

# THE BEARERS OF HUMAN RIGHTS' DUTIES AND RESPONSIBILITIES FOR HUMAN RIGHTS: A QUIET (R)EVOLUTION?\*

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*Abstract: Recent years have seen an increase of interest on the part of human rights theorists in the “supply-side” of human rights, i.e., in the duties or obligations correlative to human rights. Nevertheless, faced with the practically urgent and seemingly simple question of who owes the duties related to international human rights, few human rights theorists provide an elaborate answer. While some make a point of fitting the human rights practice and hence regard states as the sole human rights duty-bearers merely by referring to that practice, others criticize the “state-centric” approach to human rights duty-bearers and expand the scope of the latter to include any international institution beyond the state and even private actors. Curiously, however, even those more expansive accounts of human rights duty-bearers are usually very evasive about why it should be so and especially how it should work. The time has come to broach anew the issue of the bearers of human rights duties, and responsibilities of international institutions in human rights theory, addressing two challenges: focusing on relational and directed human rights duties specifically and not on duties of global justice in general, thereby distinguishing between human rights duty-bearers and other bearers of responsibilities for human rights, on the one hand, and accounting for and justifying the point of international human rights law and practice in this respect, thereby also securing internal arguments for reform, on the other. The essay’s argument is four-pronged. It starts with a few reminders about the relational nature of human rights and the relationship between human rights and duties and what this means for the specification of human rights duties. It then focuses more specifically on the identification of human rights duty-bearers, i.e., states and international institutions of jurisdiction like the European Union (EU), and the allocation of human rights duties to them. The third section of the article is devoted to the concurrent moral responsibilities for human rights that are incurred by other various responsibility-bearers outside institutions of jurisdiction. In the final section, the essay considers the (quiet) revolution potential of the EU’s fast-developing human rights’ duties, and discusses the normative implications of the development of universal international institutions’ human rights duties stricto sensu for international law and politics more generally.*

## I. INTRODUCTION

Recent years have seen an increase in interest on the part of human rights theorists for the “supply-side” of human rights,<sup>1</sup> i.e., for the duties

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<sup>1</sup> See e.g., on that expression Onora O’Neill, “The Dark Side of Human Rights,” *International Affairs* 81, no. 2 (2005): 427–39.

or obligations<sup>2</sup> correlative to human rights.<sup>3</sup> Nevertheless, faced with the practically urgent and seemingly simple question of *who* owes the duties related to international human rights,<sup>4</sup> few human rights theorists provide an elaborate answer. While some make a point of accounting for the contemporary human rights practice and, based on that practice, regard states as the sole human rights duty-bearers,<sup>5</sup> other authors criticize the “state-centric” approach to human rights duty-bearers<sup>6</sup> and expand the scope of the latter to include any international institution beyond the state,<sup>7</sup> and even private actors.<sup>8</sup>

Curiously, however, even those more expansive accounts of human rights duty-bearers are usually very evasive about why duties can extend beyond the state and, especially, how this should work.<sup>9</sup> Thus, they remain very vague about the identity of human rights duty-bearers (captured loosely by the reference to “international institutions” or, worse, the “international community”), the relationships between those various duty-bearers and states<sup>10</sup> (some of them being referred to as “subsidiary,” “secondary,” “indirect,” or “residual”), and the nature and content of what they respectively owe (referred to interchangeably

<sup>2</sup> I am using “duties” and “obligations” interchangeably.

<sup>3</sup> See e.g., James Nickel, “How Human Rights Generate Duties to Protect and Provide,” *Human Rights Quarterly* 15, no. 1 (1993): 77–86; James Nickel, *Making Sense of Human Rights*, 2nd ed. (Oxford: Blackwell, 2007), 37–41; Samantha Besson, “The Allocation of Anti-poverty Rights Duties — Our Rights, but Whose Duties?” in Krista Nadakavukaren Schefer, ed., *Duties to Address Poverty* (Cambridge: Cambridge University Press, 2013), 408–31.

<sup>4</sup> I am focusing on international human rights and understand them as being at once moral and legal rights. On the mutual relationship between domestic and international human rights and on their joint moral and legal dimensions, see Samantha Besson, “Human Rights and Constitutional Law,” in Rowan Cruft, Matthew Liao, and Massimo Renzo, eds., *Oxford Handbook on Human Rights* (Oxford: Oxford University Press, 2015), 279–99.

<sup>5</sup> See e.g., Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 109–10, 113–17, 122–25 and 160–74; Joseph Raz, “Human Rights without Foundations,” in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 321–37.

<sup>6</sup> Cristina Lafont, “Human Rights and the Legitimacy of Global Governance Institutions,” *Revista Latinoamericana de Filosofía Política* II, no. 1 (2013): 1–33, 6–7. See also Cristina Lafont, “Accountability and Global Governance: Challenging the State-Centric Conception of Human Rights,” *Ethics and Global Politics* 3, no. 3 (2010): 193–215.

<sup>7</sup> See e.g., Nickel, “How Human Rights”; Nickel, *Making Sense of Human Rights*, 38–41; Lafont, “Human Rights.”

<sup>8</sup> See e.g., Thomas Pogge, *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Cambridge: Polity Press, 2008); James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); John Tasioulas, “Towards a Philosophy of Human Rights,” *Current Legal Problems* 65 (2012): 1–30.

<sup>9</sup> See, however, H. Shue, *Basic Rights*, 2nd ed. (Princeton, NJ: Princeton University Press, 1996), 157; David Miller, “Distributing Responsibilities,” *Journal of Political Philosophy* 9, no. 4 (2001): 453–71.

<sup>10</sup> See e.g., Nickel, “How Human Rights,” 81–82, 85; Nickel, *Making Sense of Human Rights*, 38–39; Griffin, *On Human Rights*, 104–5; Lafont, “Human Rights,” 27.

as “duties” or “responsibilities”<sup>11</sup> or as duties/responsibilities to either “respect” or to “promote” human rights<sup>12</sup>).

More specifically, there are two methodological problems with many theorists’ accounts of the duty-bearers of human rights. The first difficulty is the conflation of global justice and human rights and, accordingly, the confusion between this debate about the supply-side of human rights and another one in which statist accounts of justice oppose globalist ones.<sup>13</sup> While human rights may be regarded as part of global justice and even a central part, they do not exhaust it.<sup>14</sup> Straddling those very different issues has impoverished accounts of human rights duties by focusing only on certain duties (to protect and provide) and not on others (to respect), but also only on certain (basic) rights and not on others. More generally, this conflation of responsibilities under global justice and human rights duties obliterates the line between the duties that are owed to human right-holders and the other sorts of moral responsibilities for human rights that are not owed to them.<sup>15</sup> It is as if by wanting so much to focus on the supply-side of human rights, those authors fell prey to the reverse danger of forgetting the existence of right-holders in the first place and hence the directed nature of human rights duties.

A second difficulty with current accounts of human rights duty-bearers is that most of them are unconcerned with the state of international law on the question<sup>16</sup> and do not attempt to account for the fact that states and some rare international institutions,<sup>17</sup> like the European Union (EU), are the sole duty-bearers under international human rights law, and that other actors incur more diffuse responsibilities at most for human rights.<sup>18</sup> This may be either because, for them, human rights theory is not about accounting for human rights practice, or because they simply regard that legal practice as morally wrong and in need of reform. This posture not only jeopardizes the justification for the latter theories’ claim to reform

<sup>11</sup> See e.g., Andrew Kuper, “Introduction: The Responsibilities Approach to Human Rights,” in *Global Responsibilities: Who Must Deliver on Human Rights?* (New York: Routledge, 2005), ix–xxii; Thomas Pogge, “Human Rights and Human Responsibilities,” in Kuper, ed., *Global Responsibilities*, 3–35; Leif Wenar, “Responsibility and Severe Poverty,” in Pogge, ed., *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007), 255.

<sup>12</sup> See e.g., Beitz, *The Idea of Human Rights*, 109–10.

<sup>13</sup> See Thomas Nagel, “The Problem of Global Justice,” *Philosophy and Public Affairs* 33, no. 2 (2005): 113–47.

<sup>14</sup> See also Griffin, *On Human Rights*, 65.

<sup>15</sup> See e.g., Kuper, “Introduction,” xxii; Pogge, “Human Rights and Human Responsibilities”; Wenar, “Responsibility and Severe Poverty.”

<sup>16</sup> See, however, Nickel, *Making Sense of Human Rights*, 38–39; Beitz, *The Idea of Human Rights*, 109–10, 113–17.

<sup>17</sup> I will refer to international “institutions” instead of “organizations” to refer to all past, existing, and future institutions that are neither states nor private actors, and not only to existing international organizations under international law.

<sup>18</sup> See e.g., Olivier de Schutter, *International Human Rights Law*, 2nd ed. (Cambridge: Cambridge University Press, 2014), 147 ff.

the practice, but it also leads them to underestimate important normative resources available in the legal practice of human rights. The view that states and international institutions are the sole bearers of human rights duties corresponds to a practice that has constantly been contested and justified in international law, including by international lawyers themselves. It does not, in other words, amount to a “truism.”<sup>19</sup>

The time has come to broach anew the issue of the bearers of human rights duties and the responsibilities of international institutions in human rights theory. Doing so requires addressing two challenges: first, focusing on relational and directed human rights duties specifically rather than on duties of global justice in general, thereby distinguishing between human rights duty-bearers and other bearers of responsibilities for human rights; and second, accounting for and justifying the point of international human rights law and practice, thereby also securing internal arguments for reform.

Methodologically, this makes this essay part and parcel of the more general project to develop a normative legal theory of human rights.<sup>20</sup> Starting from legal questions and categories, it proposes a general interpretation of international human rights law. This implies identifying the justifications underpinning the current international human rights practice in order to present that practice in its best light. Like any legal interpretation, it is constrained and shaped by the normative practice of law, but it is also part of that practice and hence constrains it and shapes it in return. Thus, although the proposed legal theory of human rights is not trapped into the kind of normatively inert descriptions of the human rights practice one finds in “political” theories of human rights,<sup>21</sup> it is not free from that practice in the way that the practice-guiding normative accounts of moral human rights one finds in “ethical” theories are.<sup>22</sup>

In a nutshell, there are two key notions one encounters in the international human rights practice that can help us justify and improve it from within: “jurisdiction” and “responsibility.” First of all, based on the jurisdiction threshold for the application of international human rights law, I will argue that human rights should be understood as normative relationships that correspond to relationships of jurisdiction. For reasons I will explain, such relationships must be institutional, even more so if they are to be democratic and, hence, egalitarian. Does this mean that only states may bear human rights duties? No. States do, of course, bear those duties, but so also does any international institution that can exercise jurisdiction and be organized democratically. To date, this is only the case for the EU.

<sup>19</sup> Contra: Lafont, “Human Rights,” 6–7.

<sup>20</sup> See Samantha Besson, “The Law in Human Rights Theory,” *Zeitschrift für Menschenrechte – Journal for Human Rights* 7 (2013): 120–50.

<sup>21</sup> See e.g., Beitz, *The Idea of Human Rights*.

<sup>22</sup> See e.g., Griffin, *On Human Rights*; Tasioulas, “Towards a Philosophy of Human Rights.”

Does it mean that other states and international institutions are off the hook for human rights? No, not at all. And here comes the second concept one encounters in the human rights practice: responsibilities for human rights. I will argue that responsibilities for human rights should be carefully distinguished from human rights' duties. Responsibilities for the protection and promotion of human rights (by their respective states and international institutions of jurisdiction): are concurrent with the human rights duties of those states and institutions; bear on subjects other than those states and institutions, and in particular on other states, on international institutions, and even on individuals; are not directed, and hence are not owed, to the human right-holders themselves; and, most of the time, have a different content than the human rights duties that they support.

My argument is four-pronged. It starts in Section II with a few reminders about the relational nature of human rights and what this means for the specification of human rights duties. Section III focuses more specifically on the identification of human rights duty-bearers, that is, institutions of jurisdiction, and the allocation of human rights duties to them. Section IV of the argument is devoted to the concurrent moral responsibilities for human rights that are incurred by other various responsibility-bearers outside institutions of jurisdiction. In Section V, the essay considers the (quiet) revolution potential of the EU's fast-developing human rights' duties, and discusses the normative implications of the development of universal international institutions' human rights duties *stricto sensu* for international law and politics more generally. Section VI concludes.

## II. HUMAN RIGHTS AS NORMATIVE RELATIONS

Understanding the supply-side of human rights requires unpacking their relational structure and then sketching what the specification of their corresponding duties actually implies..

### A. *The relational structure of human rights and duties*

Based on the practice of international human rights law, human rights may be regarded as a subset of rights that are both moral and legal in nature.<sup>23</sup> *Qua* right, a right gives a person (a right-holder) a claim to the respect of a duty by another person (the duty-bearer) whose duty is directed to the right-holder. As such, a right is a normative relation between a right-holder and a duty-bearer, pertaining to a protected object.

<sup>23</sup> See for a full account, Samantha Besson, "La structure et la nature des droits de l'homme," in Michel Hottelier and Maya Hertig, eds., *Introduction aux droits de l'homme* (Brussels: Bruylant, 2014), 19–38.

One characteristic of human rights in practice helps clarify their relational nature: their generality or equality.<sup>24</sup> Human rights are the equal rights of everyone who possesses them, independent of his or her status. Interestingly, equality is itself a (basic) relational or social status:<sup>25</sup> one is simultaneously a person valuable in herself and a person equal to others, that is, a person whose status and moral worth are defined by her moral relations to others.<sup>26</sup> Moreover, equal moral status is actually defined by reference to mutual moral entitlements or rights.<sup>27</sup> One may argue that human rights are constitutive of the fundamental equal status and mutual relationship of their holders as equal and mutual rights of all against all. It is by recognizing that each other's fundamental interests require protection against general or standard threats that we acquire our equal moral status by virtue of an ensemble of human rights that protect us from such threats.

The relational or social nature of equal moral status implies that "the proper acknowledgement of a person's moral status requires some sort of fundamental public recognition of equality."<sup>28</sup> Equality is distinctly public or political, as a result. This applies, at least, when the conditions of a political community are fulfilled, i.e., when individuals share roughly equal and interdependent stakes, and when they stand in a social relationship to one another. The mutual constitution of human rights and equal political status explains why democracy is the political regime required by human rights, and why human rights are required in turn for democracy. Without understanding the relational and especially the egalitarian dimension of human rights as in the proposed reading, a central feature of human rights practice would get lost: their inherently political and democratic dimension (e.g., Article 8(2) European Convention of Human Rights [ECHR]).<sup>29</sup>

Of course, moral and legal rights to membership of this kind cannot be guaranteed exclusively from within a given political community since they work as universal constraints on democratic sovereignty. This is why they are usually protected from the outside through international human rights law.<sup>30</sup> At the same time, however, to be democratically legitimate, such rights must be recognized legally through inclusive and deliberative processes. The difficulty is that there is no universal political community where individuals may grant each other equal rights and where

<sup>24</sup> See Samantha Besson, "The Egalitarian Dimension of Human Rights," *Archiv für Sozial- und Rechtsphilosophie Beiheft* 136 (2012): 19–52.

<sup>25</sup> See Elizabeth S. Anderson, "What Is the Point of Equality?" *Ethics* 109, no. 2 (1999): 289, 313.

<sup>26</sup> See Anderson, "What Is the Point of Equality?" 288–89.

<sup>27</sup> See Allen Buchanan, "Moral Status and Human Enhancement," *Philosophy and Public Affairs* 37, no. 4 (2009): 378–79.

<sup>28</sup> See Anderson, "What Is the Point of Equality?" 288–89.

<sup>29</sup> See e.g., European Court of Human Rights, *Zdanoka v. Latvia*, March 16, 2006 (appl. no. 58278/00).

<sup>30</sup> See also Ronald Dworkin, *Justice for Hedgehogs* (Harvard: Belknap Press, 2011), 335–39.

those rights could constitute an equal political status. The answer to this riddle is to realize that the legalization of international human rights is a two-way street. The recognition and existence of those rights as international human rights that constrain domestic polities ought to be based on democratic practices recognized domestically. And only those polities that respect international human rights are deemed legitimate in specifying the content of such rights and, hence, in contributing to the recognition and existence of such rights *qua* international human rights; such rights will then constrain these polities in return. This is what I have referred to elsewhere as the mutual validation and legitimation of domestic and international human rights law.<sup>31</sup>

International human rights norms guarantee rights to individuals both within their domestic community and — because international human rights are usually guaranteed *erga omnes* — within the jurisdiction of other states. These rights correspond to each state's duty to secure and ensure respect for "human rights" within their own jurisdiction. In that sense, international human rights duties are second-order duties of states to generate their own first-order duties to protect human rights under domestic law, i.e., international duties to have domestic duties.<sup>32</sup> These duties protect the universal moral right to have human rights, i.e., the right to equal membership in a moral-political community with all the human rights this status implies.

### *B. The specification of human rights duties*

As normative relations and claims, human rights give rise to duties. While human rights can be abstract, human rights duties must be specified in context by reference to a concrete threat to a protected interest.<sup>33</sup> Any given human right amounts to a sufficient ground for holding other individuals under all the specific duties necessary to protect that interest against standard threats in different circumstances across time.<sup>34</sup>

There are three separate sets of issues that need to be elucidated in this context: first, the specification of the content of human rights duties; second, the identification of human rights duty-bearers; and, finally, the assignment of human rights duties to those duty-bearers.

<sup>31</sup> See Samantha Besson, "The Legitimate Authority of International Human Rights – On the Reciprocal Legitimation of Domestic and International Human Rights," in Andreas Føllesdal, ed., *The Legitimacy of Human Rights* (Cambridge: Cambridge University Press, 2013), 32–43.

<sup>32</sup> See also O'Neill, "The Dark Side of Human Rights," 433.

<sup>33</sup> See Joseph Raz, "On the Nature of Rights," *Mind* 93, no. 370 (1984): 196, 200.

<sup>34</sup> See Jeremy Waldron, "Introduction," in *Theories of Rights* (New York: Oxford University Press, 1984), 10–11; Charles R. Beitz and Robert E. Goodin, "Introduction: *Basic Rights and Beyond*," in Charles Beitz and Robert Goodin, eds., *Global Basic Rights* (Oxford: Oxford University Press, 2009), 1–24, at 10.

Starting with the question of the specification of the content of human rights duties, and following Shue's seminal three-tier model, one usually distinguishes between negative duties to avoid depriving (respect), positive duties to protect from depriving (protect) and positive duties to aid the deprived (fulfill).<sup>35</sup> Positive duties arise to protect against the violation or nonfulfillment posed either by agents other than the duty-bearers, such as individuals, other states, or international institutions within the scope of jurisdiction of the duty-bearing state, or by natural elements. Such duties add a layer of protection to negative duties to avoid depriving. They entail either developing indirect institutional and legislative protection, or taking direct practical measures of protection. Positive duties to aid, finally, arise when negative duties to avoid or positive duties to protect have either been violated or not fulfilled sufficiently and where aid is needed. All of these duties, whether positive or negative, may be triggered by all human rights without distinction.<sup>36</sup> It is important to stress that there could, of course, be many other types of human rights duties depending on the need for protection.<sup>37</sup>

All three categories of duty mentioned could potentially arise concurrently if need be in a concrete case, even though they are articulated by reference to one another. The reason they could arise concurrently is to enable the burdens of duty to be spread across time and agents; otherwise, each duty could potentially amount to an unreasonable burden on a given agent.<sup>38</sup> Of course, not all human rights duties will be borne by the same human rights duty-bearers at the same time in the end.<sup>39</sup>

### III. THE IDENTIFICATION OF HUMAN RIGHTS DUTY-BEARERS AND THE ALLOCATION OF HUMAN RIGHTS DUTIES

Before human rights duties can be fairly and justifiably allocated to a specific duty-bearer, the latter must be identified as a potential duty-bearer: first, generally, as an institution and, secondly, more specifically, as the institution that exercises jurisdiction over the right-holder.

#### A. *The institutional account of human rights duty-bearers*

The identification of a potential human rights duty-bearer ought to be justified. Human rights duties do not simply bind anyone who *can* be bound. At this stage of the argument, authors tend to diverge. Some defend an interactional or inter-individual view of human rights

<sup>35</sup> See Shue, *Basic Rights*, 52–53, 60.

<sup>36</sup> See Shue, *Basic Rights*, 52.

<sup>37</sup> See Beitz and Goodin, "Introduction," 13.

<sup>38</sup> See Shue, *Basic Rights*, 59, 61, 173.

<sup>39</sup> See Shue, *Basic Rights*, 120.



duty-bearers that regards individuals as sole duty-bearers,<sup>40</sup> while others defend an institutional view of human rights duty-bearers. Among those authors who have adopted the institutional view, some see institutions as mere mediators or representatives of individuals and their duties and not as direct duty-bearers,<sup>41</sup> whereas others regard institutions as duty-bearers in their own right.<sup>42</sup> Finally, institutionalist accounts are divided into two groups: a first group considers that individuals may bear human rights duties concurrently with institutions,<sup>43</sup> while the second one sees individuals as only bearing residual or subsidiary human rights duties.<sup>44</sup>

This essay defends an institutional model of human rights duties: institutions of jurisdiction are primary duty-bearers, not only as a mediating framework for individual duties, or with residual or subsidiary duties of individuals, but in their own right. This model excludes from duty other international subjects, such as other individuals, states or international institutions that do not have jurisdiction, even though, as I will argue later in this essay, those subjects bear responsibilities for human rights.

There are two normative arguments for an institutional account of human rights duty-bearers. First of all, there is an argument from equality. As explained previously, human rights are inherently relational and mutual just as the equal political status they constitute. As such, human rights are not only rights of all, but also rights *against all*. We are all duty-bearers of the rights we hold. Importantly, what this means is that we are all duty-bearers *together* and not separately. Owing duties together requires the creation of institutions as duty-bearers to be able to bear those duties together. Second, is the argument from democracy. Given the mutual relationship between political equality and human rights, it should come as no surprise that democracy is the political process through which decisions about our equal rights and duties and the specification and allocation of those duties should be taken. And this may only be done through institutional processes.

Besides these normative arguments for the institutional model of human rights duty-bearers, one may also mention practical ones. The first and most important argument usually made for the institutional account of human rights duty-bearers is an argument of feasibility ("ought implies can").<sup>45</sup> Institutions are the only ones to have the sustainable capacity to respect and uphold human rights duties.<sup>46</sup> According to Shue, institutions are a way of spreading the burden or costs of respecting human rights on

<sup>40</sup> See e.g., Griffin, *On Human Rights*, 104–5.

<sup>41</sup> See e.g., Shue, *Basic Rights*.

<sup>42</sup> See e.g., Nickel, "How Human Rights"; Pogge, "Human Rights and Human Responsibilities," 8 ff.; Nickel, *Making Sense of Human Rights*, 38–41; Beitz, *The Idea of Human Rights*, 113 ff.

<sup>43</sup> See e.g., Shue, *Basic Rights*, 56–57; Thomas Pogge, "Shue on Rights and Duties," in Beitz and Goodin, eds., *Global Basic Rights*, 113–30.

<sup>44</sup> See e.g., Nickel, "How Human Rights"; Nickel, *Making Sense of Human Rights*, 38–41; Beitz, *The Idea of Human Rights*, 113 ff.

<sup>45</sup> See Shue, *Basic Rights*, 166 ff.; Beitz and Goodin, "Introduction," 9 and 15.

<sup>46</sup> See also Nickel, "How Human Rights," 81.

the members of the community in a feasible manner and in a way that centralizes the resources available. Second, institutions secure the mediation of human rights duties between all individuals involved.<sup>47</sup> In so doing, they also help direct human rights duties to their respective bearers by identifying the right-holders and duty-bearers of any given human right at the same time and in a systematic fashion.

*B. The identification of institutional human rights duty-bearers*

So, which institutions should be the bearers of human rights duties? I will distinguish between primary institutional duty-bearers of human rights — whether they are states of jurisdiction or, still exceptionally to date, international institutions of jurisdiction — and subsidiary individual bearers of human rights duties.

*1. The Primary Human Rights Duty-Bearers: Institutions of Jurisdiction.*

The primary human rights duty-bearers are institutions of jurisdiction, i.e., the institutions that have jurisdiction over the right-holders. They are mostly states, but this may also arguably be the case of international institutions.

*i. Institutions of jurisdiction in general.* It follows from the egalitarian dimension of human rights that the institutions that bear human rights duties should be those of the political community in which the right-holders have equal and interdependent stakes, but also those that have jurisdiction over the right-holders and are in a jurisdictional relationship to them. This is how human rights arise in international human rights law and practice: from a relationship of jurisdiction.<sup>48</sup> When there is no relationship of jurisdiction between an entity and a group of individuals, those individuals do not have human rights against that entity and that entity has no human rights duties toward those people (e.g., Article 1 ECHR). Jurisdiction both requires the recognition of human rights normatively (jurisdiction as a normative trigger of human rights) and provides the conditions for the corresponding duties to be feasible (jurisdiction as a practical condition of human rights). As a matter of fact, the two relationships may be regarded as mutually constitutive to the extent that there is a general human rights' positive duty for states to exercise jurisdiction and hence to incur human rights duties, and, when they have lost its effective use, to regain it in order to be able to protect human rights effectively.<sup>49</sup> That (*prima facie* paradoxical) mutuality between human rights and jurisdiction

<sup>47</sup> See Shue, *Basic Rights*, 166 ff.; Beitz and Goodin, "Introduction," 15–16.

<sup>48</sup> See Besson, "The Extra-Territoriality of the European Convention on Human Rights," based on European Court of Human Rights, *Al-Skeini and Others v. the United Kingdom*, July 7, 2011 (appl. no. 55721/07).

<sup>49</sup> See e.g., European Court of Human Rights, *Catan and Others v. the Republic of Moldova and Russia*, October 19 2012 (appl. no. 43370/04, 18454/06, and 8252/05).

is a reminder of the existence of the moral right to have human rights in the first place and, more correctly in this context, of the moral duty to have human rights duties. This is also arguably the meaning of Article 28 of the Universal Declaration of Human Rights (UDHR) and its “entitlement” to an institutional order, domestic or international, where human rights may be realized and hence arise in the first place.

In a nutshell, jurisdiction refers to *de facto* authority, that is to say the practical political and legal authority that is not yet legitimate or justified authority, but claims to be, or at least is held to be, legitimate by its subjects.<sup>50</sup> *Qua de facto* authority, jurisdiction consists in effective, overall and normative power or control (whether it is prescriptive, executive, or adjudicative). It amounts to more than the mere exercise of coercion or power, as a result: it also includes a normative dimension by reference to the imposition of reasons for action on its subjects and the corresponding appeal for compliance.

Importantly, jurisdiction applies both on the domestic territory and extraterritorially. Jurisdiction is functional therefore, and not primarily personal or territorial, although personal and territorial control may be used as shorthand criteria when assessing jurisdiction. Jurisdiction is an all or nothing matter and not a matter of degree: either one is giving reasons for action and requiring compliance, or one is not. It cannot, therefore, be split into levels and acquired gradually. And this applies whether jurisdiction is territorial or extraterritorial. Of course, depending on the context and based on their concrete and dynamic character, different human rights duties will arise, and this is particularly evident for positive duties to protect that require specific control.

*ii. States of jurisdiction.* To date, the institutions that exercise jurisdiction under international law are primarily states. Interestingly, the identity of particular institutional duty-bearers within the state or institution of jurisdiction may be reconstructed from rules of attribution of conduct and responsibility used to attribute remedial responsibility in case of violation of the state of jurisdiction’s human rights duties in practice.<sup>51</sup> States bear human rights duties for and through various agents whose conduct may be attributed to it. This includes the states’ own agents, of course. Those agents in any given state of jurisdiction include all its organs, whether legislative, executive or judicial and whether central or decentralized as in federal states (e.g., Article 4 ARSIWA<sup>52</sup>). They also include those that are borrowed from other states in some cases (e.g., Article 6 ARSIWA).

<sup>50</sup> See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995), 215.

<sup>51</sup> Despite its retroactive influence on the latter, the question of the allocation of remedial responsibilities for the violation of human rights duties should be carefully delineated conceptually from that of the allocation of human rights duties in the first place.

<sup>52</sup> Articles on the Responsibility of States for Internationally Wrongful Acts; see UN General Assembly, Resolution 56/83 (December 12, 2001).

As I will explain now, states also bear human rights duties, under certain conditions, “for” private actors and international institutions.

States bear human rights duties with respect to the actions or omissions of private actors. They do so, both when the acts of private individuals may be attributed to the state and the state bears indirect duties as a result, and when the state bears direct positive duties of its own to protect against private actors.

First, then, because certain acts of private actors may be attributed to the state, the state bears duties in those cases as if those actors were its agents. One may imagine different cases: Private actors are exercising elements of governmental authority (e.g., Article 5 ARSIWA); their conduct is directed or controlled effectively by the state (*de facto* organs) (e.g., Article 8 ARSIWA); their conduct was carried out in the absence or default of the official authorities (e.g., Article 9 ARSIWA); or, finally, their conduct is acknowledged by the state as its own (e.g., Article 11 ARSIWA).

Second, states also bear positive duties of their own to protect right-holders against the conduct of private actors under certain conditions.<sup>53</sup> Those positive duties include duties to prevent violations by private actors, for instance through private or criminal legislation or police actions, but also to remedy them if the duties to prevent violation have failed, for instance through the judicial system. Those duties to prevent are duties of due diligence subject to strict conditions: the state could and should have known about the private threat, first, and it was reasonable to expect it to intervene, second. The mere fact that the violation occurred is not enough for the duty to prevent to be regarded as breached.

States may also bear human rights duties in relation to the activities of international institutions. One may distinguish between the indirect obligations that arise from the potential later attribution of acts committed by international institutions to states, on the one hand, and the obligations to protect from international institutions that fall directly on states, on the other.

First, in cases in which states’ organs act for an international institution, the latter’s conduct may be attributed to them provided they share effective control over them (e.g., Articles 6-7 DARIO<sup>54</sup> and Article 57 ARSIWA). What this means in retrospect is that states bear human rights duties in relation to the acts or omissions of international organizations when they (also) control the agents acting for the organization. Other means of attribution of responsibility of the organization to its member states, such as aid or assistance, direction and control, or coercion of the organization by a state (Articles 58-62 DARIO), are not available in the case of human rights’ violations and do not give rise to duties for states accordingly.

<sup>53</sup> See e.g., European Court of Human Rights, *O’Keeffe v. Ireland*, January 28, 2014 (appl. no. 35810/09).

<sup>54</sup> Draft Articles on the Responsibility of International Organizations; see UN General Assembly, Resolution 66/100 (December 9, 2011).

International human rights law does not indeed generate duties for the organization itself, but only for its member states, and the existence of corresponding duties of the organization is a condition for the attribution of responsibility to member states under those provisions.

In some cases, however, states may try to escape their human rights duties by transferring competences to international institutions that have distinct personality, but do not have jurisdiction over the corresponding right-holders and do not bear human rights duties of their own, as a result. True, states do not incur responsibility for those acts by the mere fact of membership in the international institution (e.g., Article 62 DARIO) and may not therefore be regarded as bearing related human rights duties in retrospect. However, this potential abuse of membership in an international institution has led to the development of a regime of international attribution of responsibility to states for the intentional circumventing of *their* human rights duties through (membership in) an international institution and the conduct of the latter; states are subject to attribution of responsibility even when the act in question is not internationally wrongful for the international institution itself (e.g., Article 61 DARIO, within the boundaries of Article 62 DARIO).

What this means, secondly, is that states are ascribed an international human rights-based positive duty of diligence to make sure that their membership in the organization and the activity of the organization do not prevent them from protecting human rights and that human rights protection provided by the organization is equivalent to their international human rights law duties.<sup>55</sup> This comes close to a state duty to protect that may be understood along the lines of their duty to protect against private actors. It is more limited, however, to the extent that it leaves a gap in cases where states could not have reasonably anticipated the problem or have secured some minimal equivalent safeguards.

*iii. International institutions of jurisdiction.* There is nothing in this account that precludes extending the burden of human rights duties beyond states and especially to international institutions, provided they have jurisdiction. Based on the egalitarian reading of human rights of international human rights law and practice proposed earlier, what is required, however, is for these institutions to amount to political communities where both political equality may be claimed and exercised, and where the institutions have the kind of overall and effective normative control discussed before.

This is by no means easy to achieve beyond the state. To date, first, there is no international political community and not even regional ones besides states either.<sup>56</sup> Moreover, the circumstances of political equality, which imply

<sup>55</sup> See e.g., European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, November 26, 2013 (appl. no. 5809/08).

<sup>56</sup> See Samantha Besson, "Human Rights and Democracy in a Global Context – Decoupling and Recoupling," *Ethics and Global Politics* 4, no. 1 (2011): 19–50.

being in a certain relationship to one another, i.e., sharing a social context,<sup>57</sup> are not yet given at the international level. Second, most international institutions do not have the required overall and effective normative control over their individual subjects, if they have any, to amount to having jurisdiction.

There is one glaring exception to the lack of political community and jurisdiction beyond the state, however, and that is the European Union (EU). First of all, the EU is generally regarded as a political community where individual stakes are sufficiently equal and interdependent. The EU Treaties actually recognize those individual subjects as “citizens” and guarantee their political equality (Article 9 TEU). Secondly, the EU exercises overall and effective normative power or control over its individual subjects. This has been confirmed recently in the context of the negotiations of accession to the ECHR where the existence of EU jurisdiction has been recognized by analogy to member states’ jurisdiction (e.g., Article 1 par. 4 of the 2013 Draft Agreement on the Accession of the EU to the ECHR (Draft Accession Agreement)).

It is no wonder, then, that the EU amounts to the only international institution to date to have its own human rights regime (Art. 6(1) TEU) and to incur direct human rights duties under that regime. It is also the only one to be bound directly by international human rights law. Thus, the EU has been a party to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) since 2010, and is in negotiation to join the European Convention on Human Rights (Article 6(2) TEU).<sup>58</sup>

## 2. *The subsidiary bearers of duties to have human rights duties: Individuals.*

On the proposed institutional account of human rights duty-bearers, individuals bear human rights duties only as residual duty-bearers. Those duties have also been described as “back-up” duties by James Nickel.<sup>59</sup>

Importantly, those duties are subsidiary, and not concurrent to the human rights duties of institutions of jurisdiction, i.e., states’ duties or the EU’s duties. The latter have indirect and direct positive human rights duties to protect against violations of human rights caused by individuals. Individuals’ duties only arise when their institutions have failed or before they have set up their institutions.

The failure of institutions in this sense amounts to more than the mere violation of human rights duties by the state or institution of jurisdiction, however. It corresponds to the loss of effective normative control and

<sup>57</sup> See David Miller, “National Responsibility and Global Justice,” in Ronald Tinnevelt and Helder de Schutter, eds., *Nationalism and Global Justice, David Miller and His Critics* (London: Routledge, 2011) 25; David Miller, “A Response,” in Tinnevelt and de Schutter, eds., *Nationalism and Global Justice*, 192; David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 56 ff.

<sup>58</sup> See the 2013 Draft Accession Agreement of the EU to the ECHR: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1%282013%29008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf).

<sup>59</sup> See Nickel, *Making Sense of Human Rights*, 40–41.

hence of jurisdiction in the polity. To that extent, individual back-up duties ought to be distinguished from what other authors have regarded as subsidiary individual duties that are triggered as second-order duties in case of single violations of human rights duties by state institutions.<sup>60</sup> As a matter of fact, they are not strictly speaking “human rights” duties, but duties to have human rights duties and hence to regain institutional jurisdiction as a state or institution of jurisdiction in order to then be able to bear those human rights duties.<sup>61</sup>

The individuals concerned are those belonging to the political community, or about to belong to it through the exercise of jurisdiction. This is determined, just as were the relevant institutions in the previous section, by reference to the conditions of political equality, i.e., their sharing equal and interdependent stakes. Importantly, individual duties to have human rights duties, when they arise, are held collectively as shared duties. This may be explained by reference to the egalitarian nature of human rights and the fact that we are all right-holders and duty-bearers at the same time.

A question that arises in this context is whether subgroups of individuals may also be regarded as bearers of duties to have human rights duties in circumstances of failed or nascent jurisdiction. One may think of transnational corporations or nongovernmental organizations. The political and egalitarian dimensions of human rights would tend to deny this possibility and to favor only inclusive groups, and groups that endeavour to politically represent all individuals in the community, such as liberation movements or transitional governments. This is not to say that other individuals may not incur responsibilities for human rights, as we will see, but those should not be conflated with duties to have human rights duties.

### *C. The allocation of human rights duties to institutional human rights duty-bearers*

The allocation of human rights duties takes place if possible within the institution of jurisdiction, but also, in case of competing jurisdictions, between institutions of jurisdiction themselves.

The assignment or allocation of duties to specific duty-bearers raises questions of fairness and also must be justified.

The primary allocation of the aggregate burden of human rights duties to the polity and its institutions ought to be justified in itself. Just as the burden of duties allocated to institutions is an aggregate of duties, the

<sup>60</sup> See e.g., Griffin, *On Human Rights*, 104–5.

<sup>61</sup> This duty to have human rights duties of individuals in a given political community, which is a duty correlative to a right (to have human rights), is distinct from the responsibilities to have human rights of all discussed below.

grounds for the allocation to the institutions may also be deemed as an aggregate of various justifications. As a result, one need not choose between harm, causality, special ties, benefit or capacity as grounds of moral responsibility,<sup>62</sup> and all can be subsumed under an aggregate justification of human rights duties.<sup>63</sup> By contrast, the subsequent reallocation of human rights duties to specific organs of the state or institutions of jurisdiction, and/or the attribution of derived (criminal or private law) duties to individuals must be justified individually.

In the assessment of the justification of an assignment of human rights duties to specific duty-bearers, the reasonableness of the overall burden and of the cost also needs to be taken into account in addition to the grounds for assigning the duties. Given the limited resources available at any given time and the numerous duties that may have to be assigned, priorities must be made in terms of the degree of resources allocated to any given right, but also in terms of the rights to which those resources ought to be allocated. Those questions are morally indeterminate, of course.<sup>64</sup> All the same, robust egalitarian distribution principles should apply. The strength of the specific duties and of the threats to the protected interest may also provide additional arguments of priority.<sup>65</sup>

In view of the moral complexity of the allocation of human rights duties and of the priorities to be set, the quality of the institutional process is essential to the justification of the allocation. Democratic institutions offer a procedural framework in which human rights duties can be deliberated over and allocated in an inclusive and egalitarian fashion. The need to allocate human rights duties in context also explains why the domestic institutions of jurisdiction themselves are best positioned to do so. Of course, international human rights institutions may and should assist institutions of jurisdiction, that is, states and the EU, in the subsidiary allocation of the specific duties to specific institutional bodies and to individuals. This only takes place *ex post*, however, and in the context of concrete cases pertaining to the remedial responsibilities for a violation of specific human rights duties.

One last remark is in order with respect to the allocation to individuals of the collective duties to have human rights duties, (i.e., during the pre-institutional or post-institutional stage). The allocation of the aggregate burden of human rights duties to those individual duty-bearers finds its justification in the aggregate set of reasons for those duties. Of course, once those duties are individualized, the question of justification will arise anew and, this time, without an institutional and procedural framework

<sup>62</sup> See Miller, "Distributing Responsibilities," 464 ff.; Miller, *National Responsibility and Global Justice*, 98 ff.

<sup>63</sup> See Beitz and Goodin, "Introduction," 17.

<sup>64</sup> See Nickel, "How Human Rights," 81.

<sup>65</sup> See Nickel, *Making Sense of Human Rights*, 85.



to decide on the question in a democratic way. There would seem to be no other choice than to resort to strategic moral thinking in these sorts of cases.

In an increasing number of cases, the question has arisen of how to allocate human rights duties among many institutions of jurisdiction. Those cases correspond to circumstances in which many institutions (i.e., states and/or international institutions) exercise concurrent jurisdiction over the same right-holders, such as occupation or collective peacekeeping operations. The separate allocation of the respective human rights duties to the same organs (e.g., civil administration in an occupied state) or to different ones but engaged in the same activities (e.g., renditions officers) threatens human rights protection in practice and renders remedial responsibilities opaque.

The problem is difficult to remedy because neither states nor international institutions of jurisdiction have the shared or encompassing institutional framework to allocate duties together with another state or institution. Because human rights duties follow and require jurisdiction and because jurisdiction, like authority, is exclusive, the allocation of human rights duties itself is exclusive to the institution of jurisdiction. International human rights duties are primarily unilateral duties owed by one institution or state at a time, and not by all other state parties as multilateral duties.

In this context, international human rights institutions could and should play an important role as subsidiary external allocators of human rights duties.<sup>66</sup> Regrettably, however, their role in practice is still limited to the *ex post* allocation of remedial responsibilities for violations of human rights duties.<sup>67</sup> The question then is whether those duties should be shared, thus preventively emulating the joint attribution of conduct to the states and institutions of jurisdiction sharing effective control and the corresponding allocation of joint international remedial responsibilities to the respective states or institutions.<sup>68</sup> Even if the duties are not shared, one may argue that their allocation should be coordinated transnationally in cases of concurrent jurisdiction based on the duties themselves. In such circumstances, indeed, the effective protection of the interest at stake requires jurisdictional coordination.

In fact, the question gets even more pressing when an international institution and one of its member states exercise concurrent jurisdiction. International institutions usually use states and organs of the state as agents of the institution. And this means that they could organize the sharing of the

<sup>66</sup> See e.g., the pending case before the European Court of Human Rights, *Hassan v. United Kingdom* (appl. no. 29750/09) (on concurrent jurisdiction by the United Kingdom and the United States).

<sup>67</sup> See also Samantha Besson, "Science without Borders and the Boundaries of Human Rights – Who Owes the Human Right to Science?" *European Journal of Human Rights* (2015): forthcoming.

<sup>68</sup> See e.g., European Court of Human Rights, *Al-Jedda v. the United Kingdom*, July 7, 2011 (appl. no. 27021/08).

effective control of a given state organ with that state in advance, and hence coordinate the allocation of its human rights duties. As a matter of fact, the institutional structure of the international institution itself makes such a coordinated or even shared allocation of human rights duties possible.

This question is particularly interesting in the EU. Potential cases of concurrent jurisdiction are numerous there. One may think of cases in which EU member states implement EU secondary law or where the EU and member states have complementary competencies. So far, the allocation of EU human rights duties in the EU has followed the allocation of competencies, and in case of complementary competencies, the allocation has been done by reference to normative control and its exclusive attribution to either the state or the EU. Cases of concurrent jurisdiction and hence of shared human rights duties have never been considered, as a result. Things may change after the EU's accession to the ECHR. Indeed, the EU will become the first international institution to join the ECHR and hence to become a potentially concurrent duty-bearer to states in that regime.

#### IV. THE IDENTIFICATION OF HUMAN RIGHTS RESPONSIBILITY-BEARERS AND THE ALLOCATION OF RESPONSIBILITIES FOR HUMAN RIGHTS

Alongside the human rights duties of some, all subjects of international law also incur distinct international responsibilities for human rights. After elaborating on their content and specification, I will turn to the identification of their bearers and to their allocation.

##### A. *The specification of the responsibilities for human rights*

Responsibilities for human rights are part and parcel of the international responsibilities for global justice that arose slowly between the 1940s and the 1970s with the adoption of international law and institutions active in the monitoring and protection of human rights. While (domestic or regional) institutions of jurisdiction have remained the addressees of human rights duties, other individuals, states, and international institutions have since then increasingly been considered as concurrent bearers of responsibilities for the protection of human rights by the primary duty-bearers of those rights.

Those responsibilities are captured by the broad concept of a responsibility *for* human rights. In short, they are responsibilities to (i) hold accountable (monitor, ensure compliance), (ii) assist or aid (promote, train; mostly through cooperation) and (iii) intervene (as an *ultima ratio* only).<sup>69</sup> They include responsibilities to protect and remedy, but also responsibilities to respect.<sup>70</sup> Some are preventive while others are remedial.

<sup>69</sup> See Beitz, *The Idea of Human Rights*, 109 and 163.

<sup>70</sup> Not all responsibilities to respect correspond to a right, however, and hence not all responsibilities to respect human rights are directed and owed to those right-holders.

The primary example, of course, is the “responsibility to protect” (R2P) of all states in the international community that was endorsed by the United Nations (UN) through a General Assembly Resolution in 2009.<sup>71</sup> Another example is the “corporate responsibilities to respect human rights”<sup>72</sup> developed in the context of the United Nations’ effort to curtail the negative impact of multinational corporations on human rights’ protection, and that bear on corporations but also, concurrently albeit differently, on their states of origin. Finally, the 2011 Maastricht Principles on Extra-territorial Obligations (ETO) of States refer to the “responsibilities” for human rights of other states besides the states of jurisdiction’s (territorial and extraterritorial) human rights “duties” (e.g., Article 29 ETO).<sup>73</sup> They echo the so-called “supporting”<sup>74</sup> responsibilities of “international cooperation and assistance” under the International Covenant on Economic, Social and Cultural Rights (Article 2(1) ICESCR) that bear on all states parties to the Covenant.

The primary characteristic of responsibilities for human rights, and what distinguishes them from human rights duties, besides the identity of their bearers, of course, is that we lack ways of specifying their content and bearers, and of allocating the former to the latter.<sup>75</sup> Second, even when specified and allocated,<sup>76</sup> responsibilities for human rights are not directed to a right-holder and are not correlative to a right. Finally, most of the time, they have a content distinct from human rights duties, for they do not protect the interests at stake directly, but preserve the ability of the states or international institutions of jurisdiction to protect them.

The difference between responsibilities for human rights and human rights duties explains why the former are not subsidiary, secondary, or default human rights duties, but concurrent responsibilities that apply alongside human rights duties.<sup>77</sup> Responsibilities for human rights are related to and coexist with human rights duties to the extent that they help prevent human rights violations by human rights duty-bearers or remedy those violations when human rights duty-bearers are unable or unwilling to fulfill their duties.

<sup>71</sup> See United Nations General Assembly Resolution 63/308, *The Responsibility to Protect*, A/RES/63/308 (14 September 2009).

<sup>72</sup> See United Nations, *Guiding Principles on Business and Human Rights*, 2011, [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>73</sup> See the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights, 2011, [http://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk\\_web.pdf](http://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf).

<sup>74</sup> See United Nations, *Guiding Principles on Extreme Poverty and Human Rights*, 2012, [http://www.ohchr.org/Documents/Publications/OHCHR\\_ExtremePovertyandHumanRights\\_EN.pdf](http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf), par. 93–94.

<sup>75</sup> See Beitz, *The Idea of Human Rights*, 117, 163.

<sup>76</sup> The distinction between human rights duties and responsibilities for human rights is not one of perfect versus imperfect duties, therefore.

<sup>77</sup> See also Beitz, *The Idea of Human Rights*, 108; David Miller, “The Responsibility to Protect Human Rights,” in Lukas H. Meyer, ed., *Legitimacy, Justice, and Public International Law* (Cambridge: Cambridge University Press, 2000), 233.

*B. The identification of the responsibility-bearers for human rights*

Just as their content, the bearers of the responsibilities for human rights are usually indeterminate. They are diffusely vested in the "international community" at large.<sup>78</sup> The difficulty is that this community is not (yet) institutionalized: it consists of various individuals, states, and international institutions, some regional and some global, but never, in the latter case, in an inclusive fashion.

As individuals, first of all, we all bear a shared responsibility for the respect of human rights as the primary constituency of the international community.<sup>79</sup> Importantly, and for the reasons of equality mentioned before, that responsibility is collective and we bear it together as a result. Practically, of course, there are important coordination limitations to what individuals can do collectively at the global level. This is why, in the absence of institutionalization of the international community, other and especially institutional subjects of international law are more likely to act upon their responsibilities for human rights.

Second, then, the states other than the human rights duty-bearing states of jurisdiction may be seen as instruments of global justice through which we institutionalize our shared individual responsibilities for human rights.<sup>80</sup> Importantly, states are bearers of responsibilities in their own right, and not only as a way of mediating their constituency's responsibilities for human rights. Again, states cannot do much on their own without institutional coordination at the global level.

This explains why, finally, international institutions are often regarded as bearers of our responsibilities for human rights to the extent that they provide an institutional framework for state cooperation.<sup>81</sup> Again, one may make the argument that they should not only do so in mediating our responsibilities, but also in their own right *qua* subjects of international law.

*C. The allocation of responsibilities for human rights to responsibility-bearers*

The allocation of responsibilities for human rights to their bearers is one of the most difficult issues currently before us. The difficulties have to do with the many potential grounds for allocating those responsibilities and with the lack of procedures for actually assigning those responsibilities to various bearers.

<sup>78</sup> See Beitz, *The Idea of Human Rights*, 108.

<sup>79</sup> Those responsibilities for human rights of all individuals are distinct from (and concurrent to) the subsidiary human rights duties of individuals in a given political community pre-institutionalization or post-failure of their institutions, just as the responsibilities for human rights of all states are distinct from (and concurrent to) the human rights duties of any given state of jurisdiction.

<sup>80</sup> See Miller, "The Responsibility to Protect Human Rights," 241.

<sup>81</sup> See Shue, *Basic Rights*, 178.

1. *Grounds.* There are various grounds or justifications for preventive or remedial international responsibilities for human rights. Those grounds range from outcome to causality, harm, capacity, benefit, or special ties.<sup>82</sup> Depending on the case, any of them may be chosen as ground of individualized responsibility for human rights, but nothing prevents them from all applying at the same time or some of them in some cases and others in different cases.<sup>83</sup>

Interesting questions follow, however. One of them is the issue of potential conflicts among responsibilities for human rights. David Miller rightly suggests choosing the strongest connection in such cases.<sup>84</sup> Another, non-exclusive, possibility would be to foresee cascades of responsibilities with some grounds kicking in when other more strongly connected grounds of responsibilities have not been acted upon. It seems, however, that there should be a priority of the outcome responsibility of the state that is also the duty-bearer of human rights duties in case of violation of its duties. Other states cannot have to make up entirely for the failure of the domestic institutions to comply with their human rights duties.

Another important question pertains to the cost of one's responsibilities. Responsibilities for human rights can only be justified as long as respecting them can be done without incurring excessive costs in each case.<sup>85</sup> This is a constraint similar to the one applicable to human rights duties. The question is even more complicated, however, in the context of the responsibilities for human rights as there usually are many potential responsibility-bearers on many different grounds.

2. *Process.* There is a difference between identifying an entity as potentially responsible and assigning responsibility to her.<sup>86</sup> The assignment of responsibility requires spreading the burden over various agents and assessing the fairness of the overall individual burden on each of them.

By reference to what applies to human rights duties, allocation of international responsibilities for human rights requires an institutional and procedural framework.<sup>87</sup> To date, however, there is no universal international institutional framework or procedure for the aggregation of responsibilities for human rights on all grounds and to all its subjects. As a result, the allocation of international responsibilities for human rights remains a matter of judgment for each potential responsibility-bearer in each case. Potential responsibility bearers must resort to individual and strategic or pragmatic thinking in the absence of assurance about others' actions.<sup>88</sup> One cannot

<sup>82</sup> See Miller, "Distributing Responsibilities," 464 ff.; Miller, *National Responsibility and Global Justice*, 98 ff.

<sup>83</sup> See also Beitz, *The Idea of Human Rights*, 170–71.

<sup>84</sup> See Miller, "Distributing Responsibilities," 468 ff.

<sup>85</sup> See Miller, "The Responsibility to Protect Human Rights," 241 ff.

<sup>86</sup> See Miller, *National Responsibility and Global Justice*, 82–83.

<sup>87</sup> See Shue, *Basic Rights*, 166 ff., 180.

<sup>88</sup> See Shue, *Basic Rights*, 160–61.

exclude from all this that no one will act in the end.<sup>89</sup> Of course, the consequence of this “uneven web of disaggregated responsibilities to act”<sup>90</sup> is insecurity. This has also been referred to as the protection gap between human rights duties and responsibilities for human rights.<sup>91</sup>

#### V. TOWARD GLOBAL JURISDICTION AND GLOBAL HUMAN RIGHTS DUTIES?

If the proposed analysis of the EU as sole international institution with human rights duties holds, one may want to think about the development of jurisdiction and hence of human rights duties beyond the domestic polity as a global trend for universal international institutions (e.g., at the UN). The question, however, is whether this quiet evolution in international human rights law could not also be considered a revolution in political and democratic terms.

Assessing this evolution and its desirability is both a matter of scale and a matter of density. It is a matter of scale, first, because transposing the EU experiment to a global level means potentially raising the spectre of a world-state. It is also a matter of density, second, because even if the institutional integration of states at play in the EU can be conceived in a non-statist way, it questions the state model and hence the way in which individual equality, human rights and democracy have been guaranteed to date.

The first option is not desirable at the global level. The idea of a worldwide political community and hence of a global democracy *stricto sensu* is not only implausible, but normatively undesirable. It would undermine the productive tension between human rights and democracy presented earlier in the essay.<sup>92</sup> Short of a revolution in international human rights law, but also in the way we have protected political equality and democracy so far through the institution of different states and the international law regime that guarantees those institutions, the perspective of a world-state is simply not appealing normatively.

So, one may wonder about the desirability of the second route: the development of a multilevel or federal international political community of some sort. Although this model leaves the plurality of states in existence, and hence saves us at first sight from the downsides of a world-state, the difficulty is that once human rights and democracy are recoupled in an international institution situated beyond the state, it is difficult to see how

<sup>89</sup> See Beitz and Goodin, “Introduction,” 22–23.

<sup>90</sup> Beitz, *The Idea of Human Rights*, 173–74.

<sup>91</sup> See Miller, “The Responsibility to Protect Human Rights,” 246; Miller, *National Responsibility and Global Justice*, 274.

<sup>92</sup> See Seyla Benhabib “Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty,” *American Political Science Review* 103, no. 4 (2009): 691–704.

one could maintain a general human rights competence at the domestic level and, hence, save the state. And the same may be said about the democratic unit of reference for the protection of individual equality. So, here again, the alternative is between openly turning that entity into a state and hence falling back into the scale issue addressed before albeit with international human rights law firmly in place, or trying to tame the state while integrating it into an international political community at the risk of diluting it.

As a matter of fact, current developments in the EU are evidence of the instability of its unique human rights and citizenship regime over time and to the questioning of its member states' autonomy. The EU human rights regime may qualify as a transnational human rights regime. To start with, it is not a municipal human rights regime aimed at all state institutions — including the local ones in all areas of central and local law (e.g., that of a federal state like Switzerland); it is aimed at EU institutions — mostly, and only exceptionally at national institutions within the scope of EU law. Nor, however, is it an international human rights regime setting minimal standards only for states (e.g., that of the ECHR or UN human rights conventions), because it sets regular standards for the international institution itself, i.e. the EU.

The current question, however, is whether EU human rights can actually remain the rights of the citizens of a nonmunicipal polity and hence of a non-state in the long run. I have argued elsewhere that they cannot.<sup>93</sup>

Practically, first of all, there are signs of the EU's transformation into a municipal or statist polity, albeit a federal one. These transformations and especially the human rights-based transformations are actually reminiscent of the ones that took place in the United States from the eighteenth century onward. One should add the growing impact of international human rights law duties of the EU on its internal human rights regime. In short, the centralizing experience of domestic, but also of international, human rights law in federal entities makes the EU's transnational project an unlikely alternative to the consolidation of a European state in the long run. Conceptually, second, there are difficulties with the transnational model of human rights of the EU and hence with its transposition to the global level. One may indeed question the compatibility between dual or plural polities and citizenships, on the one hand, and individual equality and human rights, on the other. But maybe it is individual equality itself that we should put into question and, ultimately, human rights themselves? That, of course, would be quite a revolution both in political theory and in practice, and surely one that cannot be started from within human rights law and theory itself.

<sup>93</sup> See Besson, "Human Rights and Democracy in a Global Context."

## VI. CONCLUSIONS

States and some so-far rare international institutions, like the EU, are the sole bearers of human rights duties under international law. This is a well-confirmed practice under international law, and it needs to be taken seriously by those human rights theorists who want their theory to guide that practice. It is also a practice that may be justified within the proposed egalitarian reading of international human rights law.

Two key notions one encounters in the international human rights practice make the consequences of this interpretation less dramatic than its critiques claim they are: first, human rights duties are related to jurisdiction and this is not something states are the only ones to be able to exercise, as exemplified by the EU in particular; second, individuals bear subsidiary human rights duties before their political communities are institutionalized or when their institutions have failed; finally, besides duties, human rights give rise to concurrent responsibilities for their respect, promotion, and protection on the part of various other international subjects: individuals, other states, and international institutions. Wondering further about the quiet but steady evolution of political and legal integration beyond the state, and in particular about the consolidation of jurisdiction and the human rights duties of the EU, I argued that unless we are ready to start a revolution in the way we think of and protect individual equality and, hence, not only human rights but democracy itself, it may be better not to transpose the EU experiment too quickly to other international institutions of a universal scope.

Those theoretical conclusions have practical consequences for how we conceive of human rights duties in international law in the future. First and foremost, the duties of states and international institutions of jurisdiction should be our priority: they should be held more actively and consistently responsible for violations of their human rights duties, including in cases where those violations have been triggered by non-state actors in violation of states and international institutions of jurisdiction's positive duties of diligence both territorially and extra-territorially. Second, as to non-state actors themselves: we should make the most of their responsibilities to respect and protect, and in particular of the responsibilities of the UN for facilitating the cooperation for human rights among states other than the state(s) or institution(s) of jurisdiction in any given context. It is important not to water down the strength of existing human rights duties by trying to expand the scope of duty-bearers to all bearers of responsibilities for human rights. It is essential, in particular, to remember to resort when possible to moral resources other than human rights and, by extension, to legal instruments other than international human rights law.

As the new historians of international human rights are slowly uncovering, one of the most curious political developments of the 1990s has been the growing inclusion of all humanitarian issues under the roof of human rights.



Global justice scholars may be making an analogical mistake when they conflate all concerns of justice beyond the state with human rights concerns. While this may have been a fruitful rhetorical and political move back then, I hope to have shown that it is certainly not the best way to move forward in moral terms, nor the way for human rights and democracy to constitute a lasting change in our global political morality.

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