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Article

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Allocating Human Rights Obligations in the ECHR

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ABSTRACT

This article asks how to allocate human rights obligations stemming from the European Convention on Human Rights and defends an interpretivist account of human rights based on the values of integrity and equality to answer it. First, it considers the structure of rights and argues that human rights usually require a duty bearer who needs to be identified. Second, the article analyses interest-based theories of human rights and shows that they do not speak to the allocation of duties. Third, I argue that duties can only be allocated relying on a normative principle and that an interpretivist account of human rights allows for underlying values to be identified. Fourth, I show that these values should be understood to be integrity and equality. Finally, the article applies the framework to the judgment in Carter v Russia, showing that an explicitly normative account supplies principled distinctions where other approaches cannot.

KEYWORDS: European Convention on Human Rights, extraterritorial human rights obligations, human rights obligations of non-state actors, *Carter v Russia*, interpretivism

1. THE RELEVANCE OF ALLOCATION

This article asks how to allocate human rights obligations stemming from the European Convention on Human Rights (ECHR or Convention).[1] Another way to put this question is to say that the article aims to explain how to identify duty bearers under the Convention. It can be broken down again into two further questions, namely, which type of agent can and should be a duty bearer under the Convention, and which specified agent(s) of that type should have obligations toward an individual in a given case. I argue that the identification of duty bearers requires justification and is thus a normative question that should be answered by reference to the nature of human rights. Building on an interpretivist account of human rights I argue that their nature and purpose is determined by the values that govern the practice[2] of the ECHR and I defend the position that these values are equality and integrity.

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1 This way of putting the question is inspired by Besson, 'The Allocation of Anti-poverty Rights Duties: Our Rights, But Whose Duties?' in Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (2013) 408.

2 I am using the term practice to refer to the work and findings of the European Court of Human Rights (ECtHR), but also to any engagement with it that holds any relevance for the Convention's interpretation or application. Written submissions or oral arguments before the Court, or even domestic courts' reception of these practices are examples.

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The argument unfolds in four steps. First, I consider the structure of rights. An examination of human rights as Hohfeldian incidents shows that to make them intelligible as they are used in practice, they need to be understood to incorporate claim-rights. As such, human rights require both a right holder and a duty bearer. Because this analysis does not speak to the identification of either right holder or duty bearer, I consider interest theories and will theories of rights (in general—as opposed to human rights) and argue that they do not supply a principle to allocate duties. Second, the article analyses justifications of human rights and whether they might elucidate the question of allocation of duties. In particular, I consider interest-based theories of human rights and show that they cannot overcome the limitations of the interest theories on which they build.

Third, I show that the allocation of human rights duties requires the identification of normative principles. I then argue that an interpretivist account of international human rights law and the ECHR is the most promising way to think about allocating duties as well as the justification of any such allocation. I draw on Ronald Dworkin's work but I do not treat interpretivism as a theory about the nature of law. Rather, I rely on it as a normative method—a way of reasoning about normative concepts, including law. Fourth, I suggest that we have much to gain by recognising the law of the ECHR as a social practice. Seeking to determine what human rights require within the Convention's system of accountability allows us to specify right holders and duty bearers according to the underlying values. These values, I argue, are integrity and equality. Integrity explains why public institutions are the primary duty bearers of human rights and equality suggests that the relevant capacity regarding the potential right holder of these institutions is that of guaranteeing the individual's equal moral status.

In practical terms, the question of allocation is relevant to at least two topical and important issues. First, it addresses potentially holding non-state actors liable for human rights abuses,[3] and second, it provides a principled account of extraterritoriality.[4] On the one hand, it is beyond doubt, based on the text of the Convention alone, that (contracting) states can be duty bearers, but the same cannot be said for non-state actors. An answer to the question as to what type of agent can be a human rights duty bearer would elucidate this. On the other hand, extraterritorial human rights obligations are duties owed by states to individuals outside their territory.[5] In most contexts the assumption is that the territorial state in question is also the duty bearer. However, this assumption cannot explain extraterritorial obligations. In order to identify extraterritorial human rights obligations we need to know who owes these obligations to which individuals. That is, we need to allocate the burdens that go along with human rights obligations, and precisely because they are burdensome we need to justify this allocation.

2. HUMAN RIGHTS AND HUMAN RIGHTS OBLIGATIONS

The allocation of human rights obligations or human rights duties[6] only matters if human rights require the existence of duties in the first place. Accounts of the internal structure of rights, and

[3] On this issue see, among many others, Clapham, *Human Rights Obligations of Non-state Actors* (2006); Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect'' (2009) 9 *Human Rights Law Review* 225; Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal* 21.

[4] Extraterritorial human rights obligations are those owed to individuals who at the time of the alleged violation are not within the territory of a state whose obligations are in question. On this see Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011); Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (2020). On the ECHR specifically see Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857; Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (2020).

[5] The present article draws on an account first developed to address the question of extraterritorial human rights obligations in international human rights law generally: Raible supra n 4 at ch 2.

[6] I am treating the terms 'obligation' and 'duty' as interchangeable for the purposes of this article.

particularly the framework advanced by Hohfeld, speak to this concern. Once it is established that at least some instances of human rights also require the existence of duties or obligations, the question is how to identify the duty bearer. However, debates about the internal structure of rights—which are the concern of the Hohfeldian framework—do not say anything about this. It is thus necessary in a next step to look to human rights theory more specifically. The most influential accounts of human rights and their justification are interest-based theories. I analyse their structure and show that they cannot, without more, allocate human rights obligations.

A. Human Rights as Claims

Wesley N. Hohfeld proposed to categorise legal relationships using four (now called) Hohfeldian incidents.[7] Hohfeld's scheme distinguishes four types of entitlements: claims (or rights),[8] privileges (or liberties),[9] powers, and immunities.[10] In brief, a privilege is a 'right' to perform or omit an action, for example to drive a car or to access one's home. A claim, on the other hand, is the 'right' that somebody else performs or omits an action, for example not to obstruct me from accessing my home. Powers and immunities entail the 'rights' to alter our privileges and claims or that the same are not altered by somebody else.[11] In ordinary language all of these entitlements may be and often are referred to as rights. The right to free expression, for example, is most aptly framed as a privilege (or liberty) to speak one's mind. The corresponding, and equally necessary, right not to be hindered in that expression is a claim towards others—the duty bearers—that they do not interfere.

This last example is the Hohfeldian incident that captures rights assertions in a strict sense: the claim.[12] As we will see, the distinction between a Hohfeldian claim and a Hohfeldian liberty is crucial to our understanding of human rights.[13] Claims are assertions that (A) has a right that (B) x, where x is an active verb.[14] A claim-right thus relates the *right* of (A) with a *duty* to (or not to) x held by (B) towards (A). Both the right holder (A) and the duty bearer (B) need to be specified or at least specifiable.[15] Importantly, this analysis is neutral regarding the function of rights as well as in terms of what justifies or grounds them.[16]

For our purposes, there is agreement about the fact that a claim-right needs to regulate what a duty bearer owes to a right holder.[17] Regarding the allocation of duties under the ECHR, the analysis of the internal structure of rights nevertheless generates a puzzle: how do we make sense of a claim-right, for example, to liberty and security if the right is formulated relating to a particular good? What is the obligation of the duty bearer and what role does it play in relation to the good that is supposed to be provided? I said above that the duty of (B) towards (A) consists in actions (doing or not doing) rather than a good. While the action (or omission) in question could be characterised as 'securing a given good' the emphasis would still have to be on the fact that the duty imposed by the right is an action.

[7] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16. For analysis and elaboration on the original proposition see, eg, Kramer, 'Rights Without Trimmings' in Kramer, Simmonds and Steiner (eds), *A Debate over Rights* (1998) 7; Wenar, 'The Nature of Rights' (2005) 33 *Philosophy & Public Affairs* 223; Duarte d'Almeida, 'Fundamental Legal Concepts: The Hohfeldian Framework' (2016) 11 *Philosophy Compass* 554.

[8] This is to emphasise that claims or claim-rights are widely considered the paradigmatic instance of a right. In the early version of the scheme, Hohfeld himself uses the term 'right' for this incident: Hohfeld supra n 7 at 30.

[9] Kramer prefers 'liberties': Kramer supra n 7. Hohfeld supra n 7 and Wenar supra n 7 use 'privilege' to mean the same.

[10] Hohfeld supra n 7 at 30.

[11] For an accessible overview of the Hohfeldian incidents and how they relate to each other to form what Wenar calls 'complex, molecular rights' see Wenar supra n 7 at 224–233.

[12] Kramer supra n 7 at 9; Wenar, 'The Nature of Claim-Rights' (2013) 123 *Ethics* 202.

[13] This distinction is crucial for rights discourses in general: Duarte d'Almeida supra n 7 at 564.

[14] Wenar, 'The Nature of Rights' supra n 7 at 225.

[15] Kramer supra n 9.

[16] Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 *Oxford Journal of Legal Studies* 257 at 258.

[17] Ibid. at 258. On the framework as a whole see Duarte d'Almeida supra n 7.

There are two possibilities to address this issue, which I will discuss relating to the right to liberty and security as found in article 5 ECHR. Either a right to a good can never be a claim-right or rights to goods, such as liberty and security, are claim-rights but in an imprecisely expressed form. The first possibility would mean that the statement '(A) has a right to liberty and security' is nonsensical. This is because both privileges and claims concern actions rather than goods. However, liberty or security are not actions and can thus not form the object of a right. Given the analysis above, this is entirely plausible, but unsatisfactory for our purposes. The assertion of a right, which resonates with ordinary language as well as social and legal practice but does not comply with our conceptual analysis should not be dismissed so easily.

The second possibility—that a right to a good is an imprecise expression of a right—would entail a translation of 'liberty and security' into specific actions describing the duty the claim entails.[18] If nothing else, this is certainly more to the point of interpreting the ECHR than following the first option. In order to make sense of the phrase '(A) has a right to liberty and security' we would thus have to say that '(A) has a right to enjoy access to liberty and security' to make it into a liberty. Or we would have to specify that '(A) has a right that (B) provide her with the conditions necessary for liberty and security to be enjoyed' to make a right to liberty and security a claim. For present purposes, it is not vital to know exactly *how* to specify a right to a good. The key here is to acknowledge *that* such a specification is necessary.[19] All claim-rights that appear to be to a particular good have to be translated into the following form: (A) has a right that (B) (not) x, rather than to good Y. This would also explain why article 5 ECHR specifies required actions, such as informing anyone who's arrested about the reason for the arrest and charges against her. These actions—presumably—contribute to creating conditions for an individual to enjoy access to liberty and security. In general, human rights practice relies on concepts that can be read as a response to precisely this problem. Think of obligations to respect, protect, and fulfil human rights. These categories translate goods, such as liberty or security into descriptions of action.[20] The European Court of Human Rights (ECtHR) does not do this: it instead relies on the distinction between negative and positive obligations,[21] thus missing an opportunity for clarification.[22]

The analysis of the structure of claim-rights captures the fact that rights that seemingly entitle the right holder to a certain outcome need to be specified in terms of concrete mandated behaviour or conduct. This conduct may consist in securing that outcome. Some of the common phrasings concerning human rights are imprecise in this regard and thus make a sort of translation necessary. What this translation brings to the fore is the following. Conceptually speaking, rights mandate actions. The required action is imposed on someone other than the right holder. In turn, this has implications for the normative content of rights. Rights need to provide reasons for others to act in a certain way for the sake of the right holder (or a beneficiary as the case may be—but this is not the focus for our purposes) and the normative content needs to be justified by recourse to principles that support these reasons.[23] In other words, the structure of rights is important because it impacts on what would count as a justification of their normative content, including the allocation of any duties that arise.

[18] The discussion in this paragraph draws on Wenar, 'The Nature of Rights' supra n 7 at 234–35.

[19] Similar: O'Neill, *Bounds of Justice* (2000) at 98–99, 103.

[20] The typology was first outlined by Eide, *Report of the UN Special Rapporteur on the Right to Food* (7 July 1987) UN Doc E/CN.4/Sub.2/1987/23 at paras 66–69 and given that socioeconomic rights are frequently expressed as relating to goods it is no accident that this is the area the concepts were developed for.

[21] For a recent discussion of the structure of analysis employed by the Court see Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87 *Nordic Journal of International Law* 344.

[22] Sceptical about these and similar distinctions in general: Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *Human Rights Law Review* 81.

[23] Meckled-Garcia, *What Interest in Human Rights? The Primacy of Reasons over Interests in Justifying Practical Rights* (manuscript on file with the author, 2016).

Hohfeldian claims do not, however, help us identify the right holder or duty bearer nor the exact content of either the right or the correlating obligation.[24] For our purposes, this means we have to look further for a way of allocating and justifying obligations imposed by the ECHR. In a first step, we should ask where an actor—be they a person or an institution—would find guidance *how* to define what actions are required and of whom to translate rights to certain goods. One way is the attempt to gain insights from theories that aim at distinguishing rights from duties without a corresponding right.[25] Two kinds of theory have been particularly influential in this respect: interest theories and will theories. I discuss both of them briefly but will be focusing on interest theories and what they have been taken to imply for our purposes next. It is worth noting that theories of human rights specifically (as opposed to rights in general) are often categorised differently than along the lines of interest and will theories. The most common typology is to distinguish between political and ethical or moral conceptions.[26] However, the point of those theories is best understood as elucidating which rights meaningfully count as human rights. They do not chiefly concern themselves with the relationship between rights and duties, while interest and will theories do. As we shall see in more detail immediately below, interest theories are conceptually more easily associated with public law rights, whereas will theories have been defended with private law rights in mind. Interest theories have been the more important inspiration for human rights theories because these rights, including those found in the ECHR, are functionally much closer to public law rights than private law rights.

B. Interests and Duties

Will theorists would say that what makes something a right is that it affords 'discretion over the duty of another.'[27] This emphasis on discretion stems from the fact that will theories respond to the paradigms of rights found in private law, especially in property and contract law.[28] Interest theories hold that a right is a right because it protects an interest of the right holder and thus furthers their well-being.[29] Take a right to freedom and security—appropriately translated as just explained above. Will theories hold that this is a right because it gives the right holder choices, for example, over where they go or do not go.[30] An interest theorist, on the other hand, would say that the right to freedom and security is a right because it protects the right holder's interests to freely move their body in the world, and furthers their well-being for this broader reason, not only because of the choices it generates.

These are accounts of what rights should be understood to do for a right holder and not about what justifies the allocation of either the rights or any corresponding duties.[31] Nevertheless, both will theories and interest theories have been associated with particular justifications of rights (and obligations).[32] Sreenivasan explains:

[24] Sreenivasan supra n 16 at 258.

[25] Charity is often given as an example. I may have a duty to give to charity, but it does not follow that anyone or any organisation in particular has a right to receive it.

[26] On these two types of account and how they relate to the ECHR see Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and the Political Conceptions* (2016).

[27] Wenar, 'The Nature of Rights' supra n 7 at 238. Hart, influential in his proposition of a will theory referred to this discretion as control: Hart, *Essays on Bentham* (1982) at183.

[28] Sreenivasan supra n 16 at 259. Hart does not defend his version regarding constitutional rights: Hart supra n 27 at 192–93. Convention rights are conceptually clearly much closer to this category than, say, rights found in contract law.

[29] See, eg, Raz, *The Morality of Freedom* (1986) at 166; Kramer supra n 7 at 62; Wenar, 'The Nature of Rights' supra n 7 at 240–41.

[30] See, eg, Hart supra n 27 at 185; Kramer supra n 7 at 62.

[31] Similar Kramer supra n 7 at 60. See also Wenar, 'The Nature of Claim-Rights' supra n 7 at 207–08. He points out that neither interest theories nor will theories solve the problem of justifying the allocation of rights and duties to specific agents. However, it is not appropriate to treat this as a flaw of these theories: allocation is not their concern.

[32] Sreenivasan supra n 16 at 262.

> On the account associated with [will theories], the justification for empowering Y to waive the duty correlative to her claim-right, and so for vesting her with the claim-right, lies in the fact that so doing serves Y's interest in autonomous choice. In the paradigm cases, empowering Y to waive this duty also advances her interests on balance. By contrast, on the account associated with [interest theories], the justification for the structure of Y's normative standing, as we might put it, lies in the more general fact of what advances Y's interests on balance. It is not tied to the more specific fact of what advances Y's interest in autonomous choice.[33]

Interest theories of rights are more easily associated with a broad range of interests, individual well-being in general, and with (equal) moral standing, as opposed to a specific interest in autonomy. Because of this difference, the justification of human rights is more frequently built on interests in general and as such often borrows from interest theories of rights.[34] Sometimes this means that the conceptual claim advanced by interest theories and justificatory claims about what human rights we have and what their content is are not as clearly separated as they should be. The idea that interests *justify* the existence and allocation of rights and duties is not a necessary part of a conceptual or formal interest theory but is relevant for interest-based accounts of human rights.[35]

What makes something, including a human right, a right, according to interest theories is that it furthers an individual's well-being by protecting their interests.[36] Interests in this sense must be sufficiently important to give rise to obligations on the part of others to respect these interests of the right holder.[37] Raz's general definition of a right is a version of an interest theory of rights:

> *Definition:* 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.[38]

He continues by saying that a right of one person grounds duties of another[39] and states that '[a] right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, such as a burden imposed being too weighty, justifies holding that other person to have the duty.'[40] The work of justification here is not done by an individual's well-being or interests taken on their own, but by the fact that the interest in question is *sufficiently important* and that there are *no countervailing considerations*.[41] Raz accordingly points out that interests are only part of the justification of rights.[42]

Moving from an interest theory of rights to an interest-based theory of human rights needs to take these issues into account. Leaving out these caveats has had one consequence in particular

[33] Ibid. (footnotes omitted).

[34] See, eg, Nickel, *Making Sense of Human Rights*, 2nd edn (2007); Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1. For an account that is based more closely on autonomy see generally Griffin, *On Human Rights* (2008).

[35] Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2009) at ch 5; Meckled-Garcia, *What Interest in Human Rights? The Primacy of Reasons over Interests in Justifying Practical Rights* supra n 23 at 5–6; Raible supra n 4 at ch 2.

[36] Wenar, 'The Nature of Rights' supra n 7 at 240–41.

[37] Raz supra n 29 at 166; Tasioulas, 'The Moral Reality of Human Rights' in Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor* (2007) 75 at 77.

[38] Raz supra n 29 at 166 (footnote omitted). The definition refers to moral rights. But in terms of the structure and justification of duties, legal rights are comparable to moral rights. The opposite is also true: Hohfeldian incidents were developed to explain the structure of legal relationships but are now often relied upon to look at the structure of moral rights as well.

[39] Ibid. at 167–68.

[40] Ibid. at 171.

[41] On the flaws of such interest-based accounts of human rights: Meckled-Garcia, *What Interest in Human Rights? The Primacy of Reasons over Interests in Justifying Practical Rights* supra n 23.

[42] Raz supra n 29 at 181–82.

that, to my mind, is in the way of properly justifying the allocation of human rights duties, including those in the ECHR. An interest-based theory of human rights allows for normative considerations to be replaced with an agent's *capacity* to bring about positive effects on an individual's wellbeing. This has been particularly obvious regarding the question of extraterritoriality of positive obligations—more so in the findings of human rights bodies other than the ECtHR. I will first outline an example of how capacity functions as a consideration and will then explain why this trend is relevant for the Court, even though it has so far not embraced this type of reasoning.

Consider the UN Human Rights Committee's (HRC) findings in *AS* et al *v Italy* for example.[43] The HRC deployed an argument in which it relied on a particular capacity of an agent to identify them as a duty bearer. I discuss it here because it illustrates the usual form such arguments take in human rights cases. The communication concerned the failure of Italy to rescue migrants from their sinking vessel in the Mediterranean and found the state responsible for failing to fulfil its positive obligations.[44] For our purposes, the findings regarding (extraterritorial) jurisdiction under article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) are relevant. In particular, the HRC considered that an Italian vessel answered the migrants' boats distress calls, took into account its proximity, and obligations under other legal instruments. It concluded that: . . . the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta.[45]

The HRC's approach to identifying Italy's obligations conceptually relies on Italy's capacity to rescue the migrants because their distress and the effect of Italy's decisions was foreseeable.[46] What is not made explicit is the underlying argument as to why and how Italy's capacity matters. This would plausibly take the following form. Migrants at sea have a right to life. The interest protected by this right is to not be arbitrarily deprived of one's life. This interest is, other things being equal, sufficiently important to hold an agent other than the right holder under a duty to uphold it. Having to migrate on a dangerous route negatively impacts this interest and thus the individuals' wellbeing. The duty to mitigate against this lies with whoever has the capacity. An Italian vessel was close by and had the capacity to make a positive difference by rescuing the migrants.[47] Thus, Italy has a duty towards the migrants whose interests are endangered.

This example illustrates well that moving from interests to duties requires several steps. It makes clear that what justifies any obligation as well as its allocation is not the interest of the right holder on its own but a combination of the interest's importance coupled with an agent's capacity to protect it. The general form of an interest theory of rights, however, does not specify capacity as relevant, nor does it say anything about what factors would make an agent capable.

[43] Human Rights Committee, *AS* et al *v Italy* (3042/2017), Merits, CCPR/C/130/D/3042/2017. The other communication employing the same type of reasoning was *AS* et al *v Malta* (3043/2017), Admissibility, CCPR/C/128/D/3043/2017. The application was declared inadmissible because of the non-exhaustion of domestic remedies. Of course, cases with the same or similar facts could also be encountered by the ECtHR. *Safi* et al *v Greece*, App No 5418/15, Merits and Just Satisfaction, 7 October 2022 is an example. The identification of the duty bearer was not in question, but this is little more than a factual coincidence.

[44] *AS* et al *v Italy* (3042/2017), Merits, CCPR/C/130/D/3042/2017 at para 8.5.

[45] Ibid. at para 7.5.

[46] The committee also relied on other international law obligations to try and specify the duty bearer. These considerations are not illustrative for our purposes but nevertheless show an awareness that a normative identification of the duty bearer is necessary. For analysis see Marko Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' EJIL:Talk! (16 March 2021) https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/ [last accessed 1 August 2023].

[47] On how proximity plays a role in allocating obligations more generally see Wenar, 'Responsibility and Severe Poverty' in Pogge (ed), *Freedom from Poverty as a Human right: Who Owes what to the Very Poor?* (2007) 255.

In other words, interest theories do not provide the means to justify why one agent, rather than another, should carry the associated burdens and a focus on the justification of who owes the duty provided here exposes this shortcoming. In fact, these theories smuggle in a criterion of capacity as a sufficient condition for allocating a duty without properly accounting for it.[48] Interests only tell us about the potential right holder and in which area of human activity a right might be appropriate. What is missing is a normative principle that connects the interests of right holders with the required actions of duty bearers who would have to shoulder the obligations generated by an interest.[49] How to identify such a principle instead is the task taken up by the next section.

3. PRINCIPLES AND THE IMPORTANCE OF CONTEXT

A. The Role of Principles

Why is an agent's capacity not an appropriate criterion to allocate human rights obligations under the ECHR? The problem with 'capacity' is, first, that it is imprecise. There are many kinds of capacities required to perform the complex duties ECHR rights impose on potential duty bearers. Think, for example, about procedural rights under article 6.[50] Discharging the corresponding duties of providing access to a court without undue delay requires the running of a justice system, with competent staff that are paid adequately and on time. To be competent they need access to training which at the very least in the case of judges and advocates requires access to higher education. This justice system needs court houses with all the maintenance and running costs such infrastructure comes with. The decisions made by the staff in these buildings need to enjoy a minimum of authority. And so on. What would be the decisive capacity to allocate such duties to an agent? The capacity to pay for the required steps? The capacity to organise the required resources? The capacity to generate authority? It is not clear how to select a particular one.

This leads us to the second problem facing 'capacity' as a criterion. It is important to recall that allocating a duty and justifying that allocation has a normative quality. That is, identifying an agent's obligations says something about what they ought to do, not about what they are in fact doing. This means that an argument about allocating duties needs to be suited to generating and justifying a normative statement. Let's return to capacity: its existence or lack thereof is a fact. The same is true for the existence of an individual interest. All of these are statements about how the world is. But allocation of duties in the ECHR needs to be based on a normative principle.

That the existence of capacity is a fact is an important limitation. Facts are in need of a logically prior principle that explains their relevance for a particular justification.[51] In particular, a logically prior principle is needed to explain why it is one fact rather than another fact that supports a principle. In our case, the first principle would be something like 'whatever agent

[48] On this aspect see Raible, 'Extraterritoriality between a Rock and Hard Place' (2021) *Zoom-in 82 Questions of International Law* 7 at 16–20.

[49] Meckled-Garcia, 'Specifying Human Rights' in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (2015) 300 at 312–14. For an approach suggesting that facts cannot—on their own—support normative statements more broadly see Cohen, 'Facts and Principles' (2003) 31 *Philosophy & Public Affairs* 211. For its application to international human rights law see Raible, 'Between Facts and Principles: Jurisdiction in International Human Rights Law' (2022) 13 *Jurisprudence* 52.

[50] Procedural guarantees are a good example. Their role in shaping the contours of Convention rights is considerable as the ECtHR has read them into many of the substantive rights as well: Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights' in Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014) 137. In addition, and particularly providing a trial within a reasonable timeframe is one of the most violated provisions of the ECHR: Keller and Stone Sweet, 'Assessing the impact of the ECHR on national legal systems' in Keller and Stone Sweet (eds), *A Europe of rights: The Impact of the ECHR on National Legal Systems* (2008) 677 at 696–697.

[51] This view is based on Cohen supra n 49.

has the capacity to positively impact the relevant individual interest ought to have an obligation under the ECHR to do so.' But why is it capacity rather than, say, control over the potential rights holder that is decisive?[52] The kind of capacity required is not clear for the same reason: the other, prior principle explaining which kind of capacity would be relevant is missing. What this illustrates is that no fact—including the existence of capacity—picks out its own relevance. Instead, facts are made relevant by a normative principle. That principle will explain why a particular fact—or, in our case, a particular kind of capacity—counts as a justification for the original normative proposition about obligations under the ECHR. [53]

B. Interpretivism and Context

The first half of this article shows that conceptual arguments about the structure or function of rights do not—in and of themselves—allocate human rights obligations, nor do they provide the means to justify this allocation. In addition, we have just seen immediately above that a principle, a normative statement, is required to do this work. But we still do not know what such a principle would be when it comes to allocating human rights obligations in the ECHR. It follows that, form here on, the method of enquiry has to change. The method needs to be suited to the identification and perhaps also generation of normative statements—principles—that govern the ECHR as a context for normative reasoning.

The rest of this contribution argues that interpretivism can provide a framework for a method that supports identifying and generating principles. It is usually understood as a general legal theory providing an alternative to positivism and is associated with the work of Ronald Dworkin.[54] On this understanding, law fundamentally functions as a manifestation of past political decisions of when collective force is justified.[55] For the purposes of this article, however, I reframe interpretivism as a normative method, that is, as a way of reasoning about normative questions.[56] On this understanding, interpretivism allows for context and past decisions being taken into account and so creates a relationship between (relevant) facts and principles. Whether the method is successful in developing principles for allocating obligations in the ECHR is a different question and will become clearer as the argument moves along: the proof of the pudding is meant to be in the eating. Nevertheless, I briefly set out my reasons for adopting it before moving on to the substance of the argument.

First, human rights claims are made in many different social, political, and legal contexts. Interpretivism makes it possible to recognise that the context in which a human rights claim is made ought to influence the principles that govern such a claim. Interpretivism further allows us to say that the law of the ECHR is a distinct social practice. Building on this, I am able to argue that the ECHR specifically is its own context in which human rights claims are made. Importantly, this aspect of interpretivism allows for the possibility that it is not necessary that all human rights claims originate from or respond to the same values or principles. This is because different contexts of the human rights practice may well be governed by different concerns.[57]

[52] Power and control are often relied upon to describe jurisdiction according to article 1 ECHR as a criterion for the allocation of duties. See, eg, *Al-Skeini v United Kingdom*, App no 55721/07, Merits and Just Satisfaction, 7 July 2011 at paras 130–139. For analysis of this framing see Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857; Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *Law & Ethics of Human Rights* 47; Raible, *Human Rights Unbound* supra n 4 at ch 3.

[53] For a more in-depth treatment of this aspect see Raible, 'Between Facts and Principles' supra n 49 at 67–68.

[54] In relation to law in general see, eg, Stavropoulos, 'Legal Interpretivism' in Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2014) https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/. For international law in particular see Çali, 'On Interpretivism and International Law' (2009) 20 *European Journal of International Law* 805.

[55] Dworkin, *Law's Empire* (1986) at 93.

[56] This argument draws on Raible, *Human Rights Unbound* supra n 4 at 55–61. Dworkin himself only comes close to this understanding in Dworkin, *Justice for Hedgehogs* (2011) at ch 6–8.

[57] Letsas, 'Philosophical Foundations of the Covenants: Is there a Unitary Concept of Human Rights?' (ESIL Symposium, Zürich, 14 April 2016) at 3–7.

To say that the relevant context for the purposes of this article is the ECHR is thus not to say that the Convention (or any other particular context, for that matter) is the focal point of human rights. However, singling out the Convention as a context allows taking into account its systemic aspects as well as the content of the rights enshrined in it. If the ECHR is a sound context for human rights to operate in, it should be possible to identify normative principles that govern its interpretation. If such normative concerns that fit the practice of the ECHR cannot be identified, it is not a salient context. If parts of what we originally thought constituted the context we are interested in do not in fact correspond the value or values that are constitutive of said context, we can no longer regard them to form part of it. This is what Dworkin means when he says that a theory needs to both 'fit and justify' the practice it aims to explain.[58]

The latter statement summarises the interpretive methodology I rely on in this article.[59] The method I employ understands any concepts that refer to shared practices which have a normative character as interpretive.[60] Human rights law or parts thereof fit the description of such shared practices. Interpretive concepts, according to Dworkin, should be understood as follows:

> We share [them] not by agreeing about tests for application but by agreeing that something important turns on [their] application and then disagreeing, sometimes dramatically, about what tests are therefore appropriate to [their] use, given that [their] application has those consequences. Any theory about the correct analysis of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought or ought not to happen. Since the doctrinal conception of law is interpretive, we provide a theory of the grounds of law by posing and answering questions of political morality.[61]

This quote is useful to show where my version of interpretivism understood explicitly as a normative method builds on Dworkin's work and where it necessarily departs from it. As set out in the quote above, interpretivism as a method is committed to the fact that normative practices need to be interpreted according to their value.[62] The value or point of the practice explains and supports the reason for the practice's existence, but it also shapes what the practice requires.[63] As such, the interpretivist normative method is sensitive to values and principles that determine and inform a shared practice and does not rely on social facts alone to explain them. Note how this corresponds to the concern set out in the section immediately above: it does not use facts on their own to support any principle of law but makes room for further principles to make any facts relevant. However, at this point my version of the interpretive method departs from Dworkin's interpretivism as a legal theory. The method does not insist the law itself is necessarily part of political morality. The present method instead only requires that the value of law, or principles explaining why a fact counts as a justification for legal norms, must be normative. That is, these values and principles must be unresponsive to facts in the sense that they are true regardless of whether a certain fact (or set of facts) is also true.[64]

[58] Dworkin, *Law's Empire* supra n 55 at 380; Letsas, 'Philosophical Foundations of the Covenants: Is there a Unitary Concept of Human Rights?' supra n 57 at 9.

[59] See generally (and among others) Dworkin, *Law's Empire* supra n 55.

[60] International law, and thus at least presumably the ECHR, is no exception. See Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2.

[61] Ibid. at 11 (footnote omitted).

[62] Regarding law as a practice specifically: Dworkin, *Law's Empire* supra n 55 at 47; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* supra n 35 at 29–30.

[63] Dworkin, *Law's Empire* supra n 55 at 48.

[64] I am adopting Cohen's terminology, which he explains in Cohen supra n 49 at 215–216. For an argument applying both the terminology and Cohen's theory to the issue of extraterritoriality and thus human rights law see: Raible, 'Between Facts and Principles' supra n 49.

Second, a useful aspect of interpretivism is its (not only terminological) similarity with a concept of interpretation that consists of both conservative and creative aspects. It shares this with what is often referred to as a key characteristic of legal interpretation.[65] This is important for the present argument because its purpose is to say something about the allocation of human rights obligations in the legal context of the ECHR. One of the features of an interpretive concept is that identifying principles that explain why certain facts are relevant is constrained by the history of the practice in question. Looking at the practice of the law of the Convention specifically, this would mean the following. Identifying underlying principles starts with provisions and cases relevant to what we want to say about the practice. For the Convention, this would usually be its text, including any relevant additional or amending protocols as well as decisions and judgments issued by the ECtHR. Identification or—depending on our emphasis—the creation of relevant principles occurs against the background of this history of the practice. Questions and disagreements raised in the process might concern whether a particular judgment is in line with the value of the practice. But disagreements may go further in the sense that they relate whether a case changes what is required in the first place or whether said case may even impact any underlying principles.

Applying interpretivism as a method, the next section seeks to answer the question which values determine the underlying principles informing human rights in the ECHR. I argue that human rights as found in the Convention should be understood in relation to two values in particular: integrity and equality. Integrity takes seriously the Convention as a system of accountability of (primarily) states. Equality in the form of equal respect generates a substantive account of Convention rights as standards of treatment (as opposed to determined outcomes) owed to individuals. These values, as well as how they relate, allow for an answer to the original question of how to allocate human rights obligations because they generate principles that explain what kind of capacity is relevant and why. The connection also explains what it is about states that makes them the primary duty bearers of human rights obligations.

4. THE ECHR AS A CONTEXT FOR HUMAN RIGHTS

A. Integrity as Legitimacy

The ECHR is a legal document and the social practice relating to it is usually taken to form part of international human rights law. As an interpretive concept, the law of the Convention has a value or point, or potentially several ones, which govern its interpretation and thus the identification of principles, such as the one that would explain or justify the allocation of obligations.[66] What is the value of the Convention? According to Dworkin, the value unique to law in general is legality or the rule of law[67] and its most important characteristic is to 'guide and constrain the power of government . . . as licensed . . . by past political decisions about when collective force is justified.'[68] Dworkin's argument transforms the understanding of legality into that of integrity. It thus identifies law's contribution to political morality (either from within or from outwith, depending on one's view on the nature of law) as to enable principled treatment of individuals.[69] However, this only applies to law within a defined political community, such as a state.[70]

[65] Dickson, 'Interpretation and Coherence in Legal Reasoning' in Zalta (ed) Stanford Encyclopedia of Philosophy (Winter 2016) https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/.

[66] See generally Letsas, *A Theory of Interpretation of the European Convention on Human Rights* supra n 35.

[67] Dworkin, *Law's Empire* supra n 55 at 93; Dworkin, *Justice in Robes* (2006) at169.

[68] Dworkin, *Law's Empire* supra n 55 at 93. See also Çali supra n 54 at 810.

[69] Dworkin, *Justice in Robes* supra n 67 at 176–78.

[70] Ibid. at 171–78.

Some, including Dworkin himself, have argued that international law and with it international human rights law and thus the ECHR cannot be governed by integrity in the same way.[71] Integrity may say something about the value of law within a political community, but international law is different from domestic law because it does not regulate the dealings of a coercive authority with its subjects. The perceived function of international law is instead to enable states to cooperate precisely without such an authority.[72] Dworkin himself, for example, argued that international law is best understood to respond to the underlying values of legitimacy and salience. According to this approach, states as the subjects of international law and their coercive governments must work towards increasing their legitimacy in ways that have already been endorsed by states.[73] This would explain why principles underlying international law are usually identified starting with the meaning of treaties, rather than ideas about what morality would require.[74] However, we are interested here not in international law in general, but in the ECHR. I want to argue that the Convention is statist in nature and simultaneously responds to the value of integrity. I am building on Dworkin's idea of why legitimacy matters to explain why I think this is plausible.

Arguing for international law to be responsive to a value of legitimacy assumes that each state's coercive power needs to be justified because the basic moral concern is for individuals, not states or their governments. Dworkin goes further and argues that if a state fails to accept cooperative international law it also fails to meet duties towards individuals it is responsible for or represents.[75] In other words, legitimacy as a relevant value for international law is only plausible once there is a concern for individuals that is in some sense more fundamental than any concern for states.

The ECHR is an international treaty and as such is a paradigmatic example of the cooperative nature of international law.[76] However, the obligations enshrined in these treaties are owed to other states only in a very formulaic sense. The real beneficiary of these duties are individuals with whose rights, which are also enshrined in these treaties, the duties correlate. Enhancing legitimacy as a sort of standing duty of states under international law thus takes a particular form in the case of the ECHR: facilitating principled treatment of individuals. Concerning the Convention this generates the following picture. Legitimacy is the value that underlies international law as whole. In turn, in the case of the Convention, legitimacy is given the specific expression of integrity at least as far as individual treatment is concerned.[77]

The relevance of integrity as a governing value of the Convention system has an important consequence for our purposes: it means that public institutions are the primary duty bearers of human rights obligations. By public institutions I mean branches of government, administrative agencies, and so on. I thus use the term to take account of a wide range of possibilities rather than

[71] See generally Meckled-Garcia, 'International Law and the Limits of Global Justice' (2011) 37 *Review of International Studies* 2073; Dworkin, 'A New Philosophy for International Law' supra n 60. For an argument that international law is not susceptible to the substantive aspects of Dworkinian interpretivism see Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 *European Journal of International Law* 627; for arguments that it is or may be see John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85 and more generally Çali supra n 54.

[72] Meckled-Garcia, 'International Law and the Limits of Global Justice' supra n 71 at 2077–85; similar Dworkin, 'A New Philosophy for International Law' supra n 60 at 13–14.

[73] Dworkin, 'A New Philosophy for International Law' supra n 60 at 19.

[74] Article 31 Vienna Convention on the Law of Treaties.

[75] Ibid.

[76] Meckled-Garcia, 'International Law and the Limits of Global Justice' supra n 71 at 2080.

[77] This may not be the case for all of the ECHR's provisions: think only of inter-state complaints provided for in article 33 ECHR. But this contribution is only concerned with allocating human rights obligations and accordingly this aspect does not need to worry us here.

in any precise sense. These will also look different from state to state.[78] However, relying on the character of integrity we can begin to draw the contours of the public nature of these bodies. Public institutions are agents who claim the legitimate use of collective force for themselves. Law—on Dworkin's interpretivist account as a theory of the nature of law—fundamentally functions as a manifestation of past political decisions of when collective force is justified.[79] That is, a public institution relies on past political decisions as expressed by the relevant domestic legal system as a source of its legitimacy.

What is a public function is itself a political decision and this can be interpreted more or less broadly by different political communities. The approach defended here, however, warrants opting for a broad definition as a starting point. For example, if a function is as a matter of law usually allocated to political bodies, such as local or regional governments, a (legal) decision to contract a private entity should not change the fact that this function is public. The upshot of integrity here is that such a course of action is more likely to render a particular aspect of the private entity public, than it is to make the originally public function private.[80]

Of course, there are other kinds of collective force, such as, say, the power of employers over employees. However, as far as force that makes use of law is concerned, the state and its public institutions are the background agents who could change the nature and impact of an employer's abilities in this sense, while a random employer could not do the same. This is what makes a state a primary duty bearer.[81] Accordingly, the value of integrity tells us not only *that* we should look to public institutions as duty bearers but also what it is *about* them that makes this true. The point of integrity—as a value informing the ECHR—is to constrain and channel government coercion not just in any way but to afford principled and coherent treatment to individuals.

Recall the discussion on what kind of capacity might serve to allocate human rights duties.[82] Integrity generates principles that explain the relevance of capacity as a fact and further allows for its specification. As just seen, integrity captures the principle that collective coercion needs to be justified. In turn, this means it can explain why a capacity to coerce singles out public institutions as the kind of actor we are looking for when we seek to identify a duty bearer under the ECHR. That is, the value of integrity generates a normative statement about collective coercion that then helps us to explain that a capacity to coerce indeed justifies allocating a human rights duty and also explains why this is so.

States as public institutions are the paradigmatic agents of collective coercion and thus the paradigmatic bearers of human rights obligations. However, there is nothing in this account that excludes the possibility of non-state actors being identified as the bearers of human rights obligations. All that would be required for a non-state actor or private entity to become a duty bearer is that they share relevant features with public institutions.[83] Before saying more about these relevant features (which will also further clarify the nature of publicness), I need to set out the implications of the value of equality for the Convention. The next section takes up this task.

[78] The ECHtHR often takes account of this fact in the form of its autonomous concepts doctrine as applied, for example to what constitutes a court or tribunal for Convention purposes. On aspects of the autonomous concepts doctrine see, eg, Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 4 *European Journal of International Law* 279; Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (2015) at ch 7.

[79] Dworkin, *Law's Empire* supra n 55 at 93. See also supra text accompanying fn 55.

[80] UK courts, for instance, currently seem to adopt the opposite approach on private entities contracted to carry out public functions. For analysis of recent practice see Williams, 'Public Authorities and the HRA 1998: Recent Trends' (2020) 25 *Judicial Review* 179. I discuss several examples of hard cases in this respect in Raible, *Human Rights Unbound* supra n 4 at ch 7.

[81] Raible, *Human Rights Unbound* supra n 4 at 63.

[82] Supra sections 2.2 and 3.1.

[83] Raible, *Human Rights Unbound* supra n 4 at 151–157.

B. Equality

The discussion of rights as claim-rights identified two key features.[84] First, rights as claims place a duty on an agent other than the right holder. And second, a claim-right is always a right *that this duty bearer behave or act in a certain way*. The value of integrity in turn suggests that one of the points of the ECHR is to ensure principled *treatment* of individuals by public institutions. The common core is that rights are about action, they provide part of the reasons for acting in a certain way.[85] Specifically, human rights as complex structures include claim-rights. As such, they are concerned with the treatment of a right holder by the duty bearer. Equivalently, the Convention by virtue of the value of integrity aims to shape the treatment of individuals by public institutions. This means that the structure of human rights as claim-rights needs to be supplemented by the value of integrity and the principles it generates to answer part of our question how to allocate human rights duties. So far, I hope to have shown that governments in a broad and politically contingent sense are the primary bearers of human rights obligations. I further explained that it is possible (though admittedly less likely) for non-state or private actors to be human rights duty bearers so long as they share relevant features with public institutions. The next step is to identify which state (or institution) it is that has to extend such treatment. To do so, I will sketch what I think is the most promising conceptualisation of human rights in the ECHR.

Following the interpretivist method proposed here, the first question is to ask which value informs the conceptualisation of human rights in the ECHR. Dworkin argues that human dignity should be seen as the grounding value of human rights.[86] Dignity according to this view gives rise to two principles: the principle of equal worth of each individual,[87] and personal responsibility, which is best described as a principle of liberty.[88] The following quote about political rights explains what Dworkin thinks these principles can do. I would add that he uses the term of political rights much in the same sense as I use human rights in this article.

> Someone who claims a political right makes a very strong claim: that government cannot properly do what might be in the community's overall best interests. He must show *why* the individual interests he cites are *so important that they justify that strong claim*. If we accept the two principles of human dignity that I described in the last chapter, we can look to those principles for that justification. We can insist that people have political rights to whatever protection is necessary to respect the equal importance of their lives and their sovereign responsibility to identify and create value in their own lives.[89]

This quote shows how to take interests into account while emphasizing that it is the interests' content and importance that justify the duties correlating with rights. This importance and content may justify duties, but it is in need of an explanatory, normative principle that supplies it with relevance. The principles of equality and liberty perform this role.

As we will see below, the principle of equal worth is crucial in identifying which agent bears human rights duties towards a particular individual. The principle also adds nuance to the necessary features of a public institution. The underlying importance of the equal moral worth

[84] Supra section 2.1.
[85] Recall Raz supra n 28 at 166 and the discussion supra in section 2.2.
[86] Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (2006) at 9–10. This is Dworkin the political philosopher writing, not the methodological interpretivist.
[87] Ibid. at 11–17; Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 *Law & Ethics of Human Rights* 281 at 284–86.
[88] Dworkin, *Is Democracy Possible Here?* supra n 86 at 17–21; Möller supra n 87 at 285.
[89] Dworkin, *Is Democracy Possible Here?* supra n 86 at 32 (emphasis my own).

of individuals is further an aspect of international human rights law in general. The preambles of the UDHR, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) could not be clearer in this respect as each of them references the recognition that rights are only of value if they are enjoyed equally. The preambles also point out that the dignity the rights draw upon is 'inherent', that is, related to moral status.

In the case of the ECHR this is not quite as clear. The Convention and the ECtHR's case law—the relevant practice for our purposes—still contain some aspects that suggest reliance on the idea that individuals have an equal moral status.[90] First, article 14 ECHR contains an individual right against discrimination. But this has been characterised as an 'insipid' right[91] because it only applies if rights listed in the instrument are implicated.[92] Once an ECHR right is implicated however, the protection of article 14 does not require that fundamental interests threatened, and not even that the implicated rights have been violated.[93] This aspect would appear to fit well with the idea that Convention rights are about treatment reflecting equal respect.

Second, the case law on article 14 in recent decades clearly pulls towards more substantive protection of equality. Fredman, for example, shows that more recent judgments of the ECtHR employ expansive approaches to the grounds and the definition of discrimination.[94] Perhaps even more significantly, she also shows that the overall approach of the Court is moving from ideas of formal equality to protecting substantive equality at least along distributive, recognitional and participatory dimensions.[95] Nikolaidis comes to a similar conclusion when he argues that the Court has developed a substantive manifestation of equality consisting of protection against social oppression and reasonable accommodation of difference.[96] Beyond the provision in article 14 ECHR, substantive equality also finds expression in jurisprudence on positive obligations[97] and concepts, such as vulnerability, which the Court employs to account for relevant differences in the position of applicants.[98]

Third, the direction of travel at the ECtHR lends weight to an aspect of the interpretivist method that I have not emphasized so far. As a method of normative reasoning, it is supposed to guide us towards making social practices as normatively appealing as they can be. In Dworkin's words, the values that we identify to be underpinning a social practice are 'a matter of imposing purpose on an object in order to make the best possible example of the form or genre to which it is taken to belong.'[99] There are values more clearly present in the Convention than equality—among them liberty as we have already seen—that are best realised by a social practice that is also responsive to a value of equality in the sense of equal moral status of individuals. Take only Rawls's famous first principle of justice: 'Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.'[100] Liberty is only real when it is equal. And this equality is best captured

[90] Dworkin's view is not the only one that emphasises equality in relation to human rights. See, eg, Buchanan, 'The Egalitarianism of Human Rights' (2010) 120 *Ethics* 679; Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 *Beiheft, Archiv für Rechts- und Sozialphilosophie* 19.

[91] Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 *Human Rights Law Review* 273 at 273.

[92] This is sometimes referred to as falling within the scope or ambit of a protected right: Rainey, McCormick and Ovey, *The European Convention on Human Rights*, 8th ed (2020) at 653–655. On the early history of how this bar has been lowered by the Court see Fredman supra n 91 at 275–77.

[93] ECtHR, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits)*, App No 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, and 2126/64, Merits, 23 July 1968; Rainey, McCormick and Ovey supra n 92 at 653.

[94] Fredman supra n 91 at 277–288.

[95] See generally ibid.

[96] Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (2015) at ch 2.

[97] Ibid. 72–83.

[98] Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (2021) at 172–178.

[99] Dworkin, *Law's Empire* supra n 55 at 52.

[100] Rawls, *A Theory of Justice* (1999) at 53.

by recognising the intrinsic and equal moral status of individuals. Overall, both the Court and political theory converge on including equality as a principle underpinning the ECHR –in its own right as well as to make liberty within the Convention more effective.

Against the background of the value of equality, Convention rights take on a nuanced function. They specify areas of human activity collectively considered central to human existence by the practice and its participants.[101] That is, their importance which is so central to the justification of burdens as we have seen above, has been decided in a political process. This accorded—contingent, even—importance, in turn, then means equal concern and respect are particularly relevant within those areas of human activity. For example, to lead their life in liberty and equality everyone needs access to liberty and security, which is guaranteed in article 5 ECHR. The present account does not suggest that nobody can be detained under any circumstances. Instead, it means that rules on when detention is possible do not only need to follow the stipulated grounds in article 5 ECHR but must not neglect equal concern and respect for individuals. An individual's human rights would be violated if they were detained because of their life choices or their innate characteristics that are deemed inferior by others. The equality principle in the context of rights excludes any treatment of individuals that fails to respect their intrinsic and equal worth. On Dworkin's account (which I share), a clear example of a violation of this principle is blatant discrimination because it is based on singling out individuals or groups as inferior.[102] In short, the principle of intrinsic value requires that public institutions accord equal concern and respect to each individual.[103]

This might seem much too conservative. But recall that a liberty principle also exists. This enables us to say that there is some sort of minimum threshold to protect dignity and that this is what gives rise to violations without discrimination. In other words, if the liberty principle is violated, that is sufficient to claim neglect for an individual's equal moral worth. But in order to make sense of the practice as a whole, it needs to be supplemented with a concern for equal respect in treatment that does not reach this threshold. In this sense, the principle of equality can be deemed more fundamental.

The principle of equality is further useful because it explains the allocation of duties not only to public institutions but to particular ones.[104] It is thus able to say something about the relevant pair of agents involved in the incidence of a claim-right, but it also further specifies the *kind* of agent can and should have human rights duties. The equality principle in the context of rights excludes any treatment of individuals that fails to respect their intrinsic and equal worth as we have just seen. On Dworkin's account (which I share), a clear example of a violation of this principle is blatant discrimination because it is based on singling out individuals or groups as inferior.[105] It follows that the value of equality requires that public institutions accord equal concern and respect to each individual.[106] In turn, this means that only a public institution that is able to guarantee equality in this sense can be a human rights duty bearer. For a private institution

[101] The list may be considered imperfect, or we may think that more rights or different rights should be included. But this would be a question for political decision-making the results of which are then again subjected to the interpretivist method. Development of the list of rights is also, in a broader sense, an aspect of the practice anyway. For an important and at the time of writing in 2022 ongoing example see the potential addition of a human right to a healthy environment: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/environment-and-human-rights [last accessed 1 August 2023].

[102] Dworkin, *Is Democracy Possible Here?* supra n 86; Möller supra n 87 at 285.

[103] Letsas, *A Theory of Interpretation of the European Convention on Human Rights* supra n 29 at ch 5.

[104] To my mind equality is particularly salient and important in this respect. But its general importance is by no means universally accepted. See, eg, Parfit, 'Equality and Priority' (1997) 10 *Ratio* 202; Scanlon, 'The Diversity of Objections to Inequality' in *The Difficulty of Tolerance* (2003) 202. Parfit points out that appeals to the intrinsic value of equality are most plausible in terms of legal, political, and (presumably) moral, status, which is exactly what we are concerned with here: Parfit supra n 104 at 215.

[105] Dworkin, *Is Democracy Possible Here?* supra n 86; Möller supra n 87 at 285.

[106] Letsas, *A Theory of Interpretation of the European Convention on Human Rights* supra n 29 at ch 5.

exercising select public functions this requirement would translate to the ability to guarantee equality of individuals in the exercise of that particular public function. The value of equality thus specifies the capacity a potential duty bearer needs to have: they need to be able to guarantee equality. Note that this is a different requirement than a simple ability to do something about a potentially detrimental situation. The notion of guaranteeing equality of treatment could take a wide variety of forms. It might mean providing non-discriminatory access to education if the institution is a school, or it could mean enforcing meaningful labour regulation in a special economic zone even if the institution running said zone is a corporation.[107]

Connecting this concern for equality with the value of integrity considered above gives rise to the following picture. Equal treatment can be claimed (paradigmatically) against public institutions,[108] but not just any public institution. The value of equality allows us to say that the institutions in question must be such that they are in a position to guarantee equality in the sense of intrinsic and equal worth of each individual. This, in turn, answers another part of our question about capacity as a criterion for the allocation of duties. Because of the explanatory principle of equality, the relevant capacity is not just any kind of power, but a position to offer equal treatment. This is the additional criterion a non-state actor or private entity needs to fulfill to be a human rights duty bearer. But it is again important to emphasise that it is the features suggested to be relevant by the values of integrity and equality that identify the duty bearer, not their legal nature. It is, however, the case that public institutions are more likely than private ones to fulfil them.

5. APPLYING THE FRAMEWORK: *CARTER v RUSSIA* AND EXTRATERRITORIAL LETHAL FORCE

The use of lethal force in an extraterritorial context is a long-standing puzzle in the debates about the extraterritorial jurisdiction in the ECHR and it illustrates the practical relevance and conceptual challenges of allocating obligations well. The question is this: can killing an individual be considered as an exercise of state authority and control as required by article 1 of the ECHR?[109] The Court has in its case law come to the following, seemingly inconsistent, conclusions on lethal force (among others). It has said that killing individuals by way of aerial bombardment does not entail human rights obligations under the convention.[110] It has also said that shooting instead of arresting an individual did entail such obligations in cases where the state agents also exercised public powers beyond the possibility to deploy lethal force.[111] The Court has further found that lethal force during active hostilities in an armed conflict did not create a jurisdictional link, relying on what the Court called a context of chaos .[112] The ECtHR has also said, however, that targeted killing with an element of proximity does create human rights obligations under the Convention, even if there is no exercise of the above-mentioned public powers.[113] This latter scenario is what brings us to *Carter v Russia*, which concerns the poisoning and assassination of Alexander Litvinenko in London in 2006.[114] I shall discuss the

[107] See for further discussion of these examples Raible, *Human Rights Unbound* supra n 4 at ch 7.

[108] This is based on integrity as legitimacy: supra at section 4.1.

[109] The (still) leading case is *Al-Skeini v UK* supra n 52 at paras 130∼139. A good summary of the debate and the problems it addresses can be found in Milanovic, ∼European Court Finds Russia Assassinated Alexander Litvinenko∼ EJIL:Talk! (23 September 2021) https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/ [last accessed 1 August 2023].

[110] Infamously so: ECtHR, *Bankovi v Belgium*, App no 52207/99, Admissibility, 12 December 2001 at paras 74 81.

[111] This was one of the modifications to the *Bankovi* approach it made in *Al-Skeini v UK*, see *Al-Skeini v UK* supra n 52 at para 135.

[112] *Georgia v Russia (No 2)*, App no 38263/08, Merits, 21 January 2021 at para 126.

[113] *Carter v Russia*, App No 20914/07, Merits, 21 September 2021 at paras 129 130, citing ibid. at paras 130 131.

[114] *Carter v Russia* supra n 113.

facts and the Court s findings and explain why they have been read to expose arbitrariness in the case law. In a final step, I aim to show that the interpretivist account of human rights based on integrity and equality can make sense of all of the abovementioned findings.

The Court decided *Carter v Russia* based on the following facts. Alexander Litvinenko was poisoned with polonium, most likely ingested in the form of green tea offered to him by Andrey Lugovoy and Dmitry Kovtun during a meeting on 1 November 2006.[115] He took ill and on 23 November died from multiple organ failure caused by acute radiation syndrome.[116] A UK inquiry into Litvinenko s death found that the use of polonium indicated state involvement and that the assassins almost certainly acted either on behalf of or with sufficient approval by Russia. From this, the ECtHR inferred that Lugovoy s and Kovtun s actions were attributable to Russia in the sense of article 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[117]

The ECtHR s chamber in *Carter v Russia* found that Russia had jurisdiction according to article 1 of the ECHR because the case concerned a specific [act] involving an element of proximity that constituted an extrajudicial targeted [killing] by State agents acting in the territory of another Contracting State outside of the context of a military operation. [118] The Court cited *Al-Skeini v UK*,[119] signifying that it was relying on the personal conception of jurisdiction, which is established by state agent authority and control. And it distinguished *Carter v Russia* from *Georgia v Russia (No 2)* by stressing that a targeted killing was not taking place during hostilities and jurisdiction could thus not be excluded in the same way. [120]

If we do not take into account the nature of human rights in the Convention, this judgment is most plausibly read to expose arbitrariness in the case law on extraterritorial jurisdiction.[121] After all, for the individuals in question it does not matter if their life was taken during hostilities, in a police shooting, or by extrajudicial targeted killing. Their right to life seems equally violated in all of these cases. The capacity of the state in question to exercise lethal force does not suitably distinguish between these cases either: the victim is dead, and the capacity is beyond question. However, analysing *Carter v Russia* based on the account defended here, allows for a different picture to emerge.

The interpretivist account of human rights based on integrity and equality suggests a principled distinction between these cases is not only possible but warranted. It shows that the relevant feature of the action of the state is not its result, but whether it was either caused or accompanied by the capacity to extend equality to the affected individuals. In the case of a targeted killing as in *Carter v Russia* the state involved is in an epistemic and normative position to guarantee equality to the affected individual. Of course, the state does not in fact extend such treatment in these cases. The point is, though, that it could. During active hostilities as in Georgia v Russia the capacity to offer equal treatment is hampered by the limited epistemic opportunities. The available information on who is affected and why is incomplete to an extent that we cannot plausibly speak of a capacity to offer equal treatment.[122] This is what the context of chaos as identified by the Court in *Georgia v Russia (No 2)* captures.[123] Much disparaged in the literature,[124] it accounts for the fact that the state in question *does* have the capacity to

[115] Ibid. at paras 23 34.
[116] Ibid. at paras 30 34.
[117] Ibid. at paras 35 70 and 169. On the significance of the latter see Milanovic, European Court Finds Russia Assassinated Alexander Litvinenko supra n 109.
[118] *Carter v Russia* supra n 106 at para 130.
[119] Ibid. at paras 125 126.
[120] Ibid. at paras 129 130.
[121] Milanovic, European Court Finds Russia Assassinated Alexander Litvinenko supra n 109.
[122] Ibid; Raible, *Human Rights Unbound* supra n 4 at 146 149.
[123] Ibid.
[124] See, eg, Longobardo and Wallace, The 2021 ECtHR Decision in Georgia v Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities (2022) 55 *Israel Law Review* 145.

kill and harm but *does not* have the capacity to offer equal treatment of affected individuals. But it is precisely this capacity to extend equal treatment that matters for the allocation and justification of human rights obligations under the ECHR. On the account defended here, then, such obligations are not justified.[125]

6. CONCLUSION

The present contribution develops an account of how human rights in the context of the ECHR allocate obligations. I hope to have shown that claim-rights are a paradigmatic instance of human rights in the ECHR and that, as such, the latter have both a right holder and a duty bearer. We have also seen that individual interests in and of themselves neither justify duties nor allocate the burden of a human rights obligation to a specific duty bearer. The same is true for a state's capacity. The problem both of them share is that they are facts and thus require an underlying principle to fully explain why they justify the allocation of duties.

These principles need to be identified or generated. To do this, I suggested that an interpretive normative method is a plausible candidate in the context of the Convention. The ensuing account of human rights in the context of the ECHR—unlike interest-based accounts—explains how international legal human rights allocate duties. Recognising the Convention as a social practice and seeking to determine what human rights require within this system allows us to specify right holders and duty bearers according to the governing values and the principles of this particular context. I argued following the normative method I proposed that integrity and equality are these values and that they generate the principle of equal concern and respect.

The consequence of allocating human rights duties by relying on integrity and equality is twofold. First, integrity identifies public institutions as the primary duty bearers of human rights obligations. And second, equality demonstrates that only those public institutions (or similar agents) that are able to guarantee an individual's equality can be understood to be duty bearers of human rights of that individual. For the two practical questions I identified in the introduction this means the following. On the one hand, non-state actors must be able to guarantee an individual's equality at least in an area of activity specified by a Convention right in order to be considered duty bearers. On the other hand, the present account suggests that a the extraterritorial application of the Convention should be justified by reference to the capacity to guarantee such individual equality. Applying this framework to explain the judgment in *Carter v Russia* illustrates that (extraterritorial) jurisdiction in the Convention mirrors an important aspect of its underlying principles.

[125] For arguments that are also sceptical of converging demands of human rights and international humanitarian law see, eg, Modirzadeh, The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict (2010) 86 *US Naval War College International Law Studies* 349; Dill, Towards a Moral Division of Labour between IHL and IHRL During the Conduct of Hostilities in Bohrer, Dill and Duffy, *The Law Applicable to Armed Conflict* (2020) 197.