Fundamentally equal but unequally protected? Human rights, unequal protection, and states as duty bearers

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1. Introduction

The Universal Declaration of Human Rights famously declares that 'all human beings are born free and *equal in dignity and rights*.'[2] The italicized phrase can certainly be regarded as one of the most important guiding thoughts of the contemporary practice of human rights. Yet at the same time the protection that is actually provided by human rights varies widely across countries. The right to health, for example, will get a person far fewer protections – and of lesser quality – in South Africa than in, say, Germany. For example, in Germany this human right would likely translate into the provision of renal dialysis for those who need it; in South Africa it is very unlikely that it would.[3] Furthermore, such differences arise because of deep-seated features of the current way of organizing human-rights protection – such as the central role given to states, in a world where states vary greatly in (among other things) wealth. And the differences do not only concern socio-economic rights but may – where they arise on account of wealth differences, for example – also concern civil and political rights, such as

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1 Some of the themes of the present essay were first developed in my article Philips 2014. 'On Setting Priorities among Human Rights,' (2014) 15 *Human Rights Review* 239–257. I thank Arienne Mulder for agreeing to write a BA thesis on the topics of this article under my supervision – which kept me thinking about the subject. Many thanks also to Marjolein van den Brink, Jenny Goldschmidt, and two anonymous reviewers for some excellent remarks. Last but certainly not least, many thanks to Titia Loenen – along with her reading group on human rights – for thought-provoking and stimulating discussions over several years.

2 Universal Declaration of Human Rights, Art. 1 (emphasis added).

3 The example is inspired by Albie Sachs's discussion of the constitutional right to health in South Africa. See Sachs 2009, at p. 161ff.

the right to security; consider, for example, the amount of money spent on training the police.

This state of affairs seems problematic. The meaning of all human beings being 'equal in dignity and rights' (or, as I will also put it, 'fundamentally equal') is not exactly clear –something to which I will extensively come back below. However, whatever precisely its meaning, there is a real question whether it could be compatible with significant inequalities among humans with regard to the protection of very important interests. On the face of it, further explanation is required if one is to maintain that human beings are fundamentally equal yet it is all right for some human beings to receive far less protection of their urgent interests (such as health) than others.[4] In this essay, I want to investigate whether the two – fundamental equality and the unequal protection of urgent interests – might be compatible after all. It will be concluded that there are severe limits to their compatibility (Section 2). I will go on to argue that this has implications for how we should conceive of the duty bearers of human rights (Section 3). In particular, one cannot stick to states as the main and primary duty bearers of human rights – each state for the people within its jurisdiction – with other agents only being subsidiary duty bearers, playing a relatively minor role, or fall-back duty bearers which only come into the picture where states fail to act as they should.

The approach of this essay will be philosophical rather than juridical. That is to say, it will draw on all reasons that seem appropriate rather than only on reasons that are deemed admissible in a juridical framework. Its notion of human rights will be philosophical, too: this notion will not – in a manner to be explained in detail in a moment – be bound to juridical meanings and uses but can depart from these if there are good reasons to do so.

For the sake of clarity, let me say a little more about the particular philosophical conception of human rights which I shall use.[5] Some main elements of this conception are the following. First, human beings are

4 For a clarification of the notion of 'urgent interests' see Section 2.1 below. For the question of which interests can plausibly count as urgent, see Section 2.3.

5 It is generally beyond the scope of the present essay to defend this conception of human rights against alternatives. It *will* be argued, however, that this conception provides a particularly strong interpretation of the post-WWII practice of human rights. See Section 3.2 below.

regarded as fundamentally equal – although, as said, we will have to elaborate on what this means precisely. Secondly, they all have legitimate claims that their urgent interests must be protected against certain threats.[6] However, it is not conceptually implied in the notion of human rights, as I understand it, that all human beings should receive equal protection of their urgent interests against threats.[7] (I will come back to the notions of 'urgent interests' and 'equal protection'.)

On the other hand, even though human rights do not imply that equal protection of urgent interests should be provided, they obviously do say something about which protections should be provided. I think it is helpful to think of them as doing this on two levels. First, there is a more abstract level where the threats to interests are specified as well as the protections to be provided, all of this in a fairly general way and sometimes rather implicity; see for example UDHR, Art. 14(1): 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' Secondly, the answer to the question of *concretely which* protections are to be provided – e.g. concretely which arrangements to protect and promote health – will not at all times be the same. For I take it that human rights cannot plausibly consume all wealth and resources that the world has available (generated through social cooperation etc.).[8] This would also imply – and I would accept this implication – that if the world were, for example, to become much poorer, less could be required as a matter of human rights than is presently the case. At the more abstract level just mentioned, nothing would change, and human rights would be valid across time and space. But at the

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6 More particularly, the threats in question may be called standard threats – a notion which refers, among other things, to the threats being common and predictable. Cf. Shue 1996, at pp. 29-34. I assume that in the case of human rights, the interests on which these threats bear are urgent for wide categories of humans across time and place.

7 As for the UDHR: when it declares, for example, a right to a fair trial for everyone, I think that it demands that, for all humans, there are protections which can reasonably count as fulfilling this right. It does not demand that the protections for all humans are equal. Incidentally, if this should be wrong, and if the UDHR does demand equal protections, many questions asked in this article will remain standing: is unequal protection – as it is systematically engendered by the current institutional set-up – justifiable if we assume fundamental equality? And, can a plausible interpretation of the practice of human rights abandon states as duty bearers to some considerable extent?

8 What part of that wealth they may plausibly consume must be discussed on another occasion.

second, more concrete level, something *would* change. The background idea is that, at a concrete level, human rights can only demand such protections as the wealth of the world as a whole could amply afford if everyone were to receive them. Put differently: although human rights do not conceptually imply equal protection, I assume that human rights cannot plausibly require such ambitious protections that the world as a whole would not even amply have the wealth to provide them to everyone.

Furthermore, the philosophical conception of human rights which I will use assumes that when we speak of human rights, we have some idea about who is to bear the duties that come with such rights.[9] And finally, it will be assumed that there may be other duty bearers of human rights than states (each state for its own people). Foreign states, intergovernmental organizations, NGOs, business corporations etc. might also be duty bearers. This does not mean, of course, that it is always – or even usually – a good idea to assign human rights duties to, say, NGOs. Nor does it settle the question of how to distribute duties in an acceptable way or, put differently, the question of how to set up a plausible division of moral labour.[10] These are all very large questions which the present essay can obviously not answer, although it will have some things to say about them.

So much by way of a clarification of the philosophical conception of human rights that will be used in this essay. Let us now return to our main topic: whether fundamental equality could plausibly go together with unequal protection.

2. Fundamental equality and unequal protection

2.1 Are fundamental equality and unequal protection compatible?

Human rights, as I have understood them, assert that all human beings are fundamentally equal. But is the fundamental equality of all human beings compatible with an unequal protection of their urgent interests, where this

9 On the other hand, we can speak of human rights even when we cannot get these duty bearers to behave as they should. See Nickel 2007, at p. 29ff.

10 Important general considerations that bear on the assignment of duties, i.c. of human rights realization, include the *capacity* to carry out a task, and *causal contribution* to a problem (to there being a task in the first place). Cf. Miller 2005b; Shue 1996.

inequality is at least foreseen and often more than that – e.g. is systematically engendered by the 'regime' of protection?

As said, it is not exactly clear what it means to say that human beings are fundamentally equal. Nonetheless, I will argue that a plausible definition of fundamental equality denies that fundamental equality *conceptually implies* the equal protection of urgent interests. (If it should be otherwise and there were a conceptual implication, our question would be answered immediately.)

To show that there is no conceptual implication I will now further explain my usage of 'equal[ity] in dignity and rights' or 'fundamental equality' (as said, I will use these two expressions interchangeably).[11] I take these expressions to mean that human beings matter a lot and that they *all* matter a lot ('equal dignity'). Furthermore, this translates, for all of them, into their being justified in making certain claims ('equal rights'). To be sure, not all claims are envisaged by the human rights framework but only those claims that relate to goods (and a level of goods) without which human life could arguably not normally go minimally well.[12] Examples would typically include an adequate quantity and quality of food, freedom of movement within certain confines, a certain level of literacy etc. (I will refer to these goods as urgent interests.)[13] Certain sorts and levels of protection of these interests should be provided, and in such a way that everyone counts for one and no one counts for more than one. But this is as yet a rather vague requirement. In particular, it does not by definition mean that *equal protection* must be provided, in the sense that people receive the same protection of their urgent interests if their need

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11 In what follows, I will only be concerned with the phrase 'equal[ity] in dignity and rights' as a whole, not with dignity and rights as separate concepts (see footnote 15 below). Furthermore, I will explain my interpretation of this phrase but it is beyond the present scope to defend this interpretation vis-à-vis alternatives. In any case, I do think that my interpretation is plausibly in line with the UDHR. See e.g. Morsink 1999; Glendon 2001.

12 Furthermore, human rights will typically only deal with goods that apply to wide categories of people across all times and places. What it is for a life to 'go minimally well' would certainly need more discussion. One possibility is to draw on John Rawls's approach and say that people should, among other things, be able to form, carry out and revise a conception of the good. See Rawls 2000.

13 Thus I will use such expressions as basic needs, fundamental goods and urgent interests interchangeably. Although distinctions (of a more or less technical sort) might of course be made between these concepts, my interchangeable usage is not uncommon in the philosophical literature. Cf. Tsai 2014, at p. 81.

for protection is the same.[14] (Equal protection, as I use this expression, does not imply that people with different needs for protection receive the same protection; it may rather imply that they receive differential protection, which in some plausible way tracks the differences in what they need.) To give a – perhaps somewhat contentious – example, suppose that all human beings were the children of one mother.[15] They matter a lot to her and they all matter equally, in the sense that all count for one and no one counts for more than one. And this gives rise, for all of them, to certain claims to have their urgent interests protected. This, however, need not imply that they have a claim to receiving the same protection even if their basic needs are the same. Why not? The reason is, generally speaking, that there may be valid reasons – even in the face of similar needs – to provide more protection to one child than to the other. However, in the absence of such reasons they *should* receive the same – if we genuinely think they are all very important and no one is to count for more than one. In other words: for it to be justified, in these circumstances, to provide the children with unequal protection, we require good reasons for this.

To return to our immediate subject: there is logical space for saying that fundamental equality need not translate into equal protection; but those who wish to defend unequal protection in the face of fundamental equality

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14 Some suitable division of moral labour would then determine who is to *provide* this protection. I will also say that if such a division of labour is in place, and people receive equal protection, they are treated with *equal concern.* Incidentally, it may be more accurate to speak of equivalent protection rather than equal protection. The basic idea of equal protection is that everyone ends up with equally good protection of their interests but this need not be done in the same way everywhere, and it may not even always concern the exact same threats (for example, a fair trial may be guaranteed by different institutional arrangements which are generally equally good overall but which have different advantages and disadvantages). However, I will continue to speak of equal protection.

15 The example may be contentious in the sense (among other things) that in a mother-child case we would not normally primarily speak of rights; we would generally only do this in institutional contexts. Still, the example can in important respects illustrate what could be meant by 'equal[ity] in dignity and rights.' Again, I have only tried to explain the meaning of this expression as a whole. I will not consider the concept of dignity separately; many philosophical questions on this concept are as yet unanswered and it is beyond the scope of this article to try to answer them. For example, is dignity to be regarded as the ground of human rights, and if so, how can it steer a middle road between being too empty (and thus rather useless as a ground) and being too substantive and close to the rights themselves? Cf. for somewhat similar dilemmas Beitz 2013.

will need to make their case. They will have to provide good enough reasons. The question we must now ask is whether they can do this.

2.2. Reasons (1): special relationships such as those of co-citizenship

If people wish to assert that, in the end, fundamental equality and unequal protection are compatible, there are – as far as I can see in the literature – two kinds of reasons that stand out. They may be labelled reasons of special relationships and reasons of self-determination.[16] I will discuss these reasons and argue that, ultimately, they are both unconvincing.[17] Hence there is an incompatibility (at least to a large degree) between endorsing the fundamental equality of all humans and accepting that their urgent interests are unequally protected.

Let us consider the first kind of reasons. They are rather fundamental and appeal to special relationships, such as co-citizenship, participation in a cooperative scheme, or subjection to coercive rules. In these cases, additional duties are generated for participants. And it may be thought that these duties (among other things) justify additional claims on the part of participants, compared with non-participants. In what follows, I will always only consider cases where such additional claims concern less weighty matters and not cases where they concern what could arguably be matters of citizens' human rights (such as dialysis).[18] For example, perhaps citizens of rich countries, who pay

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16 For literature references see notes 22 and 27 below. Both kinds of reasons involve large-scale philosophical debates. In the present context, only the basic shape of the relevant debates can be provided. (Incidentally, I will leave aside such complications as those arising from the possibility – if any – to forfeit rights.).

17 That is, they are unconvincing for unequal protections that concern matters which would in rich countries be regarded as matters of human rights (e.g. the provision of dialysis for those who need it). For other kinds of unequal protections the story may sometimes be different; but it is beyond the scope of this article to consider those.

18 Cases where the choice is between, say, dialysis for insiders or for outsiders (and where they both cannot receive it) are very difficult. Perhaps insiders may often justifiably get precedence here. Importantly, however, such conflicts will not arise for human rights matters – inasmuch as the level of protection required under human rights will – also in rich countries – be tuned towards what the wealth and resources of the globe as a whole can amply afford. What needs to concern us, rather, are conflicts between the global provision of such things as dialysis (=protections of urgent interests at a level near to what rich countries regard as a matter of human rights) and attending to other interests of rich citizens.

the taxes that help sustain a health-care system,[19] may have a greater claim to health-care provisions than outsiders, even in cases where the choice is between using the tax money for very urgent care for outsiders (e.g. dialysis) and less urgent care for citizens (say, specific kinds of treatment for non-life threatening, chronic diseases).[20] If so, the world's poor may, where the protection of their urgent interests depends on assistance by rich countries, justifiably end up receiving less such protection – less than the level which rich countries regard, for their citizens, as a matter of human rights (e.g. dialysis).[21]

Yet I think that reasons of special relationships are not very likely to succeed in providing the required justification. Let me outline why – while noting that the literature about which kinds of special relationships generate which claims (and how weighty these claims are) is still incipient.[22] First, often there will (on a suitable division of moral labour) not even be a *prima facie* conflict between duly attending to the demands of special relations and protecting the urgent interests of all humans equally. The above example may not be such a case, but negative dimensions of human rights do often provide cases in point: honouring special claims of citizens is (although there may arguably be exceptions) not normally in conflict with refraining from killing people anywhere.

Secondly, however, in other cases conflicts *do*, on the face of it, certainly remain possible.[23] Think, for instance, of the positive provisions associated

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19 Citizens and those who pay taxes do not always refer to the exact same groups. Depending on the exact version of the argument on which one wants to draw, the relevant categories may be, say, those paying taxes, those subject to the laws of the country, or those subject to certain duties that come with citizenship. For simplicity I will refer to them as 'citizens' – and to the duties that they have among one another as duties of 'co-citizenship' – although this may not in all cases be exactly accurate.

20 I am assuming throughout that it is possible effectively to provide these outsiders with the provisions in question. Furthermore, interstate assistance is of course only one way to realise an ambitious global equality of human rights protection. Other ways will be discussed notably in Section 3 below.

21 In a future essay, I will be concerned with the normative importance of this level of protection.

22 This literature cannot be discussed here in any detail. Key references include Blake 2011; Nagel 2005; Sangiovanni 2007; Sangiovanni 2012.

23 It should be noted that 'equal protection of urgent interests' is not plausibly realized by levelling down to the lowest common denominator. See Section 3.1 below.

with health care, education or also upholding the rule of law. For example, may citizens of a relatively affluent country prioritize domestic tertiary education to elementary education abroad?

In the end, I think, the answer in such cases should often be negative. For we are, as said, generally talking about goods that are less urgent (e.g. tertiary education) versus goods that are considerably more urgent (e.g. primary education). In addition, only those protections can plausibly be regarded as matters of human rights, even in rich countries, where but a small part of the global wealth and resources would allow these protections to be realized everywhere. Thus after duly attending to human rights across the globe,[24] a large part of social wealth in rich countries remains available for other causes, and shifts can be made as to how to use it – for tertiary education, expensive cancer drugs, a new highway, or a new swimming pool. Therefore it is not in the end defensible for citizens of rich countries to say that care for the protection of urgent interests abroad – up to a level, approximately, of what counts as a human rights requirement in a rich country – directly gets in the way of, say, expensive cancer treatments or an extensive education system. Such causes may continue to receive due attention, even if rich states become considerably more concerned about globally achieving the protection of urgent interests.

The above argument may also be stated as follows. With claims such as those of co-citizenship, three kinds of cases are possible (we are always focusing on co-citizenship claims in affluent countries): (1) These claims could concern the protection of urgent interests in a way that would, in affluent countries, be regarded as a matter of human rights (e.g. dialysis). (2) These claims could concern the protection of urgent interests in a way that would not, even in affluent countries, be regarded as a matter of human rights (e.g. certain expensive cancer treatments). (3) These claims could concern, not the protection of urgent interests, but other goods (a new highway, etc.). In cases (1)[25] and (2), claims of co-citizenship may perhaps win out over contributing to the protection of urgent interests abroad (protection up to

24 Here I assume a suitable division of moral labour, including a certain amount of slack taken up from a restricted number of free riders.

25 We have only been concerned with case (1) in footnote 18 above.

a level which would in affluent countries be regarded as a matter of human rights). For example, dialysis for co-citizens might trump dialysis abroad, and also expensive cancer drugs for co-citizens might trump dialysis abroad. Very importantly, however, it has emerged that these are false dilemmas. Recall that in my conception of human rights, these urgent interests can only claim protection to the extent that this protection would not absorb all, or even nearly all, means available. Finally, concerning case (3), it is very unlikely that claims arising from co-citizenship – and the like – may win out here, all the more so because the interests underlying such claims may, here too, receive considerable attention even after human rights claims have duly been taken into account. And there is something else to consider as well: Thomas Pogge, for example, argues that rich countries and their citizens are not mere bystanders to the plight of the world's poor but help to cause their poverty by imposing certain institutional rules.[26] This consideration further weakens the weight of claims of co-citizenship in case (3). In sum, in none of the cases can such claims plausibly justify rich countries in not realizing, or not helping to realize, greater global equality of the protection of urgent interests – up to the level, approximately, which would in rich countries be regarded as a matter of human rights.

2.3. Reasons (2): political and cultural self-determination and other values

A second important kind of reasons found in the literature may be more promising.[27] These reasons say that certain important values – such as preserving important cultural identities or safeguarding the self-determination of a political community – cannot be adequately attended to if, globally, the equal protection of very urgent interests is realized, up to the level, approximately, of what is now a matter of human rights in affluent countries. This would be because globally realizing such a level of protection would require that we move to more globalized institutional arrangements that make it impossible to realize such values as the political and cultural self-determination of distinct communities.

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26 Pogge 2005; Pogge 2008.

27 These reasons are broadly in the spirit of Rawls 1999; and Miller 2005a; Miller 2007.

There are at least two replies to this concern. The first is to deny the importance or weight of values such as political self-determination. However, this is not a particularly promising road to take. For although it is true that the equal protection of very urgent interests[28] is very important, some of the values whose realization one allegedly has to sacrifice to get there may also be very important. For example: political self-determination, and the ability to be meaningfully involved in decisions about the development of deep cultural identities, may touch upon weighty political and cultural rights. Therefore, we will at least hesitate in saying that fundamental equality requires realizing the equal protection of urgent interests, if such equal protection jeopardizes political or cultural self-determination etc. (It is true that, as they stand, these judgments about which interests/values etc. are particularly weighty or urgent remain intuitive. Ideally, we would want to outline a developed theory to guide us here;[29] but this is beyond the scope of our article.)

There is, however, an alternative line of reply: one could deny that there is a conflict between duly attending to values such as political and cultural self-determination and globally realizing the equal protection of very urgent interests (such as interests in life and health). I believe that this line of reply works quite well; both the globally equal protection of urgent interests and values such as political self-determination may fare well if, instead of moving to very globalized institutions (relatively close to a world state), one were to accept a greater role for NGOs, international organizations, and – as was in the background of Section 2.2 above – interstate assistance.[30] Such tendencies are already clearly present in the current global situation, which is sometimes called post-Westphalian.[31] Crucially, actually protecting urgent interests more equally does not assume that we move away entirely from states, which are now often the main instruments of political and cultural

28 Where, of course, the protection of values such as political and cultural self-determination are not already included among those urgent interests. Typical urgent interests one may think of are interests in security, a fair trial, food, health, etc.

29 The list of real freedoms that Martha Nussbaum proposes in her capabilities approach may be an example. Nussbaum 2000.

30 Exactly which actions NGOs etc. may permissibly take, should of course be discussed in detail – if one is to avoid dangers such as paternalism and falling foul of political self-determination. But I cannot undertake to do this here.

31 See e.g. Fraser 2008.

self-determination. This is important, for not only could such a complete sidelining of states as duty bearers (each state primarily for its own people) jeopardize political and cultural self-determination, it might also make us move into what Mathias Risse[32] calls *terra incognita* – a configuration of institutional arrangements whose shape and effects (including possibly adverse effects) we cannot remotely foresee. Such a configuration might also endanger the equal protection of urgent interests.

2.4. Taking stock

I have argued that those who claim that the fundamental equality of all humans is compatible with a factually unequal protection of urgent interests will have to make their case. Subsequently it has been suggested that the two most common lines of argumentation fail to provide good enough reasons – at least where we are concerned with protections which in rich countries would be regarded as matters of human rights. Principled reasons appealing to special relationships such as co-citizenship (among rich citizens) will often not conflict with the equal protection of urgent interests across the globe, or else they will not have enough weight. A second line of argument would be that globally realizing the equal protection of urgent interests comes at too high a price for other important values, such as the self-determination of a political community. It has been argued, however, that this price need not be so high. In short: human rights, which accept the fundamental equality of all human beings, should also accept globally equal concern, that is, the equal protection of urgent interests across the globe – or at least considerably more equal protection than we currently find.

3. States as human rights duty bearers – and beyond

3.1. Moving away from states

We now need to ask how we are to move closer to the globally more equal concern that is required. We will begin by considering two possibilities for accommodating globally more equal concern within the institutional

32 Risse 2012.

system that we find in today's world, and that puts a heavy emphasis on states as the main and primary duty bearers of human rights – each state for its own people.[33] It will turn out that neither of them works. Hence, we need to move away considerably from states as the main duty bearers if we are to move closer to the required equal concern.

Here, then, are two ways of realizing more equal concern within an institutional system centred on states as the main duty bearers. The first is to ensure that states would have equal wealth – as well as an equal willingness to realize human rights.[34] But this will not be realized in any remotely near scenario. Nor is it even very realistic to imagine, in some near future, a significantly *less* unequal distribution of wealth (or a willingness to realize human rights) than we now have. So this first possibility should, at least at present, be discarded. The second possibility is to realize equal concern by levelling down to the lowest common denominator, that is to say, by providing equally little protection to everyone. Obviously, however, this possibility can be dismissed even more quickly. For although the level of protection required by human rights, if it is to be uniform across the globe, needs to be such that it is easily affordable given the level of global wealth – i.e., leaving ample resources and wealth free to be devoted to non-human rights causes – a uniform level of protection cannot plausibly imply that it is alright to bring the level of protection down to what the poorest states can afford.[35] It seems, then, that if we are to move significantly closer to equal concern, we ought to move away considerably from states (each state for its own people) as the main and primary duty bearers of human rights.

Still, there are at least two reasons why one might resist such a move away from states. The first was addressed above: it is the concern that certain important values – such as cultural and political collective self-determination – could not be adequately accommodated if such a move were to be made. However,

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33 Here, 'main' means that non-state parties are generally only subsidiary duty bearers, playing a comparatively minor role. These parties may only become more important as secondary, back-up duty bearers when states do not act as they should.

34 Many thanks to Arienne Mulder for insisting that an unwillingness, too, could be a disturbing factor.

35 Indeed, this affordability requirement is even met by the approximate protections at a level, approximately, of what now counts as a matter of human rights in rich countries.

it has been argued that this concern is unjustified.[36] The second reason for resisting a move away from states is that if we made such a move we would no longer be offering a remotely plausible interpretation of the post-WWII practice of human rights. I will now offer a detailed answer to this charge.

3.2. Interpreting the practice of human rights

To begin with, we must ask how we are to go about interpreting the practice of human rights. Charles Beitz says that there is (to his knowledge) no good systematic way of doing this.[37] But I do believe that there are certain things one can say. There are at least two questions to be asked here: (1) what is there to be interpreted? And (2) how do we go about interpreting it? After considering these questions, we can turn to the issue of which interpretations are the most plausible. Let us take these questions in turn.

Concerning the first question: the practice of human rights – the interpretandum – can be taken to refer to the words and actions of states, NGOs, business corporations, and social movements with regard to certain key human rights documents – I think particularly of the main human rights declarations and treaties of the UN,[38] most notably the Universal Declaration of Human Rights (UDHR).[39] If we understand the practice in this way, it may perhaps not always be crystal clear what falls within and outside it, but its broad boundaries will be clear.

As for the second question, I take interpretation to be an exercise of trying to arrive at some kind of reflective equilibrium, to broadly adopt a notion of John

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36 In fact, this argument played a central role in establishing that there was a case for greater equal concern in the first place.

37 Beitz 2009, at p. 107.

38 Other important documents are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Racial Discrimination (CERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, secondarily one may also refer to certain key regional human rights documents, such as the European Convention on Human Rights.

39 Cf. Beitz 2009, at pp. 25-26.

Rawls's:[40] we try to get at a reconstructive account – in this case of the practice of human rights – which we can endorse in the light of its presuppositions, coherence and consistency, its implications, and also – importantly – in the light of its 'fit' with the practice. Where our interpretation does not seem to fit the practice of human rights, we will make revisions to our interpretation or discard certain elements of the practice (as peripheral or even mistaken). Eventually, this back and forth between the 'raw materials' of the practice and our interpretation will get us to a stable position – reflective equilibrium – or, as Rawls also puts it, it will give us an interpretation that we can 'on reflection' accept.

Back to our main question: will an interpretation that *abandons states* to a considerable extent as the main and primary duty bearers (call this interpretation 'Ab') emerge as at least as good as one that does not abandon states (call this interpretation 'N-Ab')?[41] In other words, consider an interpretation ('Ab') which assigns certain – albeit not all – human-rights duties (concerning, for example, education or health) to foreign states, international bodies, NGOs, or business corporations. And consider an interpretation of the practice ('N-Ab') which always regards states as the main duty bearers, each state for its own people. Could the former interpretation be at least as good as the latter? I think so, for the following reasons.

Firstly, an acceptable interpretation need not, if we broadly follow a reflective equilibrium approach, capture as many elements of the practice as possible. For instance, many states and agents in civil society regard states as the main duty bearers of human rights. But our interpretation need not follow this. Rather it should strike the right balance with regard to the elements of the practice we want, on reflection, to endorse and reject. Therefore I see no reason to find interpretation Ab to be less acceptable than interpretation N-Ab merely because it discards more elements of the practice of human rights – namely, it additionally discards those that put heavy emphasis on states as the main and primary duty bearers of human rights. Nor, of course, is Ab for this reason *more* acceptable than N-Ab.

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40 Rawls 1971.

41 For other elements of what I take to be a plausible interpretation of the practice, see footnote 26 above.

However, there *are* reasons for deeming interpretation Ab to be the more acceptable one. The first reason is that one can tell a more attractive story as to what human rights are if one relies on Ab rather than N-Ab. If the protection of widely urgent interests is what human rights are ultimately about, this gets us close to, for example, the Preamble to the Universal Declaration, which refers to the horrors to which human beings had been subjected (e.g. in WWII) and to the preservation of peace. By contrast, if human rights were in the end to be about the protection of such interests *by states*, their appeal might become more parochial and less straightforward.

Second, there is another reason why under interpretation N-Ab human rights may become more parochial concerns: they will be more closely tied to a particular institutional order, and one that is already changing in a globalizing world. The human rights agency of, for example, business corporations and NGOs is increasingly important – as is recognized by many.[42] Moreover, in the current post-Westphalian world order the roles of the international community are growing and the internal and external sovereignty of states is being ever more perforated. This seems to leave interpretation N-Ab with the choice either to deny the applicability of the notion of human rights to such a world order or to come up with a second conception of human rights – in addition to N-Ab – which *would* be applicable to such a world order, even if N-Ab is not. Neither seems to be particularly attractive. The former is a paradigm case of condemning human rights to parochialism and the latter is unattractive – if for no other reason – because it is not very parsimonious to have two accounts rather than one.

All in all, then, interpretation Ab seems clearly preferable. However, there may be objections. First, someone could take issue with the above claim that, on a reflective equilibrium approach, Ab and N-Ab are equally acceptable interpretations of the post-WWII practice of human rights. This objector would typically point to some 'raw materials' that we would have to discard on interpretation Ab but should not be willing to discard. And it is doubtlessly true that there are many 'raw materials' – doings and sayings concerning the

42 Including lawyers, e.g. Alston 2005; Clapham 2006.

central human rights documents – where states are regarded as central.[43] But I believe that it is possible to give a coherent reading of the practice, and one with attractive implications, where the centrality of states as duty bearers (above all, each state for its own people) is at least mitigated to some extent. In fact, this is just the challenge in which many are engaging in the current globalizing setting, where humanitarian intervention, the involvement of non-state agents, and cross-border assistance in human rights protection and realization are gaining increasing prominence. Of course, the outlines of such a post-Westphalian human rights landscape would need to be considered in greater detail. I cannot undertake this here, but it is important to reiterate that interpretation Ab need not imply that states lose every role whatsoever as duty bearers; N-Ab only envisages that their importance is mitigated in certain important ways.[44]

A second objection to the effect that Ab is not in the end preferable to N-Ab could say that, contrary to what was argued above, it *is* possible to tell an attractive story as to what human rights are about if one accepts N-Ab. However, I cannot see what this story would look like. Human rights could be about 'protection by the state', and one could look to the famous American and French examples of the late eighteenth century. But these are citizens' rights and their relation to human rights, as I have understood them, remains to be discussed.[45] Charles Beitz, whose own proposal for (what he

43 It may be objected that states are central in these documents themselves. However, these documents only exist through interpretation. So the objection is better put as asserting that the most acceptable interpretations of these documents should give a very central place to states as duty bearers; but this assertion largely takes us back to our present discussion.

44 Cf. Section 3.3 below for a more concrete idea of what this may look like.

45 To elaborate: it *is* attractive that states have to observe certain fundamental rights; but it is something else to say that human rights are *only* or *mainly* about states honouring or promoting these rights. Why would they only be about this? In the French and American examples the answer seems to be: because we are concerned, from the outset, with a particular state (the French or the American state). But then we are talking about citizens' rights. A different answer could be: because our world is largely Westphalian in structure (i.e. to a great extent focused on largely sovereign states). But then, this does not produce an attractive story in favour of N-Ab; it merely makes human rights hostage to what seems to be a contingent situation.

calls) a practical conception of human rights is close to N-Ab,[46] compounds the problem by claiming that 'human rights do not appear as a fundamental moral category' and that 'human rights need not be interpreted as deriving their authority from a single, more basic value or interest such as those of human dignity, personhood, or membership'.[47] This may be dangerously close to asserting that it is very hard to tell a coherent and attractive story of what human rights are about.

I conclude that the objections are not convincing, and that Ab should be regarded as superior to N-Ab. Let us recall why this is important. As we saw, if we are to realize a globally more equal protection of urgent interests, we must move away from states as duty bearers to some considerable extent. Now the importance of the above discussion is that it has shown that we can justifiably do this while still offering an interpretation – and indeed a good interpretation – of the practice of human rights.

3.3. Beyong states: examples

What could a decreased importance of states as human rights duty bearers mean more concretely? We need to know this if we are to see more clearly how to move ahead. In considering this, I will again take Rawls's lead.[48] In what he calls 'non-ideal theory', Rawls distinguishes two kinds of situations. The first kind are situations where states are unwilling to act as they should and the second kind are situations where they are unable to do so, due to unfavourable circumstances. For the first kind of situations, Rawls holds that forceful intervention may be justified in the case of, for example, grave human rights violations (although extreme care is always needed in judging particular cases). This has some similarities with the Responsibility to Protect.[49] For the second kind of situations, Rawls adopts a duty to assist with institution building, which should be carried out in a way so as to

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46 Beitz sees three components in human rights. Briefly put, these are: (1) the protection of urgent interests, (2) with states as the primary and main duty bearers, each state first of all for its own citizens, and (3) pro tanto reasons for the international community to become involved. See Beitz 2009, at p. 109.

47 Beitz 2009, at pp. 127-128.

48 This time: Rawls 1999.

49 See UN General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), at 139.

be compatible with, for example, cultural and political self-determination.[50] All of this does not sound very radical and for the most part it remains focused on states. But it does concern states' engagement with those beyond their borders, and as such it *does* move away significantly from each state as the main and primary duty bearer for its own people – and is in line with Ab rather than N-Ab. Furthermore, this move away from states may be supplemented in two ways. First, one may also see certain roles for non-state agents such as business corporations and NGOs, for example in failed states (a current example arguably being Congo-Kinshasa), which typically constitute some vague middle category between an inability and an unwillingness to realize human rights.[51] Second, the above examples where states act for the sake of those beyond their borders may be extended – as always, with due care – to intergovernmental organizations such as the UN, and these may arguably constitute the beginning of institutional constellations that take an ever greater distance from Westphalian arrangements. These, then, are some elements of what a shift away from states as human rights duty bearers may look like more concretely.

4. To conclude

The main thesis of this article has been that human rights, which clearly subscribe to the idea that all humans are fundamentally equal, should also move much closer to equal concern, that is, equal protection of urgent interests. At present, the protection offered as a matter of human rights often turns out to be blatantly unequal in practice; recall what the human right to health is bound to get one in Germany – quite a lot, including probably such treatments as renal dialysis – versus in South Africa. Similar examples could be given for civil and political human rights, such as the right to security. Such differences are not only predictable but they arise on account

50 Cf. Risse 2005. There are already some tendencies in this direction in the practice of human rights; see e.g. ICESCR, Art. 2.1. Risse also rightly points out that it is not always easy to estimate whether such a duty of assistance applies – whether it is possible acceptably to contribute to institution-building from the outside, and if so, in what ways. Furthermore, assistance with institution building should in certain cases arguably be supplemented by the provision of urgent humanitarian assistance. See Risse 2012, at p. 173.

51 O'Neill 2004; O'Neill 2005.

of deep-seated features of human rights arrangements. In response to this, I have welcomed the move away from Westphalian arrangements that we can already see is happening. It is true that we should beware of moving too quickly towards institutional arrangements whose potential disadvantages and advantages we do not even remotely grasp.[52] And we should also beware of well-known dangers such as paternalism. Institutional transformation needs to be cautious and gradual – work in progress. But the future of human rights remains bound up with it.

52 As Risse cautions in Risse 2012, at p. 80ff.

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