgemäße Aktualität?*, Berlin: Akademie Verlag, 2007, 291–309; Menke, Ch., 'The Aporias of Human Rights and the One Human Right: Regarding the Coherence of Hannah Arendt's Argument', (2007) 74:1 *Social Research* 739–62; Besson, S., 'The Right to Have Rights – From Human Rights to Citizens' Rights and Back', in Goldoni, M. and McCorkindale, C. (eds), *Arendt and the Law*, Oxford: Hart Publishing, 2012, 335–55.

cruel treatment, through which a community excludes individuals and does not treat them as equal members.¹²³ They also include rights to asylum (Art. 14 UDHR) and the customary right to *non-refoulement*.

Moral and legal rights to membership of this kind cannot be guaranteed exclusively from within a given political community since they work as constraints on democratic sovereignty and self-determination. This is why they are usually protected from the outside and through international human rights law.¹²⁴ Of course, to be democratically legitimate, they have to be recognized legally through inclusive and deliberative processes. This may prove difficult in the current circumstances of international law, but processes of that kind are incrementally developed in international law-making. Importantly, the legalization of international human rights is a two-way street that is not limited to a top-down reception but is also bottom-up and comes closer to a virtuous circle of legitimation. The recognition and existence of those rights *qua* international human rights that constrain domestic polities ought therefore to be based on democratic practises recognized domestically. And only those polities that respect international human rights are deemed legitimate in specifying the content of those rights and hence in contributing to the recognition and existence of those rights *qua* international human rights that will constrain themselves in return. This is what Buchanan refers to as the mutual legitimation of domestic and international law, and it applies very well to international human rights law.¹²⁵

In short, rights to membership correspond to a first and main reading of Arndt's right to have rights: those universal moral rights, and potentially also international legal rights to membership, are rights that guarantee the ulterior benefit of human rights within each political community.¹²⁶ Those universal moral rights to have human rights are constitutive of one's equal moral status and amount, in political circumstances where the conditions of political equality are given, to a right to equal political membership and participation.

The second group of rights that guarantee membership in the political community, i. e. most human rights, can at least be regarded as legally protected universal moral rights and most of the time as legal rights as well. However, unless they refer to and correspond to existing domestic (moral-political and legal) human rights, they cannot (yet) be regarded as human rights for lack of an international moral-political community.¹²⁷

Qua legal rights, those international human rights norms guarantee rights to individuals under a given state's jurisdiction, on the one hand, and to other states (or arguably IOs) (international human rights are usually guaranteed *erga omnes*), on the

123 See Cohen, 'Rethinking', *supra* note 86, 587.

124 See also Dworkin, *Justice*, *supra* note 2, 335–9 for a similar account of the difference between international human rights law and domestic human rights law.

125 On the bootstrapping between international human rights law-making and their democratic reception and interpretation at domestic level, see Buchanan, A., *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004, 187–189; Buchanan, 'Egalitarianism', *supra* note 2.

126 See e.g. Cohen, 'Rethinking', *supra* note 86; Benhabib, "'The right to have rights'", *supra* note 122, 56–61.

127 There is, in other words, a form of political parochialism or legal contingency of human rights that conditions their recognition as international legal human rights, well before parochialism arises as a problem for the scope of legitimacy of an existing legal human right. See also Raz, 'New World Order', *supra* note 83.

other, to have those rights guaranteed as 'human rights' within a given domestic community. They correspond to states' (and/or arguably IOs) duties to secure and ensure respect for those rights as 'human rights' within their own jurisdiction.¹²⁸ In that sense, international human rights duties are second-order duties for states (and/or arguably IOs) to generate first-order human rights duties for themselves under domestic law, i. e. international duties to have domestic duties. What those international human rights norms do, in other words, is protect legally the universal moral right to have rights discussed as a first kind of human rights, i. e. the right to equal membership in a moral-political community with all the other human rights this status implies.

Unlike most readings of Arendt's right to have rights,¹²⁹ this reading understands rights in the second category, i. e. membership rights, as universal moral rights which may also be protected as international legal rights. Their underlying nature as universal moral rights actually explains their *erga omnes* effects. They are not human rights themselves but are rights to have human rights, the latter being at once moral and legal rights and not only positive legal rights.

In sum, there are two groups of rights among the rights usually referred to as international human rights: the first group (rights to membership) to be legalized at the international level, while rights belonging to the second group (membership rights) have to be legalized in domestic law in a given political community before they can be recognized as human rights under international law. In the meantime, international law's human rights norms that protect rights in the latter category guarantee rights to have human rights protected under domestic law.

ii. From International Human Rights to Domestic Human Rights and Back

Interestingly, the normative considerations presented before about the locus of legitimation and legalization of human rights are reflected in contemporary processes of legalization of human rights under domestic and international law. They fit and justify, in other words, our current international human rights law and practice. The latter are indeed usually drafted in abstract and minimal terms, thus calling for domestic reception and specification.¹³⁰

As a matter of fact, it is through the relationship of mutual reinforcement between citizens' rights and human rights and the productive tension between external guarantees and internal ones that human rights law has consolidated at both domestic and international levels.¹³¹ International human rights generate duties of inclusion

128 See O'Neill, 'Dark Side', *supra* note 104, 433 on the distinction between first-order human rights duties at domestic level and second-order human rights duties generated by international human rights law.

129 See e.g. Benhabib, "'The right to have rights'", *supra* note 122; Gosepath, 'Hannah Arendts Kritik', *supra* note 122.

130 See Besson, 'Decoupling and Recoupling', *supra* note 1; Dworkin, *Justice*, *supra* note 2, 337–8.

131 See Besson, 'Decoupling and Recoupling', *supra* note 1; Habermas, 'Concept of Human Dignity', *supra* note 2, 478; Benhabib, S., 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty', (2009) 103:4 *American Political Science Review* 691–704; Benhabib, *Dignity in Adversity*, *supra* note 1, 16 and 126; Habermas, *Zur Verfassung*, *supra* note 40, 31–2, 36–8. Interestingly, neither Habermas, *Zur Verfassung*, *supra* note 40, nor Benhabib, *Dignity in Adversity*, *supra* note 1, whose accounts of human rights use Arendt's 'right to have rights', do distinguish between the

on domestic authorities and the democratic concretizations of citizens' rights, and the latter feed into international human rights guarantees in return. This constant interaction between human rights and citizens' rights is reminiscent of Arendt's universal right to have particular rights and the to-ing and fro-ing between the universal and the particular highlighted in the previous sections. Human rights are specified as citizens' rights but citizens' rights progressively consolidate into human rights in return.

This virtuous circle can actually be exemplified by the sources of international human rights law. International human rights law is indeed deemed to belong to general international law and finds its sources in general principles of international law, but arguably also in customary international law. Both sets of sources derive international norms from domestic ones and this jurisgenerative process is actually epitomized by the sources of international human rights law.¹³² The mutual relationship between human rights and citizens' rights can also be confirmed by recent human rights practice, whether it is of a customary, conventional or even judicial nature. Citizens' rights contribute to the development of the corresponding international human rights' judicial or quasi-judicial interpretations. This is clearly the case in the European Court of Human Rights' case-law where common ground is a constant concern and is sought after when interpreting the European Convention on Human Rights (ECHR).¹³³

Besides its explanatory force in light of current human rights practice, the proposed approach to international human rights has the further benefit of fitting the structure of the international legal order more generally. It puts international human rights law back into its political context. State sovereignty and political self-determination constitute indeed one of the pillars of the international order, a pillar which is complemented and not replaced or, strictly speaking, even restricted by the second pillar of international human rights law.¹³⁴ Through those two pillars and its dualistic structure, the international legal order protects the very interdependence between democracy and human rights alluded to before and hence keeps the tension between the individual and the group at the core of international law-making. International law guarantees the basic conditions for political equality and self-determination by protecting peoples through state sovereignty, on the one hand, and by protecting individuals through human rights, on the other.¹³⁵

moral/legal nature, on the one hand, and the domestic/international legal nature, on the other; they conflate both issues.

132 See Besson, S., 'General Principles in International Law – Whose Principles?', in Besson, S. and Pichonnaz, P. (eds), *Les principes en droit européen – Principes in European Law*, Zürich: Schulthess, 2011, 21–68, on general principles of international law as sources of international human rights law. See also Simma, B. and Alston, P., 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', (1988–89) 12 *Australian Yearbook of International Law* 82–108; Flauss, J.F., 'La protection des droits de l'homme et les sources du droit international', in Société Française pour le Droit International, *La protection des droits de l'homme et l'évolution du droit international*, Colloque de Strasbourg, Paris: Pédone, 1998, 11–79.

133 See Besson, S., 'The *Erga Omnes* Effect of ECtHR's Judgements – What's in a Name?', in Besson, S. (ed.), *The European Court of Human Rights after Protocol 14 – First Assessment and Perspectives*, Collection *Forum de droit européen*, Zürich: Schulthess, 2011, 125–175.

134 See for a similar argument, Macklem, P., 'What is International Human Rights Law? Three Applications of a Distributive Account', (2007) 52 *McGill Law Journal* 575–604, 577; Cohen, 'Rethinking', *supra* note 86, 595–7.

135 See for a more detailed argument on the relationship between state sovereignty and international human rights, Besson, S., 'Sovereignty, International Law and Democracy: A Reply to Waldron',

3. Equality and International Human Rights Law

According to Buchanan, once the relationship between international human rights and equality has been established in a human rights account, the latter still needs to be tested in the light of the strong or robust non-discrimination rights enclosed in international human rights guarantees.¹³⁶ This section takes up the challenge and shows how the proposed model illuminates the current international human rights practice in the field of equality and non-discrimination. It also argues that it sheds light onto the relationship between international non-discrimination rights and other human rights, on the one hand, and that between the international non-discrimination principle and human rights, on the other.

Interestingly, indeed, equality and non-discrimination have been central to international human rights law ever since 1945.¹³⁷ Its pivotal role has taken many forms. One may mention, for instance, international human rights treaties combating discrimination (e.g. the International Convention on the Elimination of All Forms of Racial Discrimination [CERD] and the International Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]), but also international non-discrimination rights in human rights treaties (e.g. Art. 23 of the Charter of Fundamental Rights of the European Union) and international non-discrimination principles in human rights treaties (e.g. Art. 14 ECHR, Protocol 12 ECHR and Art. 26 of the International Covenant on Civil and Political Rights [ICCPR]). Whereas the second category of norms protects the self-standing individual right not to be discriminated against on certain suspect grounds without objective reasons, the third one gives domestic authorities the duty to respect human rights in a non-discriminatory way in practice. Anti-discrimination treaties, finally, usually comprise both individual non-discrimination rights of various types and a non-discrimination principle (e.g. Art. 5 CERD).

Curiously, despite the complexity of the different types and layers of rights and principles pertaining to equality and non-discrimination in international and domestic human rights law, human rights theorists have so far neglected to unpack those relationships.¹³⁸ Non-discrimination law is often assumed to be grounded in equality¹³⁹, and the principle of equality taken to justify (international human) rights to

(2011) 22 *European Journal of International Law* 373–87; Besson, S., 'Sovereignty', in Wolfrum, R. et al. (eds), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2012, online edition, [www.mpepil.com].

136 See Buchanan, 'Egalitarianism', *supra* note 2, 687–90, 709. This also implies *a contrario* that current international human rights law and, within it, international anti-discrimination law may be explained without reference to dignity, as I argued in the first section of the chapter.

137 See e.g. McCrudden, C., 'Human Rights and European Equality Law', in Meenan, H. (ed.), *Equality Law in an Enlarged European Union*, Cambridge: Cambridge University Press, 2007, 73–114; Bayefsky, A., 'The Principle of Equality or Non-discrimination in International Law', (1989) 10 *Human Rights Law Journal* 1–34.

138 For a few exceptions, however, albeit coming from the non-discrimination law side: Reibetanz Moreau, S., 'What is Discrimination?', (2010) 38:2 *Philosophy and Public Affairs* 143–79; Hellman, D., *When Is Discrimination Wrong?*, Cambridge, Mass.: Harvard University Press, 2008; McCrudden, 'European Equality Law', *supra* note 137; Holmes, E., 'Non-discrimination Rights without Equality', (2005) 68:2 *Modern Law Review* 175–94.

139 This is the case of the major international and European human rights treaties who guarantee the principles of equality and non-discrimination interchangeably in the same clauses. The same may be observed in the decisions and conclusions of the corresponding human rights monitoring bodies. See e.g. Besson, 'Never Shall', *supra* note 101; Besson, S., 'Evolutions in Anti-Discrimination Law within the ECHR and the ESC Systems', (2012) 60 *American Journal of Comparative Law* 147–80. In-

non-discrimination¹⁴⁰. Very little more is usually added, however, to disentangle or connect those egalitarian norms in international human rights law. What explains the distinctiveness of non-discrimination rights and principles cannot, however, merely consist in the equal moral status underlying each human right and its egalitarian grounding. Their relationship to equal moral status has to be more specific than that or, at least, more central to the non-discrimination rights or principles if one is to be able to distinguish them from other human rights.

In what follows, I will take non-discrimination rights and principles in turn and show how this could play out. As I will argue, however, this need not imply that they ought to be related to a more robust form of equality than equal moral status. They may, of course, but this then branches into a different debate.

a. International Non-discrimination Rights and Human Rights

The scope of this paper precludes surveying the characteristic features of all forms of domestic, regional and international non-discrimination legislation.¹⁴¹ Notably, however, some entail individual rights, while some do not.¹⁴²

Non-discrimination rights are self-standing individual rights not to be discriminated, i. e. treated unfavourably either through equal treatment in different situations or different treatment in comparable situations on certain suspect grounds and without objective reasons. What is specific about non-discrimination rights is their collective dimension. They protect individuals against inequalities of status that are socially generated by reference to their membership in a structurally disadvantaged group.

In a nutshell, there are three understandings of group or collective rights one may encounter depending on the criterion used to qualify them as collective.¹⁴³ The

terestingly, when it is no longer a principle that is at stake, but an individual right, as there cannot be an individual right to a value such as equality, those decisions and conclusions mention a right to non-discrimination and not to equality.

140 In this sense, this consists in the same dual usage of equality *qua* value that grounds human rights and *qua* something one has a human right to (it is the case in EU law e.g.: ECJ, Case 149/77, *Gabriele Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1978] ECR 1365; Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02, 30 March 2010, Preamble and Art. 20 ff.; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006/L 204/23, 26 July 2006, Preamble, par. 2 and Art. 4 ff; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004/L 337/37, 21 December 2004, Preamble, par. 4 and Art. 1), as the one observed in the context of dignity –the latter is both used as a grounding principle of human rights and as something one has a right to (see e.g. Waldron, J., ‘Dignity and Rank’, (2007) 48 *Archives européennes de sociologie* 201–37, on this dual usage of dignity).

141 See e.g. Moeckli, D. et al. (eds), *International Human Rights Law*, Oxford: Oxford University Press, 2010, Ch. 9; Fredman, S., *Discrimination Law*, 2nd edn, Oxford 2011; De Schutter, O., *International Human Rights Law*, New York: Cambridge University Press, 2010, Ch. 7.

142 Using individual rights and not mere norms or principles in this context may be explained by reference to the duty-bearers and the kind of entitlements and reciprocal duties one is addressing. See Altman, A., ‘Discrimination’, in Zalta, E. N. (ed.), *Stanford Encyclopedia of Philosophy*, available at: ><http://plato.stanford.edu/archives/spr2011/entries/discrimination><.

143 See Besson, S., ‘Gruppen, Rechte und Konflikte – Kommentar zu Martha Nussbaum’, in Holderegger, A., Imbach, R., Weichlein, S. and Zurbuchen, S. (eds.), *Hat der Humanismus eine Zukunft?* Heraus-

first one understands group rights by reference to the *exercise* of the right. The right and the interest protected are individual but the right is exercised collectively, such as the right to self-government. There the interest of the group is the sum of individual interests in the group. The second understanding of group rights refers to the *kind of interest* protected by the right or to the kind of value it has. The right is individual but the interest protected or its value is collective. One may mention the right to be elected, the right to due process or minority rights such as the rights that belong to women, children, ethnic or religious groups. Finally, a third understanding of group rights is based on the *right-holder* and beneficiary of the interest it protects. Two sub-groups may be distinguished: both the interest and the right may be collective,¹⁴⁴ although it may also be the case that the interest is individual but the right is collective because the individual interest pertains to a collective good.¹⁴⁵ Importantly, the collective interest in the first sub-group is not merely the sum of individual interests in the group.¹⁴⁶ As examples, one may mention cultural rights, the right to self-determination or the right to security. Of all three, it is the third kind of group rights that is most commonly referred to *qua* group rights *stricto sensu*. The third meaning is also the most controversial one. Of course, the third meaning is usually combined with the first and second understandings. But it need not be the case. And the first and second understandings may not imply group rights *stricto sensu*.

Non-discrimination rights are individual rights, but they belong to the second group of collective rights: the rights are individual but the interests protected are collective as the inequalities at stake affect individuals with heightened vulnerability to the standard threats protected by human rights due to their belonging to a structurally disadvantaged group. Those individual rights are needed to protect the equal moral status of each individual within the larger group when his or her belonging to a sub-group is a source of social inequalities.¹⁴⁷ The key difference to other human rights, however, is that the absence of unequal treatment constitutes the actual objective interest protected by non-discrimination rights. Equal moral status does not merely play a role as a threshold of recognition of the importance of the protected interests, but actually becomes the interest to protect as well. The groups whose members are protected through non-discrimination rights may vary from society to society and from period to period depending on which social dimension is used by others to treat individuals as inferiors at each point in time and place. This explains why grounds of discrimination used by non-discrimination rights are usually part of an open list so as to be able to adapt across time and place.¹⁴⁸

Of course, the *prima facie* inegalitarian nature of those group-specific non-discrimination rights has been criticized.¹⁴⁹ Recognizing unequal rights to correct social inequalities seems indeed to fly in the face of the principle of equal moral status

forderungen-Antworten im Fragment, Basel: Schwabe Verlag and Academic Press, Fribourg, 2011, 200–14; Buchanan, *Justice*, *supra* note 125, 409–13.

144 See e.g. Waldron, 'Taking Group Rights', *supra* note 96.

145 See e.g. Raz, J., *The Morality of Freedom*, Clarendon: Oxford 1986, 247–55.

146 Contra: Miller, D., 'Group Rights, Human Rights, and Citizenship', (2002) 10 *European Journal of Philosophy* 178–95, 184–85.

147 See Altman, 'Discrimination', *supra* note 142. See also Nickel, J., *Making Sense of Human Rights*, 2nd edn., Oxford: Blackwell Publishing, 2007, 155 on what he refers to as 'minority rights'.

148 See Lippert-Rasmussen, K., 'The Badness of Discrimination', (2006) 9 *Ethical Theory and Moral Practice* 167–85.

149 For a discussion, see Besson, 'Gruppen', *supra* note 143; Waldron, 'Taking Group Rights', *supra* note 96.

qua threshold of importance of all protected interests and human rights. This has even generated conflicts between individual rights of members and non-members of the protected groups, on the one hand, and non-discrimination rights, on the other. One may argue, however, that depending on the society and the kind of group inequalities it is faced with, non-discrimination rights are necessary to the protection of other human rights. It is difficult to see indeed how the egalitarian dimension of other human rights could be respected were those social inequalities to subsist. In that respect, non-discrimination rights reinforce the protection of the equal moral status of every person by other individual human rights. This enhanced egalitarian dimension of non-discrimination rights has numerous consequences for their regime *qua* human rights. One may mention, for instance, the specific restriction and justification regimes that apply to them, and the ways conflicts of non-discrimination rights are resolved in particular.

Finally, it is important to note that some individual rights that often go by name as non-discrimination rights are in fact 'dignity rights'. They may be explained by reference to the third understanding of dignity discussed in the first section of the chapter. One may think here of the right not to be object to harassment in particular. That right is often included into non-discrimination rights' catalogues, but does not require a differentiated treatment and cannot therefore be analysed in a non-discrimination law and rights framework.¹⁵⁰

b. International Non-Discrimination Principle and Human Rights

There is a second concretization of equal moral status in international human rights law that is also referred to as the principle of non-discrimination. It differs from the general principle of equal treatment as it prohibits, in the context of the enjoyment of human rights, treating equally or differently individuals situated in different or equal circumstances when that treatment takes place on prohibited grounds and without an objective and proportionate justification.

Again, the idea is to protect individuals belonging to vulnerable or structurally disadvantaged groups against exclusion and to promote their integration. The non-discrimination principle protects equal moral status by making sure no discrimination arises in the context of the implementation of human rights. The groups whose members are protected through non-discrimination clauses of that kind may vary from society to society and from period to period depending on which social dimension is used by others to treat individuals as inferiors at each point in time and place. This explains why those grounds of discrimination are usually part of an open list so as to be able to adapt across time and place.¹⁵¹

The role of the principle of non-discrimination is to reinforce the protection of equal moral status by each human right and to complement self-standing non-discrimination rights. It gives domestic authorities the duty to respect other human rights in a non-discriminatory way in practice. The fact that it amounts to an additional layer of protection of equal moral status, distinct from human rights, clearly results from its location in international human rights treaties. It is usually protected through a general equality or non-discrimination clause at the end of the enumera-

¹⁵⁰ See also Besson, 'Evolutions', *supra* note 139.

¹⁵¹ See Lippert-Rasmussen, 'Badness', *supra* note 148.

tion of various human rights.¹⁵² Moreover, it is usually not formulated as an individual human right like all others, but as a principle for that very same reason.

Note that the non-discrimination principle should not be confused with other more general uses of equality, and in particular with the principle of equality before and in the law that is one of the founding principles of any legal order. Equality before the law is indeed one of the dimensions of political equality and political emanations of equal moral status and of the right to have rights in political circumstances as a result.

c. International Human Rights and Other Forms of Robust Equality

Finally, there are other legal means than non-discrimination rights and the non-discrimination principle to combat social inequalities. One may use more robust versions of the principle of equality to do so, and in particular the principle of distributive equality. Various legal instruments have been devised to promote the equality of resources or welfare, and the equality of outcome or opportunity.

Those various forms of robust equality often trickle into the application of non-discrimination rights and principles that are then interpreted and used so as to promote those forms of equality. There is no necessary connection between the two, however.

First of all, non-discrimination rights and principles aim at protecting individuals against treating them as inferiors, and not so much against other forms of unequal treatment.¹⁵³ There are two further dimensions one may emphasize to distinguish non-discrimination rights and principles from those robust understandings of equality: non-discrimination rights and principles usually prohibit certain intents (and correlated actions or omissions) and not necessarily a given state of affairs, on the one hand, and non-discrimination rights and principles do not usually require more than a heuristic comparator, on the other.¹⁵⁴

Secondly, those robust forms of equality are also distinct from international human rights in general. They may actually be in conflict with international human rights law and its basic egalitarian dimension. It suffices to think here of affirmative action programmes promoting equality of outcome. This is why one cannot assume that human rights and robust equality are inherently connected beyond equal moral status. Nor can one simply assume that human rights are instrumental to robust equality or vice-versa. Of course, non-discrimination rights may contribute in practice to securing equality of opportunity, but this is not necessarily always the case. The common basic egalitarian dimension of both human rights and the conflicting equality-based measures may help resolve the conflict in some cases, moreover.

Identifying the egalitarian dimension of human rights by reference to equal moral status and not to those more robust forms of equality is essential to rebut the equality-based parochialism critique of international human rights. Clearly, the egalitarian dimension of human rights is bound to raise concerns of that kind. And I

152 See e.g. Art. 2 UDHR; Art. 14 ECHR and Art. 1 P12 ECHR; Art. 26 ICCPR.

153 See Buchanan, 'Egalitarianism', *supra* note 2, 687–90, 709.

154 On this difference, see Dworkin, R., *Taking Rights Seriously*, Cambridge M.A.: Harvard University Press, 1977, 370. For others in the field of non-discrimination theory, see Moreau, 'What is Discrimination', *supra* note 138; Hellman, *Discrimination*, *supra* note 138; Holmes, 'Non-discrimination', *supra* note 138.

have alluded to this before in the context of political equality and the relationship between human rights and democracy. Here, one should stress that the distinction between equal moral status and more robust forms of equality actually fits the practice and law on international human rights. Except in Europe,¹⁵⁵ international human rights and non-discrimination rights and principles have not been interpreted to imply some of the most robust egalitarian goals. States Parties are allowed to do so and promote them through their implementation of international human rights and non-discrimination rights and principles, but there are generally no positive duties to promote equality of opportunities or outcome, e. g. through affirmation action programmes or other special measures.¹⁵⁶

Note that those robust versions of equality should not be confused with one kind of international human rights: social and economic rights. Those rights' content and protected interests have been recognized as human rights by reference to equal political membership and so as to make sure the material conditions for that membership are respected. Those rights are the mere confirmation of the egalitarian dimension of all human rights across the board and they contribute, as a consequence, to combatting material and social inequalities. They do not as such justify or require measures to promote and protect robust forms of equality.

Conclusion

A remarkable feature of the contemporary philosophical literature on international human rights is its lack of in-depth engagement with the principle of equality. The reverse is also true as egalitarian scholars rarely dwell on the relationship between equality and international human rights. Following other authors who have recently threaded the same path, this chapter had as its aim to uncover the egalitarian dimension of human rights and draw some of its implications for international human rights and non-discrimination law. The chapter's argument unravelled in three steps.

A first section of the chapter presented a conception of equal moral status and its relationship to political equality. It claimed that the basic moral equality or equal moral status of persons may be defended separately from more robust forms of equality, such as distributive equality in particular. Equal moral status comprises two indissociable elements: the idea that all persons should be regarded as having the same moral worth and the idea that this equal moral status is relational and the basis for mutual moral claims of which some are basic universal moral rights. When the political circumstances are given and when individuals are not only subjected to the same decisions and laws, but also share interdependent and roughly equal stakes, I argued that equal moral status implies political equality. In turn, just as a person's equal moral status implies corresponding mutual moral rights and duties, political equality gives rise to corresponding equal participation rights. Political equality is

155 See e.g. on EU anti-discrimination law or the European Social Charter, Bell, M., *Racism and Equality in the European Union*, New York: Oxford University Press, 2008; Bell, M., 'Combating Discrimination through Collective Complaints under the European Social Charter', in De Schutter, O. (ed), *The European Social Charter. A Social Constitution for Europe*, Bruxelles: Bruylant, 2010, 39–48; Besson, 'Evolutions', *supra* note 139.

156 For an exception, however, see e.g. CERD, General recommendation No. 32, *The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 24 September 2009, UN Doc CERD/C/GC/32; and Art. 2 and 4 ICERD.

therefore best served by a democratic regime where individuals are recognized and can practice those equal participation rights effectively. In the first section, I also argued that dignity works at the most as placeholder and indicator of equal moral status and is therefore redundant in the human rights context. More specifically, I explained how it cannot be used to ground human rights.

In the second section, I explained how human rights *tout court* are related to political equality and how human rights theory can explain that connection while, at the same time, salvaging their universal justification against the parochialism critique. I argued that human rights are a sub-set of universal moral rights that protect fundamental and general human interests against the intervention of (national, regional or international) public institutions. I focused on the ties between political equality and human rights to explain how human rights are a subset of universal moral rights that bind political entities and have a moral-political nature. Human rights are based on objective interests that are recognized as sufficiently fundamental to give rise to duties. The threshold of importance of those interests lies in political equality: members of the polity grant each other those rights mutually and become political equals by doing so. The grounding of human rights in objective interests but by reference to political equality explains in turn why human rights and democracy are closely related.

The second section then turned to the implications of the egalitarian dimension of human rights for international human rights and especially international human rights law. The proposed egalitarian account of human rights confirms, I argued, the inherent legality of human rights as the law provides the best and maybe the only way of mutually recognizing the social-comparative importance of those interests in a political community of equals. Democratic law actually enables the weighing of those interests against each other and the drawing of the political equality threshold or comparative line. Given the moral-political and inherently legal nature of human rights and given their ties to political equality and democracy, the legalization of human rights ought to take place within democratic settings. As international law-making processes may not (yet) be deemed sufficiently democratic, the locus of legalization and hence of legitimation of human rights remains domestic, or at the most regional. This raises a puzzle for the role and justification of international human rights law. That puzzle may be solved, I argued, by reference to Arendt's right to have rights and by distinguishing between two types of universal moral rights: rights to political membership and rights of membership. The former are universal moral rights and can be guaranteed in international law as legal rights, but may not be regarded as human rights *stricto sensu*. The latter, by contrast, are universal moral rights and legal rights that become human rights on the basis of their domestic guarantees and the way in which those guarantees are then fuelled back into international law guarantees. Indeed, international human rights generate duties of inclusion on domestic authorities and the democratic concretizations of citizens' rights, and the latter feed into international human rights guarantees in return. This finds a confirmation, I argued, in the international and domestic human rights law practice where the sources and the legitimacy of those norms are closely intertwined.

A third and final section of the argument was dedicated to exploring the implications of the egalitarian dimension of human rights for the relationship between human rights, non-discrimination rights and the equality principle in international law. It explained how to distinguish the egalitarian dimension of all human rights

from specific international non-discrimination rights, from the non-discrimination principle that apply to human rights enforcement within all major international human rights treaties and, finally, from more robust international non-discrimination norms based on distributive equality. This third section showed how the proposed egalitarian reading of human rights not only fits our international human rights law practice, but also that it explains how international human rights relate to the non-discrimination rights, principles and norms that international human rights law includes.