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Frontiers of Human Rights: Corporate Responsibility and the Environment

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UNIVERSITY OF MIAMI

FRONTIERS OF HUMAN RIGHTS: CORPORATE RESPONSIBILITY AND THE
ENVIRONMENT

By

Daniel Patrick Corrigan

A DISSERTATION

Submitted to the Faculty
of the University of Miami
in partial fulfillment of the requirements for
the degree of Doctor of Philosophy

Coral Gables, Florida

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FRONTIERS OF HUMAN RIGHTS: CORPORATE
RESPONSIBILITY AND THE ENVIRONMENT

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This dissertation addresses two issues at the cutting edge of human rights theory and practice: the human rights obligations of corporations and the emergence of environmental human rights.

Human rights have historically been conceived as rights that individuals have against the state. However, in our globalized economy, multi-national corporations have emerged as powerful and influential agents. Current international practice holds that *states* have an obligation to respect, protect, and fulfill human rights, but that corporations only have a responsibility to respect human rights. Many commentators have argued that this is problematic and that we should posit corporate obligation to protect and/or fulfill human rights. The issue of the appropriate range of corporate human rights obligations is explored in light of the ongoing debate about political versus moral conceptions of human rights. Political conceptions view the primary function of human rights as regulating the international relations between states, while moral conceptions tend to focus on rights that all people have simply in virtue of being human.

I argue against the claim that political conceptions will prescribe only an obligation to respect human rights, arguing instead that, due to their reliance on varying conceptions of

the practice of human rights, political conceptions can prescribe anything from a very extensive set of corporate human rights obligations to none at all. Moral conceptions see human rights as moral rights that must be respected by all moral agents, and so prescribe at least an obligation of corporations to respect human rights. However, moral conceptions can differ when it comes to principles or criteria for determining which classes of agents are potentially eligible to bear responsibility for positive obligations to protect or fulfill human rights, as well as principles or criteria for determining the allocation of these obligations to particular agents. For this reason, moral conceptions leave it indeterminate what obligations they will prescribe beyond a basic obligation to respect. I conclude that the current distinction between political and moral conceptions of human rights is too abstract to give a determinate answer as to the appropriate range of corporate human rights obligations. I argue instead for a hybrid theory of human rights, which combines elements from both types of conceptions. Political conceptions demonstrate the need for some accountability to the practice of human rights, while moral conceptions demonstrate the need for normative criterion to determine the allocation of particular types of human rights obligations to particular classes of agents.

The past few decades have also seen an increasing recognition and development of the environmental dimensions of international human rights. However, there has been an even greater incorporation and development of environmental rights at the national constitutional level. Some have argued that due to cultural differences concerning values such as development versus environmental protection, environmental rights are best developed and adjudicated at the national level. I argue against this claim by showing that there are unique benefits that can only be realized by developing and adjudicating

international environmental human rights. But the existence of cultural differences does create pressure to keep the content of these rights minimal, since they provide universal standards for all nations.

Finally, I engage in a close analysis of the United Nations “corporate responsibility to respect human rights.” I argue that respect for rights can entail not merely negative, but also positive obligations. Furthermore, the positive obligations may be more extensive than previously realized, and in certain cases require provision of the object of a right. However, while corporations may have a universal obligation to respect human rights, the precise requirements of this obligation can only be determined in light of a particular political, institutional, and social environment. This shows that cultural differences can shape not merely the content of rights, as in the case of environmental human rights, but also the obligations to which human rights give rise.

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Introduction

As global justice emerged as a central topic in political philosophy over the past couple of decades, human rights have received an ever-increasing amount of philosophical attention. Since most nations around the world have signed onto the international human rights regime, human rights have come to play a major role in global politics and international affairs. But they also play a crucial theoretical role, serving as the normative framework to understand and assess issues of global justice, ranging from the justification of one state intervening in the sovereign affairs of another state, to the ethics of immigration policy, to determining obligations relating to global poverty or the impacts of climate change. It has now become so common to frame the normative dimensions of international and global issues in terms of human rights they have even been referred to as the “lingua franca” of global ethics. However, there are numerous issues in both the theory and practice of human rights that are still being debated and resolved. In this dissertation, I will examine two such issues: the human rights obligations of corporations and environmental human rights.

Historically, human rights have been conceived as rights that individuals have against the state. In the case of civil and political rights, this is because the state has traditionally been the entity that posed the gravest danger to the individual. In the case of socio-economic rights, this is because the state was the entity that should be responsible for meeting its citizens’ basic needs and has the means to do so. However, states are no longer the only powerful institutional

agents that can impact individuals and society. As of 2014, the 100 largest economic entities in the world consisted of just 37 states and 63 multi-national corporations and (measured in terms of GDP or revenues). If multi-national corporations have become such large and powerful agents, they can both pose a threat to individuals and also have the means to meet peoples' basic needs. Therefore, it seems plausible that these large and powerful agents should also bear at least some human rights obligations. However, given the important differences between corporations and states, it remains unclear precisely what sorts of human rights obligations corporations should have.

The duties that correspond to human rights are generally divided into obligations to respect, protect, and fulfill such rights. While states are held to be responsible for the full-range of these obligations, the Guiding Principles on business and human rights, adopted by the United Nations Human Rights Council in 2011, hold that corporations have a responsibility only to respect human rights. This framework has been controversial, as many commentators believe that corporation should have more extensive range of human rights obligations, including obligations to protect and fulfill such rights.

The majority of chapters in this dissertation will focus on this debate concerning corporate human rights obligations. The first three chapters will examine the question of the appropriate range of corporate human rights obligations through the lenses of moral versus political conceptions of human rights, perhaps the liveliest debate in human rights theory at present. Political conceptions tend to treat the primary function of human rights as regulating the international

relations between states, while moral conceptions tend to focus on human rights as those rights that all people have simply in virtue of being human. The first chapter will approach the issue in light of political conceptions of human rights, and argue that political conceptions completely underdetermine the appropriate range of corporate human rights obligations, as they rely on a conception of human rights “practice” and this can include a wider or narrower set of institutions and activities. Depending on what is included in a particular conception of the practice, a political conception might endorse anything from a very extensive set of corporate human rights obligations to none at all. The second chapter will consider this issue in light of moral conceptions of human rights. It will argue that moral conceptions prescribe at least an obligation of corporations to respect human rights, but underdetermine an appropriate range of obligations above this floor. This is because moral conceptions tend to view human rights as moral rights that must be respected by all moral agents, but can vary widely in terms of the criteria they rely on for distributing positive duties to protect and fulfill such rights. The third chapter concludes that the current debate between political and moral conceptions is too abstract to give a determinate answer as to the appropriate range of corporate human rights obligations. I argue instead for a hybrid theory of human rights, which combines elements from both types of conceptions. Political conceptions demonstrate the need for some accountability to the practice of human rights. The prescriptions of such a theory are more likely to be intelligible to agents who participate in the actual practice of human rights, and thus help to ensure that these prescriptions will be adopted and are efficacious. Moral conceptions demonstrate

the need a normative criterion for determine the allocation of particular types of human rights obligations (to respect, protect, and fulfill), as well as normative criteria for determining which classes of agents are eligible for bearing which types of obligations.

In the fourth chapter, I will turn to the topic of environmental human rights. Since the international human rights movement began prior to the environmental movement, the environmental dimensions of human rights have not always been recognized within human rights law and theory. However, much more attention is being given to this topic in recent years. While the human rights movement is increasingly recognizing and developing the environmental dimensions of international human rights, there has been an even greater incorporation and development of environmental rights at the national constitutional level. Some have argued that due to cultural differences concerning values such as development versus environmental protection, environmental rights are best developed and adjudicated at the national level. I argue against this claim by showing that there are unique benefits that can only be realized by developing and adjudicating international environmental human rights. These benefits include providing a back-up role when domestic rights protections fail, contributing to the legitimacy of states, providing a unified framework for dealing with global problems, and making democracies accountable to the legitimate interest of foreigners. However, the existence of cultural differences does create pressure to keep the content of these international rights minimal, since they provide universal standards to which all nations are held accountable.

In the fifth and final chapter, I will return to the topic of corporate human rights obligations, and in particular Ruggie's corporate responsibility to respect human rights. This chapter will examine the particular obligations prescribed by Ruggie's corporate responsibility to respect human rights in light of the concept of respect for rights. I will argue that there are both negative and positive obligations that can be derived from the concept of respect for rights. Most of the positive obligations that Ruggie explicitly prescribes are justified, with one exception. Here, I suggest that his norm needs to be slightly revised. However, I go on to argue that there are obligations of positive provision that can be generated by respect for rights, obligations that Ruggie himself may not have recognized. This suggests that the corporate responsibility to respect human rights may be more demanding, or create a greater range of obligations, than both Ruggie and his critics may realize. Finally, I will suggest that the obligations of positive provision generate by respect for rights can only be determined within the particular social and institutional arrangements of a given society where a corporation operates or conducts its affairs. So while social or cultural differences were shown to put pressure on minimizing the content of environmental human rights, they can be shown to produce different obligations in the case of the corporate responsibility to respect human rights.

Chapter 1

Political Conceptions of Human Rights and Corporate Responsibility

Does a political conception of human rights dictate a particular view of corporate human rights obligations? John Ruggie, who served as the United Nations Special Representative on business and human rights, drafted the “Protect, Respect, and Remedy” Framework, which specifies corporate human rights obligations. Ruggie’s “Guiding Principles on Business and Human Rights,” which aim to implement the Framework, were unanimously adopted by the U.N. Human Rights Council in 2011. However, there have been numerous critics of Ruggie’s approach. A primary point of contention is that Ruggie assigns to corporations only a responsibility to respect human rights, while states (or governments) bear the full range of human rights obligations, including duties to respect, protect, and fulfill these rights. Some critics have argued that corporations should be responsible for a wider range of human rights obligations, beyond merely an obligation to respect such rights. Furthermore, it has been argued that Ruggie relied on a political conception of human rights, and that this is what led him to limit corporate obligation to mere respect for human rights. In this chapter, I explore and critically assess this general claim about political conceptions of human rights. This will involve distinguishing different types of political conceptions of human rights, as well as specifying what makes a theory of human rights a “political conception.” In light of this clarificatory discussion, I argue that the general thesis is false; the mere fact that a theory offers a political conception of human rights does not necessarily entail any certain range

of corporate human rights obligations. Finally, I identify some of the other aspects of a theory of human rights that do affect the range of corporate human rights obligations it will prescribe.

In the first section of the chapter, I provide a brief history of recent attempts by the U.N. to frame corporate human rights obligations. In the second section, I outline the criticism of Ruggie's Framework, which contends that it was reliance on a political, rather than moral, conception of human rights that led him to limit corporate obligation to mere respect for human rights. In the third section, I provide a brief characterization of the distinction between moral and political conceptions of human rights. In the fourth section, I consider two approaches that have been suggested as underpinning the development of the Framework. I offer a criterion for determining whether an approach to constructing human rights norms constitutes a political conception of human rights, and claim that both of the suggested approaches constitute versions of a political conception of human rights. I then draw the preliminary conclusion that a political conception of human rights can endorse either no corporate human rights obligations or a narrow range of such obligations. In the fifth section, I consider the most prominent political conceptions of human rights, those offered by John Rawls, Joseph Raz, and Charles Beitz. These theories of human rights will be assessed in terms of two aspects: the essential feature(s) or function(s) they attribute to human rights and the standard(s) they use to qualify a norm as a legitimate human right. I also discuss the degree to which each theory is more revisionary or more conforming with regard to international human rights practice. In the sixth section, I show that human rights practice can be understood as including a broader or narrower range of the activities relating to human rights, and

that this will tend to influence whether a political conception of human rights recognizes a more or less state-centric account of human rights obligations. If a political conception of human rights relies on a broader conception of the practice, this may make it more likely that the theory will prescribe corporate human rights obligations. Finally, I conclude that the range of corporate human rights obligations prescribed by a theory is underdetermined by the mere fact that a theory offers a political conception of human rights. The factors that play a role in this determination include the range of aspects included in the conception of the practice on which theory relies, and in turn, the degree to which this conception of the practice leads the theory to conform with existing human rights norms.

A Recent History of Business and Human Rights at the U.N.

In the 1990's, as economic globalization and its effects became more pervasive, the U.N. began to direct more attention to the issue of multinational corporations (MNC's) and human rights. This led the U.N. Sub-Commission on the Promotion and Protection of Human Rights to create a working group to examine the issue. By 2003, the working group had produced the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (Sub-Commission 2003). The Norms identified a range of areas in which MNC's would have human rights responsibilities. Within the MNC's "spheres of activity and influence," it assigned to MNC's the same range of human rights obligations as states. In other words, within this sphere, MNC's would have duties to respect, protect, and fulfill human rights. In 2003, the Sub-Commission voted to approve the Norms. However, the Norms faced

strong opposition from the business community. When the Norms were brought before the Sub-Commission's parent body, the U.N. Commission on Human Rights, it decided not to adopt them.

While the Commission chose not to adopt the Norms, it nevertheless sought continued examination of the issue of business and human rights, and requested the appointment of a special representative to further investigate. In 2005, Harvard political scientist John Ruggie was appointed the United Nations Special Representative of the Secretary General (SRSG) on human rights and transnational corporation and other business enterprises. After extensive research, and consultation with governments, business and civil society from around the world, in 2008 Ruggie released "Protect, Respect, and Remedy: A Framework for Business and Human Rights." (United Nations Human Rights Council 2008) The Framework was favorably received by a variety of stakeholders, which led the U.N. Human Rights Council to extend Ruggie's appointment and ask that he develop guidelines for its implementation. Ruggie proceeded with this task, and in June of 2011, the Human Rights Council voted unanimously to adopt his "Guiding Principles on Business and Human Rights," which seeks to operationalize the Framework. (United Nations Human Rights Council 2011)

International human rights law, which applies primarily to states, divides the duties corresponding to human rights into three distinct obligations to respect, protect, and fulfill. The U.N. High Commissioner for Human Rights defines each of these duties as follows: respect for a right requires that states "refrain from interfering with or curtailing the enjoyment of a right," protection of a right requires that a state "protect individuals and groups against human rights abuses," and fulfillment of a right requires a

state to “take positive action to facilitate the enjoyment” of the right. (United Nations High Commissioner for Human Rights) Ruggie’s “Protect, Respect, and Remedy” Framework relies on this tripartite distinction of human rights obligations recognized in international law. As its name suggests, the Framework involves three dimensions: The first is the state duty to protect human rights, which requires states to “protect against human rights abuses committed by third parties, including business, through appropriate policies, regulation, and adjudication.” (United Nations Human Rights Council 2008) The second is the corporate responsibility to respect human rights by “acting with due diligence to avoid infringing on the rights of others, and addressing harms that do occur.” (United Nations Human Rights Council 2008) And the third is access to effective remedy, which involves an acknowledgment that “effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect.” (United Nations Human Rights Council 2008) In relation to the state duty to protect, this requires that “states take the most appropriate steps within their territory and/or jurisdiction to ensure that when such abuses occur, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means.” (United Nations Human Rights Council 2008) In relation to the corporate responsibility to respect, it requires that “company-level mechanisms should also operate through dialogue and engagement rather than the company itself acting as adjudicator of its own actions.” (United Nations Human Rights Council 2008)

In short, the Framework attempts to clearly divide the human rights obligations of government and business. In keeping with international law, it reiterates that states bear the full range of human rights obligations, including duties to respect, protect, and fulfill

human rights, while emphasizing that the duty to protect human rights includes ensuring protection against abuses by third parties such as corporations.¹ Additionally, it makes the determination that corporations simply have a responsibility to respect human rights. Respect for human rights requires corporations to “avoid infringing on the human rights of others,” and if they do, to “address human rights impacts with which they are involved.” (United Nations Human Rights Council 2008) In other words, the Framework clarifies the respective roles of each party, by assigning to businesses an obligation not to cause harm through a failure to respect human rights, and when it does so, to address such harm, and reiterating that states have this same obligation, in addition to obligations to protect and fulfill human rights.

A Criticism of Ruggie’s Framework

A number of critics have taken issue with Ruggie’s restriction of corporate human rights obligations to a mere responsibility to respect such rights. These critics believe that corporations ought to bear responsibility for a wider range of human rights obligations, including obligations to protect and fulfill such rights.² Throughout this paper, I will refer to an obligation to merely respect human rights as a “narrow” range of human rights obligations, and the inclusion of an additional obligation to protect and/or fulfill human rights as a “broad” range of human rights obligations. There are a number of dimensions to this debate, but here I want to focus on a particular aspect. This is the

¹ The Framework requires that states “must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish, and redress such abuse through effective policies, legislation, regulations, and adjudication.” (United Nations Human Rights Council 2011)

² For examples of those advocating a wider range of corporate human rights obligations, see Wettstein (2009) and Karp (2014).

claim that Ruggie's endorsement of a narrow range of corporate human rights obligations derives from his (supposed) reliance on a political, rather than a moral, conception of human rights.

Florian Wettstein has advanced this criticism. Wettstein claims that accounts of corporate human rights obligations "typically are based on political or legal conceptions of human rights (which can then be extended into the private sphere), rather than on moral ones." (Wettstein 2012, 744) Furthermore, he adds, this is true of Ruggie's Framework: "The SRSG's framework is a case in point. It explicitly refers to the International Bill of Human Rights and the ILO core conventions and thus to a combination of legal and political conceptions of human rights as the benchmark against which to judge the human rights conduct of companies." (Wettstein 2012, 744) Finally, Wettstein points to this political (or legal) conception of human rights as directing focus on negative duties not to infringe on rights, and thus as the source of the Framework's narrow range of corporate human rights obligations.

As a result...the discussion on business and human rights has been centered in large parts on wrongdoing and, accordingly, tends to adopt an overly narrow focus on corporate obligations of a negative kind, that is, on obligations of non-interference and 'do no harm.' Symptomatically, also Ruggie's tripartite framework defines human rights obligations of corporations exclusively in negative terms as duties to respect human rights, while assigning all duties in the positive realm to the state alone. (Wettstein 2012, 745)

Thus, Wettstein contends that the endorsement of a narrow range of corporate human rights obligations, which he refers to as Ruggie's "human rights minimalism," is due to the fact that Ruggie relied on a political conception of human rights. However, even if one grants that the Framework relies a political conception of human rights, is Wettstein correct that this is what led Ruggie to endorse a narrow range of corporate human rights obligations?

Political vs. Moral Conceptions of Human Rights

Let us now turn to the current controversy among philosophers about how to properly theorize human rights, which involves the distinction between moral and political conceptions of human rights. Political conceptions of human rights are typically characterized by their focus on the role(s) that human rights play in political relations between states at the international level.³ Such roles often include limiting state sovereignty and providing a criterion for legitimate interference by other states, among others. Political conceptions generally take the practice of international human rights as their starting point, and theorize human rights based on a characterization of this practice. The “practice” is usually understood to refer to the movement that began in the wake of WWII, beginning with the drafting of Universal Declaration of Human Rights (UDHR), the subsequent drafting of numerous legally binding human rights conventions and their adoption by the majority of states around the world, and the activities surrounding these documents, including the work of monitoring bodies, human rights courts, and so forth. But as we will see, the notion of human rights “practice” can have fuzzy borders, and may include a broader or narrower set of activities associated with international human rights.⁴ The focus on the role(s) or function(s) which human rights play in the relations between states implies that political conceptions of human rights will tend to give primary attention to the obligations that human rights impose on states.

³ See for example, Rawls (1999), Beitz (2009), and Raz (2010).

⁴ A broader or narrower set of the sorts of activities just mentioned should not be confused with the earlier reference to a narrow versus broad range of human rights obligations. The current discussion is concerned with the sorts of activities that comprise the practice of human rights, whereas the earlier reference was concerned with the range of obligations that human rights impose on duty-bearers.

Moral conceptions of human rights may or may not appeal to the practice of international human rights, typically situate human rights within the natural rights tradition,⁵ and view human rights as the rights that individuals possess simply in virtue of their humanity.⁶ Thus, moral conceptions of human rights tend to see the human rights listed in the UDHR and subsequent human rights documents, as simply giving political or legal recognition to pre-existing moral rights. The focus on human rights as moral claims tends to be taken to imply that human rights impose obligations on all agents, including both individuals and institutional agents, such as states, NGO's, and corporations.⁷

Based on these general and abstract characterizations of political and moral conceptions of human rights, a couple of things become immediately apparent. First, at this level of abstraction, we will be unable to determine whether political or moral conceptions of human rights necessarily prescribe a certain range of corporate human rights obligations. Second, the characterization of political conceptions of human rights just offered differs from what Wettstein has in mind when he uses that term. In other words, Wettstein is not using the term "political conception" of human rights in the same way that political philosophers typically do. When Wettstein claims that Ruggie relies on a "political conception" of human rights, he points to Ruggie's reference to the International Bill of Human Rights and the ILO core convention. In other words, for Wettstein, a political conception of human rights is constituted by appeal to international human rights treatises and conventions, rather than to the role that human rights play in

⁵ However, moral conceptions need not endorse all aspects of this tradition, such as the view that human rights must be pre-institutional.

⁶ See for example, Griffin (2008).

⁷ See for example, Arnold (2010).

the relations between states. So we will need to sort out these different uses of the term, and determine what qualifies a theory as a “political conception” of human rights.

Political Conceptions of Human Rights: Wettstein and Ruggie

Before turning to the most prominent political conceptions of human rights, which have been developed by political philosophers, let us first consider Wettstein’s characterization of a political conception, as well as Ruggie’s own description of his approach to developing the Framework. As we shall see, Ruggie offers a different account of his methodology than the one Wettstein attributes to him.

When Wettstein uses the term “political conception” of human rights, he seems to have in mind a legalistic view, that is, one which appeals almost entirely to human rights treaties and conventions. For Wettstein, a political conception of human rights, in contrast to a moral conception, has little or no room for prescriptions beyond those embodied in current human rights law and conventions. This is why he believes that Ruggie’s appeal to the International Bill of Human Rights necessarily led to the endorsement of a narrow range of corporate human rights obligations. The International Bill of Human Rights imposes direct (legal) human rights obligations only, or primarily, on states, and thus does not necessarily allow for the recognition of direct corporate human rights obligations, and particularly not for a broad range of such obligations.

However, Ruggie himself claims to have taken a different approach when developing the Framework. Rather than relying on human rights treaties and conventions, Ruggie says that in formulating the corporate responsibility to respect human rights, he was specifying something that “already exists as a well-established

social norm.” (Ruggie 2013, 91) According to Ruggie, “a social norm expresses a collective sense of ‘oughtness’ with regard to the expected conduct of social actors, distinguishing between permissible and impermissible acts in given circumstances; and it is accompanied by some probability that deviations from the norm will be socially sanctioned, even if only by widespread opprobrium.” (Ruggie 2013, 91-92) Furthermore, Ruggie contends, while different people and societies hold different expectations about corporate conduct concerning human rights, “one social norm has acquired near-universal recognition within the global social sphere in which multinationals operate; the corporate responsibility to respect human rights.” (Ruggie 2013, 92) Thus, Ruggie’s justification for codifying the corporate responsibility to respect human rights is that it is a more or less universally held social norm. In other words, this approach seeks to identify the human rights norms that all (or nearly all) parties agree upon, and endorses those as the legitimate ones. This type of approach can be referred to as an “agreement theory.”⁸

Now let us compare these two theories. First, both the legalistic theory and the agreement theory can be classified as versions of a political conception of human rights. They do not appeal to moral rights grounded in people’s humanity or human dignity, as

⁸ See Beitz’s discussion of agreement theories in *The Idea of Human Rights*, chapter 4. Beitz distinguishes three types of agreement theories: common core, overlapping consensus, and progressive convergence. Ruggie seems to employ the common core version of agreement theory, which appeals to the “lowest common denominator” that all cultures or societies agree upon. As Beitz points out, the common core idea would end up excluding substantial parts of contemporary human rights doctrine, because these are not agreed upon by all cultures or societies. This may create an inconsistency for Ruggie. He appeals to common core agreement theory to justify the corporate responsibility to respect, but then appeals to the International Bill of Human Rights to identify the list of human rights that corporations have an obligation to respect. But if not all human rights listed in the International Bill of Human Rights can be justified by common core agreement theory, there may be a conflict. This is because the corporate responsibility to respect is based on one approach to justification, while the rights it refers to must be based on some other approach that is capable of justifying that set of rights. Whether this is genuinely a problem depends on whether it is necessary to have the same justificatory basis for human rights themselves as for the norms that assign the obligations to which these rights give rise. Regardless, Ruggie’s explanation of his justification for codifying the corporate responsibility to respect human rights, seems to make it clear that he relied upon the common core approach in developing this norm.

moral conceptions are apt to do. Rather, the legalistic version appeals to the contents of contemporary human rights treatises and conventions in order to ground human rights norms, while the agreement version appeals to more or less universal agreement by all cultures or societies in order to ground human rights norms. Thus, both versions ground human rights in a political or social basis, rather than appeal to the moral rights of individuals. I believe this is sufficient to classify them as political conceptions of human rights, although they do not appeal to the functional role that political philosophers have generally taken to be characteristic of political conceptions, namely, regulating the political relations between states on the international level.⁹

Second, these two versions of a political conception may entail a different range of corporate human rights obligations. The legalistic version is constituted by appeal to contemporary human rights documents, namely, the International Bill of Human Rights and ILO core conventions. But it is not clear whether even a narrow range of corporate human rights obligations can be derived from these documents. These treatises and conventions impose human rights obligations on states, but do not necessarily impose direct human rights obligations on any other agents. This is certainly true of the legally binding human rights covenants (ICCPR and ICESCR), which impose legal obligations only on the states that are party to them. The UDHR, which is not a legally binding treaty, contains a clause that states “every individual and every organ of society” has an

⁹ As Alain Zysset has pointed out to me, political conceptions appeal to the practice of human rights, and the mere fact that states draft and sign treatises and conventions does not in itself constitute a practice. States may sign such documents, and then nothing more comes of it. In that case, a practice never arises. However, I believe that we can interpret Wettstein as assuming that the human rights treaties and conventions he refers to (the International Bill of Human Rights) are accompanied by treaty bodies, enforcement mechanisms, and other aspects that comprise a practice (loosely defined). In other words, it seems safe to assume that Wettstein does think of these treatises as embedded in a practice. However, his legalistic version of a political conception holds that treatises and conventions are the only aspect of the practice that serve as a source for identifying legitimate human rights norms.

obligation to “promote respect for these rights...and...to secure their universal and effective recognition and observance.” (United Nations General Assembly 1948: Preamble) Perhaps direct corporate human rights obligations could be derived from this particular clause. If so, however, it is extremely unclear precisely what range of corporate human rights obligations would be prescribed. There is reference to “respect,” but also to “effective recognition” and “observance.” Can these latter terms be understood as involving obligations to protect or fulfill human rights? The clause is open to multiple interpretations, which renders it difficult to determine whether it can serve as a basis for any direct corporate human rights obligations, and if so, what range of obligations. If no direct corporate human rights obligations can be derived from the legalistic version, then contrary to Wettstein’s claim, Ruggie could not have developed the corporate responsibility to respect human rights based on such an approach. But perhaps Wettstein believes it is possible to derive a narrow range of corporate human rights obligations from the UDHR, or from some other element of the relevant human rights treaties and conventions. He never explains precisely how he believes Ruggie derived this norm from the treaties and conventions in question.

In the case of the agreement version, a narrow conception of direct corporate human rights obligation can be justified, assuming Ruggie is correct that a corporate obligation to respect human rights is a more or less universally agreed upon human rights norm. However, it is important to point out that the agreement version does not *necessarily* entail a narrow range of corporate human rights obligations. It allows that the range of justified corporate human rights obligations can change as universal agreement shifts. So given time, it is always possible there could come to be universal agreement

that corporations also have an obligation to protect or fulfill human rights, or that corporations have no direct human rights obligations at all. In fact, the international human rights regime is an evolving practice, as are the normative beliefs surrounding it. The direct human rights obligations of corporations is a relatively new issue, and there is not yet strongly settled opinion on the matter. Thus, rather than the agreement version necessarily entailing any specific range of corporate human rights obligations, it is a merely contingent empirical truth that it entails a narrow range of such obligations at the present time.

So far, then, we have seen that a political conception of human rights can potentially entail no corporate human rights obligations (according to a certain interpretation of the legalistic version), or, contingently, a narrow range of corporate human rights obligations (according to the agreement version, given currently held normative beliefs). And thus it might seem Wettstein was correct to claim that Ruggie's reliance on a political conception of human rights dictated that the Framework would prescribe only a narrow range of corporate human rights obligations. So, given our investigation up to this point, Wettstein's claim does seem to be correct, as long as he did not mean it as a necessary, rather than a merely contingent, truth (based on present facts about universal agreement). However, before settling on this conclusion, we should examine the most prominent political conceptions of human rights, those developed by political philosophers. Whereas Wettstein and Ruggie offer quite brief characterizations of the versions of a political conception they have in mind, John Rawls, Joseph Raz, and Charles Beitz have developed much more elaborate political conceptions. Examining

these theories will put us in a position to more fully determine whether political conceptions of human rights entail a specific range of corporate human rights obligations.

Political Conceptions of Human Rights: Rawls, Raz, and Beitz

Joseph Raz claims that a political conception of human rights will include two aspects: 1) it will establish the essential features that the practice of international human rights attributes to such rights; and 2) it will identify the moral standards that qualify a norm as a human right. (Raz 2010) Let us refer to these two aspects of a political conception of human rights as the “essential features (or functions)” aspect and the “qualification standards” aspect.¹⁰ Before proceeding, I want to point out that given my view that the legalistic and agreement versions count as political conceptions of human rights, I do not necessarily accept Raz’s claim that every political conception will include these two aspects. While both the legalistic version and the agreement version include the qualification standards aspect, it is not immediately apparent that they include the essential features aspect. The legalistic version claims that inclusion in a human rights convention is the standard that qualifies a right as a legitimate human right, while the agreement version holds that being a more or less universally agreed upon human right is the standard that qualifies a right as a legitimate human right. But neither of those theories, at least given the very brief characterizations offered by Wettstein and Ruggie, seems to explicitly identify the essential features attributed to human rights by the

¹⁰ I do not use the term “moral qualifications standards,” because I think Raz is wrong to assume that standards which qualify something as a legitimate human right must be moral in nature. For example, the legalistic version very clearly does not appeal to a moral qualification standard, and perhaps the agreement version does not either, depending on what we understand to be a “moral” standard.

practice.¹¹ So, rather than Raz's two aspects being necessary features of a political conception of human rights, I maintain that it is appeal to a social or political basis for human rights which qualifies a theory as a political conception. Nevertheless, Raz's two aspects suggest a helpful way of approaching the political conceptions that have been developed by political philosophers. Indeed, we will find that both aspects are to be found in the theories of Rawls, Raz, and Beitz. So let us now proceed by assessing the remaining political conceptions of human rights in terms of these two aspects.

John Rawls has offered perhaps the most influential political conception of human rights in his book *The Law of Peoples*. In this work, Rawls presents a theory of international justice. His methodology is to provide a normative reconstruction of the principles of international law, which will yield a theoretical framework for determining just relations between societies of peoples. In the course of this reconstruction, Rawls presents his political conception of human rights. For Rawls, human rights play three roles:

1. Their fulfillment is a necessary condition of the decency of society's political institutions and of its legal order.
2. Their fulfillment is a sufficient condition to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
3. They set a limit to the pluralism among peoples. (Rawls 1999, 80)

This provides Rawls's account of the essential features aspect. For Rawls, the essential feature or function of human rights is to provide a criterion for the decency of the political institutions of a society, which if met, excludes the possibility of justified intervention by other states and the international community. As a corollary of this,

¹¹ I will later argue that we can identify the essential feature(s) or function(s) attributed to human rights by the legalistic version and the agreement version, and that this will be derived from the qualification standards aspect of these theories.

human rights define the limits of acceptable pluralism among societies. In other words, if a society behaves in a way that violates human rights, then it has exceeded the limits of pluralism tolerable in international society, and other societies or the international community are then justified in intervening in that society.

When it comes to the qualification standards aspect, Rawls holds that human rights are “necessary conditions of any system of social cooperation.” (Rawls 1999, 68) For Rawls, social cooperation is a matter of cooperation between “free and equal people,” which entails fair terms of cooperation and a system of mutual advantage. Based on these criteria, Rawls offers a very short list of human rights, which includes merely the rights to life, liberty, and formally equality (similar cases must be treated similarly). (Rawls 1999, 65) In comparison to the UDHR, and other international human rights documents, this is a sharply truncated list of rights. So, at least in this respect, Rawls’s theory of human rights is quite revisionary, because it deviates drastically from the practice of international human rights.

At this point, we should notice that Rawls’s theory of human rights has little to say about what, if any, should be the human rights obligations of corporations. Rawls has defined the essential feature or function of human rights exclusively in terms of the role they play in the relations between societies or states in the international arena. So when it comes to corporate human rights obligations, one can read Rawls in at least two different ways: First, Rawls could be read as providing an exhaustive account of the role of human rights, in which case, his theory prescribes no direct human rights obligations for corporations, because human rights (directly) apply only to societies or states. Second, Rawls could be read as merely focusing on a theory of international justice between

societies or states, and thus only specifying the role of human rights in that context. On this latter reading, we do not know what Rawls would say about corporate human rights obligations, because he never provided a comprehensive theory of human rights. If the latter reading is correct, then Rawls's political conception of human rights is silent on the matter of corporate human rights obligations, and offers no prescription when it comes to a narrow versus broad range of such obligations.

Joseph Raz's political conception of human rights is perhaps less developed than Rawls's theory, but offers some interesting contrasts. (Raz 2010) In terms of the essential features aspect, Raz holds that human rights set limits to state sovereignty. More specifically, he claims, "the fact that a right is a human right [is] a defeasibly sufficient ground for taking action against violators in the international arena, that is to take its violation as a reason for action." (Raz 2010, 328) So Raz and Rawls attribute nearly the same essential feature or function to human rights. However, the two theories differ when it comes to the qualification standards aspect. Raz holds that "human rights are those regarding which sovereignty-limiting measures are morally justified." (Raz 2010, 329) He believes that Rawls's criterion for something being a human right, that it be a necessary condition of any system of social cooperation, is insufficient. This is because while Rawls's criterion may help to define the limits of state authority, which concern the morality of a state's actions, this criterion fails to define the limits of sovereignty, because such a criterion must also involve the right of others to intervene. Not all moral wrongdoing by a state will justify intervention by other states or the international community. The right of others to intervene will depend in part on the international situation (e.g. whether intervention will be used to increase the domination

of a super-power over its rivals), and not merely on the morality of the actions of the state that is the potential subject of intervention.

Raz does not specify which types of wrongdoing justify intervention (the justified limits of sovereignty), and thus does not provide a list of justified human rights. However, it is safe to assume that his theory, like Rawls's theory, will offer a truncated list of human rights in comparison to the UDHR and other international human rights documents. This is because there are many rights included in such documents which Raz surely does not believe justify intervention. Examples of such rights in the UDHR include, the right to periodic holidays with pay, the right to social security, and the right to education, to name just a few. For instance, if a state fails to provide a system of social security, or if it fails to provide basic public education for a large percentage of its children, this is not usually understood as a justification for intervention by other states or the international community. And in fact, there are many states that currently fail in just these ways. But no one calls for forceful intervention in such states. Furthermore, Raz himself seems to suggest that the list of rights found in international human rights documents exceed those which he believes are justified, when he says, "International law is at fault when it recognizes as a human right something which, morally speaking, is not a right or not one whose violation might justify international actions against a state..." (Raz 2010: 329) So as with Rawls, Raz appears to deviate from the practice of international human rights, by offering a fairly revisionary theory in terms of the list of rights that qualify as legitimate human rights.

However, Raz differs from Rawls when it comes to the issue of corporate human rights obligations. While pointing out that states have been the primary agents addressed

in international law, and that in accordance with this his theory treats human rights as being rights against states, he nevertheless allows that human rights may also be rights against agents other than states.

But I do not mean that human rights are rights held only against states, or only in the international arena. Human rights can be held against international organizations, and other international agents, and almost always they will be rights against individuals and other domestic institutions. The claim is only that being rights whose violation is a reason for action against states in the international arena is distinctive of human rights, according to human rights practice. (Raz 2010, 329)

In other words, Raz treats the violation of human rights by government as a reason for action against states as the distinctive feature or function of international human rights practice, but he is not claiming that this is a complete characterization of human rights. Raz acknowledges that human rights can impose duties on individuals and domestic institutions, as well as non-state international agents. And if he allows that individuals can have human rights obligations, then it seems likely he will include domestic and multi-national corporations among the “domestic institutions” and “non-state international agents” that can have human rights obligations. For surely if individuals can have human rights obligations, then corporations, with their far greater resources and power, can have human rights obligations. However, Raz says nothing further about this dimension of human rights. And thus Raz’s theory is silent about whether it would prescribe a narrow or broad range of corporate human rights obligations. The difference between Raz’s and Rawls’s theories in this regard, is simply that Raz seems to explicitly acknowledge that corporations can have direct human rights obligations, while Rawls (at least on the second reading) is silent about whether this is the case.

Charles Beitz offers the most developed political conception of human rights. (Beitz 2009) His methodology involves first providing a close interpretation of the

practice of international human rights, which can then be used to develop a model that best characterizes the practice. This model provides an account of the practice, including its values and purposes, which can be used to judge the various aspects of it.

After assessing and interpreting the practice, Beitz arrives at what he refers to as a “two-level model” of human rights, which is comprised of three elements. The first element defines human rights: “Human rights are requirements whose object is to protect urgent individual interests against predictable dangers (“standard threats”) to which they are vulnerable under typical circumstances of life in a modern world composed of states.” (Beitz 2009, 109) The second element specifies the “first-level” obligations created by human rights. Human rights apply first and foremost to the political institutions of states, including their constitutions, laws, and public policies, and require states to respect, protect, and “aid” these rights. The third element specifies the “second-level” obligations created by human rights. It identifies human rights as matters of “international concern,” and holds that when states fail in their first-level obligations, human rights may provide a reason for capable outside agents to act. Such action is called for in the following circumstances:

states and non-state agents with the means to act effectively have *pro tanto* reasons to assist an individual state to satisfy human rights standards in cases in which the state itself lacks the capacity to do so, and...states and non-state agents with the means to act effectively have *pro tanto* reasons to interfere in an individual state to protect human rights in cases in which states fail through a lack of will to do so. (Beitz 2009, 109)

This is a two-level model because, at a first level it assigns to states primary responsibility for respecting, protecting, and fulfilling the human rights of their residents, and at a second level it assigns to the international community the role of guarantor of those responsibilities.

The two-level model provides Beitz's account of the essential features aspect. For Beitz the essential features of human rights are, first, to impose obligations on the political institutions of states, and secondarily, to create matters of international concern which give *pro tanto* reason for action by the international community when states fail in their obligations. Beitz' theory is similar to Raz's theory in that both treat human rights violations as (*pro tanto*) reasons for action (intervention), whereas Rawls takes the stronger position of treating human rights violations as requiring intervention.

In terms of the qualification standards aspect, Beitz's theory holds that human rights are "protections of 'urgent individual interests' against 'standard threats' to which they are vulnerable." (Beitz 2009, 110) He defines "urgent interests" as those that would be "recognizable as important in a wide range of typical lives that occur in contemporary societies: for example, interests in personal security and liberty, adequate nutrition, and some degree of protection against the arbitrary use of state power." (Beitz 2009, 110) And he defines a "standard threat" as "a threat which is reasonably predictable under the social circumstances in which the right is intended to operate." (Beitz 2009, 111) Based on this account of the standards that qualify something as a human right, Beitz is able to justify more or less the list of rights found in international human rights documents. In this respect, his theory differs from the theories of both Rawls and Raz, because whereas they offer truncated lists of human rights, which are quite revisionary compared to the list of rights found in the practice, Beitz is able to more or less recognize the list used in the practice.

Let us pause for a moment to consider a potential objection. Some commentators may object to my claim that Beitz offers a theory of human rights which closely

conforms to the list of rights found in the practice. These commentators will likely point to Beitz's discussion of "hard cases." These cases concern specific human rights, or categories of human rights, which are recognized in the practice, but that Beitz believes his theory may not endorse. The human rights in question include anti-poverty rights, women's rights, and the right to political participation. More specifically, Beitz suggests that his emphasis on human rights as matters of "international concern" may have some potentially revisionary implications for these areas of human rights. However, I will argue that Beitz's theory is not in fact very revisionary, and where he claims that it is, he is (mostly) mistaken in drawing such a conclusion.

The easiest case is that of anti-poverty rights. The potential problem with treating this category of human rights as matters of international concern, according to Beitz, stems from two issues: first, determining which outside agents have reasons to act when states fail in their domestic obligation to fulfill such rights, and secondly, determining what kinds of reasons for action failure to fulfill these rights give to outside agents. (Beitz 2009, 163) Beitz suggests that there can be a wide range of sufficient reasons for affluent states to act to reduce or mitigate poverty in impoverished states. Such reasons range from "strong beneficence," (Beitz 2009, 167) to harmful interaction, historical injustice, non-harmful exploitation, and political dependence. (Beitz 2009, 171) This shows that there will not be one type of uniform reason for action provided by these rights, but rather, "an uneven web of disaggregated responsibilities." (Beitz 2009, 173) In other words, attributing responsibility to outside agents for ensuring these rights will involve different reasons in the case of different agents, and will depend on the details of particular cases. (Beitz 2009, 173-174) The fact that there is a range of sufficient reasons

for outside agents to act in reducing or mitigating poverty, leads Beitz to conclude that “there are anti-poverty rights.” (Beitz 2009, 173) In other words, while Beitz considers the possibility that his treatment of human rights as matters of international concern might challenge the legitimacy of anti-poverty rights, in the end he concludes that his theory does indeed justify such rights. Thus, in the case of anti-poverty rights, his theory is not revisionary of the list found in the practice.

Moving on to the case of women’s rights, Beitz believes there is no principled problem with such rights, even in societies where those rights conflict with deeply rooted cultural beliefs and practices. This is because men’s and women’s interests are of equal importance, and thus governments ought to, in principle, equally protect both. (Beitz 2009, 193-194) But a practical problem with such rights does arise, according to Beitz. The human rights of women are concerned not merely with changes in law and policy, but with changes in social beliefs and practices. However, changing law and policy, which is the primary means available to the state, is unlikely to bring about changes in social beliefs and practices. Furthermore, if domestic governments lack the means to enact the necessary sort of change, the international community is even less capable of doing so. (Beitz 2009, 194-195) This seems to imply that women’s rights cannot be matters of international concern on practical grounds, because there is no effective form of action for realizing such rights available to outside agents. “A government’s failure to comply with those elements of women’s human rights doctrine that requires efforts to bring about substantial cultural change does not supply a reason for action by outside agents because there is no plausibly effective strategy of action for which it could be a reason.” (Beitz 2009, 194-195) Thus, Beitz concludes that since women’s rights fail (for

practical reasons) to be matters of international concern, they therefore cannot be legitimate human rights according to his theory.

Now let us consider how revisionary Beitz's theory really is in the case of women's human rights. First, we should note that Beitz does not intend this argument to apply to the full range of women's human rights. He says that the majority of women's human rights "are perfectly general...interests in physical security and personal liberty." (Beitz 2009, 188) In other words, most areas of women's human rights represent general interests of both women and men, and thus are perfectly legitimate human rights.¹² Beitz singles out a few issues that he believes involve background beliefs and social practices that cannot be changed via law and policy: violence against women in the household, protection against rape, and abuses associated with prostitution. (Beitz 2009, 194) It is only this limited set of women's issues that Beitz believes cannot (for practical reasons) be matters of international concern, and thus fail to be legitimate human rights. In short, Beitz does not claim his theory is so revisionary as to deny the legitimacy of all women's rights, but only a certain subset of such rights. Nevertheless, it can still be argued that in comparison to the practice, Beitz's theory would be quite revisionary in denying that these important women's issues are a matter of human rights.

However, I do not believe Beitz has correctly construed the implications of his theory in this area. First, he may be wrong to claim that changes in law and public policy are unable to influence the background beliefs and social practices necessary for the realization of the full range of women's human rights. Kristen Hessler, for example, points to evidence which shows that changes regarding women's legal status in Tunisia

¹² Although see Hessler's claim that Beitz's argument will apply to women's rights more broadly. (Hessler, 2013, 380).

were accompanied by major changes in women's general social status and status within marriage. (Hessler 2013, 381) Hessler concludes that the subordinate social status of women is in part created by public policy, and can therefore be changed by making changes to law and policy. (Hessler 2013, 382) Empirical evidence, such as that presented by Hessler, shows that Beitz may simply have been wrong to claim that a primary form of action available to the state—changing law and policy—will be unable to influence the background beliefs and social practices necessary for realizing the particular subset of women's rights that are in question.

Second, Beitz acknowledges that the implementation of human rights admits of a wide range of strategies and forms of action. (Beitz 2009, 33-42) It is worth remembering that rather than treating human rights failures as simply triggers for “intervention,” as Rawls and Raz do, Beitz treats human rights as matters of “international *concern*” which generate “reasons for action.” In other words, Beitz does not view failures to realize human rights as simply grounds for coercive or forceful intervention, but instead, as generating reasons to engage in an array of strategies for realizing these rights. He discusses six strategies for implementing human rights: accountability, inducement, assistance, domestic contestation and engagement, compulsion, and external adaptation. (Beitz 2009, 33) As Hessler argues, each of these strategies of implementation is no less likely to be effective in the case of women's rights than in other areas of human rights. (Hessler 2013, 384-387) In the category of “accountability,” Beitz includes the reporting and auditing processes carried out by the various human rights treaty bodies. This is perhaps the most common means of implementation used within the practice. Hessler points out that states are no less likely

to implement women's rights in response to such auditing processes, than they are to implement, say, social and economic rights. (Hessler 2013, 385) And if changes in law and policy can affect the social practices necessary for realizing women's rights, as was suggested above, then the reporting and auditing processes may encourage states to take the necessary actions to bring about such change. For example, in 2001, the Convention on the Elimination of Discrimination Against Women (CEDAW) Committee encouraged Egypt to conduct a national survey of violence against women and to provide a reporting process so that more victims would come forward to report rape. (Hessler 2013, 384-385) Pursuing such a policy may in fact lead to changes in women's willingness to come forward and report cases of rape. If that does occur, then the accountability provided by the reporting and auditing process will have contributed to the implementation of an area of women's rights that Beitz believed could not be a matter of international concern.

Within the category of "compulsion," Beitz includes coercive interventions, such as economic sanctions, and within the category of "inducements," he includes strategies such as economic incentives for compliance. If the concern is a lack of state willingness to take action regarding the implementation of the full range of women's human rights, there is no reason to believe that in response to economic sanctions or economic inducements, a state would be less likely to take action regarding women's rights, than it would be to take action toward implementing, say, civil and political rights. (Hessler 2013, 386) So given Beitz's acknowledgement that a wide array of strategies or measures can be employed in the implementation of human rights, and the evidence that changes in law and policy can help to influence the relevant background beliefs and social practices, it seems mistaken to claim that there is nothing the international

community can do to implement the full range of women's human rights. Thus, contrary to Beitz's claim that the full range women's human rights cannot be justified by his theory, a closer examination reveals that his theory can in fact justify such rights. Once again, as in the case of anti-poverty rights, it seems that Beitz's theory need not be revisionary of the list of rights found in the practice.

Finally, let us turn to the case of the right to political participation. Beitz points out that this right is now generally interpreted as a right to democracy. His main concern with interpreting the right to political participation in this way, is that such a right may only be justified in protecting a certain underlying interest (or interests), but not justified in imposing a specific type of institutional mechanism for realizing that aim. He points out that the empirical evidence is uncertain and does not support the claim that promoting democratic political institutions in poor societies will make it more likely that people's basic interests are satisfied. (Beitz 2009, 180) Furthermore, he argues that the attempt to impose democratic institutions on a society would violate the society's right to political self-determination, at least in those societies that have a conception of the common good which they believe is best realized through a non-democratic form of political institutions.¹³ (Beitz 2009, 182) For these reasons, Beitz does not believe that a human right to democracy can be justified.

While in the case of women's rights Beitz was concerned about the practical ability to implement such rights, in the case of a right to democracy he is more concerned about the justification of this right in principle. Beitz notes that there is now "a pattern of international action" aimed at the development of democratic movements and regimes

¹³ However, Beitz believes there is even less clear evidence as to whether collective self-determination will make it more likely that people's basic interests are satisfied, so he is not convinced that there is a human right to collective self-determination. (Beitz 2009, 185)

where they do not exist, and the support and protection of ones that do exist. (Beitz 2009, 174) And nowhere does he indicate a belief that this action is ineffective. So in practical terms, the international community may indeed be able to promote democracy, and thus it can qualify as a matter of international concern. However, Beitz's argument in this case is that a right to democracy may not be justified in principle, both because it fails to make it more likely that the interests protected by human rights will be realized, and because it may conflict with other rights. Let us assume Beitz is correct that a human right to democracy cannot be justified in principle, for the reasons that he provides. Even if this is true, Beitz has not rejected a human right to political participation, which is the right explicitly listed in international human rights treaties. He has only rejected the interpretation of this as a right to a democratic form of government. This interpretation has become commonplace in the practice, although it is not a consensus belief. (Beitz 2009, 174) In that case, Beitz's position will be to some extent revisionary in comparison with current human rights practice, but not radically so. We can understand Beitz as simply agreeing with the minority of practitioners, who reject this particular interpretation of the right to political participation and render it a non-consensus belief. Furthermore, Beitz's theory is intended to be prescriptive, not merely descriptive. So it is not surprising if we find it in some ways critical of the practice.

After assessing the "hard cases," we have found merely that Beitz's theory takes a minority position on the interpretation of a certain human right recognized in the practice, and in the other cases his theory seems fully capable of justifying the rights found in the practice. He either explicitly endorses the rights recognized in the practice (anti-poverty rights), or as I have argued, should endorse such rights (women's rights). For these

reasons, I think we are justified in claiming that his theory largely conforms to the list of human rights found in the practice. Now that we have dealt with a potential objection to this claim, let us return to the issue of corporate human rights obligations.

We can see that the second element of Beitz's model holds that states have an obligation to protect human rights against threats from non-state agents that are subject to the state's jurisdiction. Here Beitz's model echoes the "state duty to protect human rights" found in Ruggie's Framework, which requires the state to protect against human rights abuses by business through regulation and adjudication. But does Beitz's theory prescribe direct corporate human rights obligations? In the third element of Beitz's model, he states that both state and non-state agents (with the means to act effectively) have "*pro tanto* reasons to assist an individual state to satisfy human rights standards in cases in which the state itself lacks the capacity to do so" and "*pro tanto* reasons to interfere in an individual state to protect human rights in cases in which states fail through a lack of will to do so." (Beitz 2009, 109) I assume that "satisfying" human rights is equivalent to fulfilling them. So Beitz's theory acknowledges that "non-state agents" can have reasons to both protect and fulfill human rights. However, Beitz's further discussion makes clear that the non-state agents he has in mind are not corporations, but rather human rights NGO's such as Human Rights Watch and Amnesty International. Indeed, the practice of international human rights can be understood as encompassing the roles played by these non-state agents. But given this clarification of the non-state agents in question, the third element of Beitz's model does not seem to include a role for corporate human rights obligations.

Furthermore, Beitz goes on to explicitly address the possibility of direct corporate human rights obligations, resisting the idea that such obligations can be derived from an account of the practice. “It is true that there have been efforts to frame human rights principles directly applicable to business firms, but thus far these efforts have lacked the independent structure and regularity to justify considering them as elements of an ongoing global practice.” (Beitz 2009, 124) This is a revealing statement, and one which I believe holds an important lesson concerning the range of corporate human rights obligations that a political conception will prescribe. Beitz claims that despite efforts to specify direct human rights obligations for corporations, these efforts have lacked certain features that would justify treating them as part of the practice.¹⁴ Due to the fact that these efforts fail to qualify as part of the practice, there is no range of direct human rights obligations, narrow or broad, that we are justified in assigning to corporations. Since Beitz’s methodology involves closely considering and interpreting the practice of international human rights, his theory is very practice-sensitive.

The implications of his approach become clear when we compare his theory to those of Rawls and Raz. Rawls and Raz employ qualification standards for justifying human rights that yield truncated lists of rights which are quite revisionary of the practice, while Beitz on the other hand, employs a qualification standard that yields more or less the list of rights found in the practice. Indeed, if Beitz’s theory endorsed a list of rights that deviated much from the list found in the practice, he would likely consider this a flaw in his theory. After all, his methodology requires that he produce a normative model of human rights which is based on a close analysis and interpretation of the

¹⁴ Beitz’s book was written just prior to the introduction and adoption of Ruggie’s framework, so it is unclear whether Beitz would consider this development to provide enough “structure and regularity” to now consider direct corporate human rights obligations a part of the practice.

practice. This methodology implies that Beitz's theory will be rather conformist with the practice.¹⁵ An interpretation that takes close account of the practice is also confined by the practice. Since determining direct corporate human rights obligations is, at best, in its infancy, and may have yet to become an established part of the practice,¹⁶ a close interpretation of the practice is likely to suggest either that there are no direct corporate human rights obligations or that it is indeterminate whether there are such obligations. Indeed, Beitz's political conception of human rights takes the former position, because, at least at the time of his writing, he believed that efforts to frame direct corporate human rights obligations lacked structure and regularity, and thus did not constitute a part of the practice. With the subsequent adoption of Ruggie's Framework by the U.N. Human Rights Council, it is possible that Beitz would now recognize some form of direct corporate human rights obligations as part of his theory.

Political Conceptions of Human Rights and Corporate Responsibility

I have suggested that Beitz's comment about direct corporate human rights obligations holds an important lesson as to whether political conceptions entail a certain range of such obligations. The political conceptions of human rights developed by political philosophers have tended to take a specific part of the existing practice of international human rights as their starting point, namely, the role that human rights play in the relations between states. However, as we have seen in our examination of Rawls,

¹⁵ This assumes of course that the norms underlying the practice and the list of human rights that it recognizes are coherent. It is of course a possibility that one could closely analyze and interpret the practice, and then find that the normative reconstruction is not compatible with the list of rights recognized in the practice. However, this possibility is likely only to arise in the case of a radically incoherent practice.

¹⁶ The adoption of Ruggie's Framework by the U.N. Human Rights Council may render this no longer true, depending on the criteria one employs for determining whether something constitutes part of the practice.

Raz, and Beitz, theories of human rights based on a political conception can vary in terms of how revisionary their prescriptions are in comparison to the practice. Beitz's theory is not very revisionary. But this is an artifact of his methodology, which requires his theory to be derived from a close examination and interpretation of the practice. Rawls and Raz, on the other hand, include some quite revisionary elements in their theories. Up to this point, I have suggested that the revisionary elements of Rawls's and Raz's theories derive primarily from the moral standards aspect, which produce lists of human rights that deviate significantly from the list found in the practice. However, we might also think their theories are revisionary in light of the essential features aspect. Both of these theories attribute one essential feature or function to human rights: a criterion for justified intervention in a state by other states or the international community. But it might be argued that the practice attributes more than one essential feature or function to human rights, in which case these theories are revisionary insofar as they focus on just this one feature or function of human rights to the exclusion of others. Beitz, by contrast, treats the essential features or functions of human rights in a broader manner, by holding that human rights first and foremost create obligations for a state with regards to its domestic constitution, laws, and public policies, and secondarily, as providing (*pro tanto*) reason for action by outside agents if the state fail in its obligations. Perhaps the theories of Rawls and Raz recognize the former element in an implicit way,¹⁷ but Beitz explicitly divides the operation of human rights into two different "levels." Thus, we might say that Beitz attributes at least two features or functions to human rights.

¹⁷ It seems to follow that a state must have domestic obligations regarding human rights, if violations of human rights are to provide grounds for intervention by other states or the international community. Yet Rawls and Raz seem only to focus on this second function, as a trigger for outside intervention.

Here is the important point for our purposes: the practice can be understood as including more or less of the activities relating to human rights, and this will tend to influence the essential features or functions that a theorist attributes to human rights. For example, Beitz recognizes that human rights can give (*pro tanto*) reasons for action to human rights NGO's, and thus that the role of such agents is part of the practice, while Rawls and Raz do not seem to recognize the practice as essentially encompassing such agents. If a theorist appeals to a more narrow range of aspects as comprising the practice, for example only those obligations that are legally binding under international human rights law, then the result will tend to be a more state-centric theory. This narrow conception of the practice is likely to lead to a narrower construal of the essential features or functions of human rights, which in turn makes it unlikely there will be recognition of corporate human rights obligations. On the other hand, if a theorist appeals to a broader range of aspects as comprising the practice, for example the activities of human rights NGO's, then this may result in a less state-centric theory. A broader conception of the practice is likely to lead to a broader construal of the essential features or functions of human rights, which in turn can make it more likely there will be recognition of corporate human rights obligations. Assume, for example, that a conception of the practice includes the activities of NGO's that monitor and pressure corporations to comply with certain human rights norms. In this case, the conception of the practice that encompasses such aspects may lead to recognition of essential features or functions of human rights that go beyond mere state obligations, to also prescribe corporate human rights obligations. The range of corporate human rights obligations prescribed by such a theory

is likely be determined by the norms and expectations involved in the activities that comprise the conception of the practice on which the theory relies.

To illustrate this last point, first consider the political conceptions of human rights developed by political philosophers. Raz did not give determinate prescriptions regarding corporate human rights obligations, and this seems to be a result of his theory focusing on just one essential feature or function of human rights, derived from a narrow conception of the practice. Similarly for Rawls (at least on one reading), his theory prescribes no corporate human rights obligations, and this also has to do with the fact that his theory focuses on just one essential feature or function of human rights, based on a narrow conception of the practice. Beitz's theory, by contrast, recognizes human rights obligations for agents other than states. His theory holds that human rights can create obligations (*pro tanto* reasons for action) for NGO's. This seems to result from attribution of a wider set of essential features or functions to human rights, based on a broader conception of the practice.

Next, consider the versions of a political conception of human rights characterized by Wettstein and Ruggie. While neither of these political conceptions focuses on the role that human rights play in the relations between states, we may nevertheless understand them as appealing to certain aspects of the practice. For the legalistic version, it is inclusion in international human rights treaties that qualifies a right as a legitimate human right. These documents are often thought of as part of the practice. Beitz's political conception, for example, gives a very prominent role to such treaties when offering a characterization of the practice. However, the political conceptions of Rawls and Raz do not focus on these documents. Rawls and Raz focus on just one aspect of the

practice: the role that human rights play in the relation between states on the international level. They then allow this feature or function of human rights to determine the qualification standards (limitations on sovereignty) for identifying legitimate human rights. By contrast, the legalistic version focuses on a different aspect of the practice: international human rights treaties. In the case of the legalistic version, the qualification standard aspect is treated as primary. As I discussed previously, when Wettstein's characterizes the legalistic version, he does not explicitly provide an essential feature or function of human rights. However, I believe that we can interpret the essential feature(s) or function(s) aspect as deriving from the qualification standard aspect, which he does provide. It would seem that on Wettstein's characterization of the legalistic version, the essential feature or function of the human rights found in international human rights treaties is to create "obligations of non-interference and 'do no harm.'" (Wettstein 2012, 745) Again, it remains unclear precisely how Wettstein thinks Ruggie derived the corporate responsibility to respect human rights from those treaties, but Wettstein clearly states that the "political or legal" human rights found in the treaties essentially emphasize negative duties of non-interference.¹⁸

Ruggie's agreement version appeals to universally held social norms regarding human rights as the qualification standard for identifying legitimate human rights norms. One can conceivably think of these social norms as part of the practice, given a quite

¹⁸ It may be difficult to reconcile this claim with the treaties and practice themselves, as they very clearly attribute to states an obligation not only to respect the human rights listed in the treaties, but also to protect and fulfill these rights. Nevertheless, Wettstein argues that we need a moral conception of human rights in order to generate positive corporate human rights obligations, because the "political and legal" human rights found in international human rights treaties are focused on negative obligations of non-interference.

broad conception of the practice.¹⁹ As with the legalistic version, Ruggie's agreement version does not explicitly state the essential feature or function of human rights.

However, I believe that we can once again interpret the essential feature(s) or function(s) aspect as deriving from the qualification standards aspect, which Ruggie does provide. In this case, the legitimate human rights norm in question is the corporate responsibility to respect human rights, from which we can infer that an essential feature or function of human rights is to attribute to corporations an obligation not to harm.²⁰ Thus, while Rawls and Raz seem to allow the essential features or functions of human rights (the role they play in relations between states) to determine the qualification standard for identifying legitimate human rights, the legalistic version and the agreement version allow the qualification standard for identifying legitimate human rights (inclusion in international human rights treaties or universally held social norms) to determine the essential features or functions of human rights. In other words, Rawls and Raz treat the essential feature aspect of a political conception as primary, whereas the legalistic version and the agreement version treat the qualification standard aspect of a political conception as primary. But in all cases, it is appeal to some part of the practice that determines the primary aspect.

¹⁹ In fact, Rawls may endorse something similar, insofar as he treats as legitimate only those human rights that all reasonable peoples would endorse. This leads Rawls to reject certain human rights that only liberal societies would endorse, because non-liberal peoples will reasonably reject such rights.

²⁰ Here the claim is simply that assigning to corporations an obligation not to harm is *at least one* essential feature or function of human rights. This is not to say that Ruggie holds that this is the only essential feature or function of human rights. In fact, the recognition of the state duty to protect human rights from abuses by corporations demonstrates Ruggie's recognition that an essential feature or function of human rights is also to create obligations for states. However, Ruggie derives the state duty to protect from international law and human rights treaties, not from the agreement theory which he relies on to justify the corporate responsibility to respect human rights. Here I focus only on Ruggie's appeal to the agreement theory.

Conclusion

Based on our examination of various political conceptions of human rights, we can now conclude that the range of corporate human rights obligations prescribed by a theory is under-determined by the mere fact that the theory offers a political conception. A political conception of human rights will not necessarily prescribe any corporate human rights obligations, and if it does, not necessarily any particular range of such obligations.

Beyond this general conclusion, we can also identify some features of a political conception of human rights that will contribute to determining what, if any, range of corporate human rights obligations is prescribed by the theory. First, a significant factor is which part or parts of the practice a political conception of human rights appeals to. Generally, the part(s) of the practice appealed to will tend to determine its prescriptions. Furthermore, the practice may be used to determine either the essential feature(s) or function(s) of human rights, or to determine the qualification standard(s) for identifying legitimate human rights. In the political conceptions that we examined, one of these aspects was treated as primary, and the other aspect determined by the primary one.

Second, the more parts of the practice that a theory appeals to, the more conformist a political conception is likely to be, where “conformist” refers to how closely the theory mirrors current practice. Beitz appeals to a very broad conception of the practice, and this leads his theory to more closely mirror the existing practice of international human rights. As a result, his theory prescribes human rights obligations for a range of agents that play a role in the current practice. For example, according to Beitz, human rights NGO’s have (*pro tanto*) reason for action when human rights violations or

failures occur. Although, Beitz's theory does not assign human rights obligations to corporations, this may be due to the fact that Ruggie's Framework had not been adopted at the time Beitz developed his theory. With the subsequent adoption of Ruggie's Framework by the U.N. Human Rights Council, Beitz might now revise his theory to prescribe a narrow range of corporate human rights obligations. Rawls and Raz, on the other hand, focus on just one part of the practice, with at least some revisionary implications for the practice. They seem to have no room for prescribing corporate human rights obligations within their theories, despite the adoption of Ruggie's Framework by the Human Rights Council, because their account of the practice focuses only on the role that human rights play in the relations between states.

It should now be apparent that what range of human rights obligations, if any, corporations will be prescribed, is determined by a range of factors and choices that a theorist must make. My hope is that this paper has helped to identify some of the key considerations. The mere fact that a theory of human rights offers a political conception is not among the determinative factors.

Chapter 2

Moral Conceptions of Human Rights and Corporate Responsibility

In the previous chapter, I argued that political conceptions of human rights do not necessarily entail any specific range of corporate human rights obligations. In this chapter I will consider moral conceptions of human rights and whether they necessarily entail a particular range of corporate human rights obligations.

As discussed previously, Wettstein criticizes Ruggie for relying on a political conception of human rights, and claims this was the reason that Ruggie prescribed a narrow range of corporate human rights obligations. Furthermore, Wettstein claims that appeal to a moral conception of human rights is necessary if we are to prescribe a broad range of corporate human rights obligations. According to Wettstein, one result of Ruggie's reliance on a political conception of human rights is that the Framework holds to a traditional state-centrism.²¹ However, it is a mistake to rely on state-centrism as a general approach to assigning human rights obligations.

Predetermining the distribution of obligations between states and corporations (and all other powerful institutions, for that matter) in such a rigid way and ruling out any responsibility of corporations to proactively engage in the protection and [fulfillment] of rights at the outset appears as unwise in the face of global

²¹ Recall that Wettstein's version of a political conception of human rights involves appeal to international human rights treaties and conventions. In the last chapter, I argued that Wettstein never makes it clear how exactly he believes Ruggie generated the corporate responsibility to respect human rights based on these documents. While it is true for the most part that under international law only states can be held legally responsible for human rights violations—and thus international human rights law is largely state-centric—this still does not explain how one derives the corporate responsibility to respect human rights from international human rights treaties and conventions. After all, if such documents are entirely state-centric, then presumably no corporate human rights obligations are derivable from them. Ruggie's own version of a political conception of human rights—the agreement theory—is a much more plausible explanation of how he arrived at the corporate responsibility to respect human rights.

problems that cannot be solved by governments, or indeed by any one agent acting alone. (Wettstein 2012, 7)

Wettstein suggests that taking a moral perspective will lead us to reject the state-centric approach and instead look to the capabilities possessed by an agent. “A more promising approach, it seems, would be to start with the assumption that all those agents with considerable power and unique and indispensable capabilities must naturally and at the outset bear their fair share of responsibility for finding solutions to prevailing human rights problems.” (Wettstein 2012, 753) However, Wettstein is quick to emphasize that it is the normativity of human rights which ground these obligations, not the capabilities of agents.

The normative ground and foundation for remedial obligations in my argument are not capabilities, but the existence of human rights. The imperative deriving from human rights is what obligates in the first instance; capability is the criterion according to which to distribute this general, collective obligation among specific agents. (Wettstein 2012, 754)

These remarks about state-centrism, the grounds of human rights, and appeal to the capabilities of an agent suggest there are at least three issues that we need to distinguish: 1) What are the grounds of human rights, or human rights obligations?, 2) How, or according to what criterion, should human rights obligations be distributed?, 3) Which classes of agents (i.e. states, corporations, etc.) should be potentially responsible for particular types of human rights obligations (respect, protect, fulfill)? In order to explore these issues in the context of moral conceptions of human rights, let us begin by examining Wettstein’s theory of human rights, along with perhaps the most developed moral conception of human rights, that of James Griffin. (Griffin 2008) In the process,

we will attempt to determine whether moral conceptions of human rights necessarily entail a particular range of corporate human rights obligations.

The Grounds for Human Rights and Human Rights Obligations

In terms of the first issue raised—the grounds of human rights or human rights obligations—we can see that this issue is essentially identical to one of Raz’s two aspects of a political conception of human rights. Recall that for Raz, the two aspects of a political conception of human rights are the essential features (or functions) aspect and the qualifications standards aspect. The second of these, the qualifications standards aspect, involves identification of the standards that qualify a norm as a human right. This means that both political and moral conceptions of human rights are likely to provide an account of the standards that qualify or ground certain claims as human rights.²²

However, moral and political conceptions of human rights will tend to give rather different accounts of this aspect, because they differ in terms of the first aspect, the essential features (or functions) aspect, due to the fact that they tend to focus on different functions of human rights. Political conceptions tend to focus on the role that human rights play in the relations between states, while moral conceptions tend to focus on the role that human rights play in protecting the dignity and interests of individuals.

²² As we saw in the previous chapter, Wettstein and Ruggie did not explicitly offer the first aspect—the essential features (or functions) aspect—in their versions of a political conception of human rights. However, I argued that we are able to derive the essential features (or functions) aspect from the second aspect—the qualification standards aspect—in their versions of a political conception. Nevertheless, it seems conceivable that a political conception of human rights might not, even implicitly, include the qualification standards aspect. In other words, there could be a political conception that focused solely on the essential features (or functions) of human rights, without ever specifying the qualification standards for human rights. For this reason, I claim only that political conceptions are *likely* to provide such an account.

When it comes to the grounds for human rights, Wettstein does not seem particularly focused on the practice of international human rights, but instead appeals to a number of philosophers and theorists in developing his account. In a Kantian manner, he claims that dignity is the source of human rights, and that human dignity derives from our ability to be moral agents. Moral agency, for Wettstein, “refers to both our ability to create our own conception of the good life and to our basic disposition to reflect upon our life scripts and their impact on the lives of others and the moral communities in which we are embedded.” (Wettstein 2009, 34) Wettstein then draws heavily on the capabilities approach, developed by Amartya Sen and Martha Nussbaum, to shape his conception of human rights. The capabilities approach emphasizes not simply having the object of a right, but also having the freedom to use that object in order to accomplish certain ends, or combinations of functionings, that one might choose. “Human rights,” he claims, “are essentially those rights that secure the conditions for living a life in dignity, that is, the basic freedoms that constitute us as self-determined human beings.” (Wettstein 2009, 56) While Wettstein does not conflate human rights and capabilities, capabilities play a foundational role in his conception of human rights. “Capabilities are both the conceptual basis for the derivation of moral rights and practical manifestations of social and societal mechanisms that enable their realization.” (Wettstein 2009, 65) This latter claim, which makes reference to social and societal mechanisms, is important, because Wettstein does not simply offer a moral conception of human rights. He embeds his conception of human rights within a larger theory of (global, cosmopolitan) justice. This theory of justice emphasizes human development as its goal. “What matters to human beings is not merely having a right but the ability to realize it. Thus, achieving justice

through the enhancement of human capabilities, freedoms, and rights can essentially be understood as a process of development.” (Wettstein 2009, 100) The result is that on Wettstein’s conception, human rights are to be understood as goals. “A rights-based conception of human development rests on an understanding of rights as goals.” (Wettstein 2009, 103) Thus, while Wettstein offers a moral conception of human rights, it is very much embedded within a larger theory of justice that is focused on human development, and this significantly shapes and influences his moral conception of rights.

At this point, we can see that Wettstein’s moral conception of human rights is quite revisionary in comparison with the practice of international human rights. First, it is debatable whether the practice of international human rights is committed to a particular theory of justice, especially one that is rooted in the capabilities approach with human development as its goal. But more importantly, the practice of international human rights does not understand human rights to be merely goals. Rather, the practice holds these to be genuine rights.²³

A further problem seems to arise, because Wettstein never offers us a specific list of the moral rights that would be justified on his theory. He does tell us that human rights include not only civil and political rights, but also socio-economic rights. (Wettstein 2009, 68-72) But that is as far as he goes. A real worry here is that Wettstein simply assumes the list of human rights found in international human rights documents, such as the UDHR. However, that becomes very problematic, as Wettstein accuses

²³ It is true that many governments around the world are unable to fulfill all of their residents’ human rights. This fact has been given special attention in the case of socio-economic human rights. But rather than conceive of socio-economic rights as merely goals, the international human rights system has incorporated the notion of a “minimum core,” specifying a minimum to which people are entitled regardless of the level of resources possessed by their government. On the other hand, the system employs the notion of “progressive realization,” which allows governments to progressively realize socio-economic rights over time, as their resources increase. While this latter development may seem to treat socio-economic human rights as merely goals, the international system continues to insist that human rights are in fact rights.

Ruggie of relying on “a combination of legal and political conceptions of human rights” when Ruggie’s Framework makes appeal to the rights listed in the International Bill of Human Rights and ILO conventions. Since Wettstein is supposedly offering an alternative, moral conception of human rights, he needs to provide a list of the specific human rights that are justified by his moral conception. If he is simply assuming the list of human rights found in international human rights documents, then he appears to be guilty of the very thing that he accuses Ruggie of doing—relying on a legal or political conception of human rights, at least in terms of the list of rights.

Now let us turn to Griffin’s theory of human rights, and consider this first issue of the grounds of human rights or human rights obligations. Griffin adopts a “bottom-up” approach to theorizing human rights, which involves starting with “human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts.” (Griffin 2008, 29) While such an approach might seem to suggest that Griffin will appeal to the practice of international human rights, or as he calls it “the human rights tradition,” the matter is a bit more complicated. Unlike the political conceptions of human rights that we have considered, Griffin understands the “tradition” to encompass the natural rights tradition, which stretches from the Late Middle Ages and Renaissance to the Enlightenment, on through the Bill of Rights tradition, to the contemporary international human rights movement. For this reason, it may be somewhat misleading to say that Griffin appeals to the “practice” of international human rights. He certainly appeals to an idea or line of thought that stretches from the natural rights tradition through the contemporary human rights movement. But he does not pay particular attention to the institutional apparatus or functioning of the contemporary

international human rights system. Nevertheless, he does desire that his theory inform contemporary human rights practice. This is because a primary motivation of his theory is to provide determinate criteria for the concept of a “human right,” to give this term a “determinateness of sense,” (Griffin 2008, 14-18) so that we are better able to determine which claims or entitlements constitute genuine human rights. In this way, Griffin believes, we can refine the practice by “curb[ing] the recent uncontrolled multiplication of rights” through “much stiffer existence conditions for human rights.” (Griffin 2008, 109)

Human rights are commonly said to be possessed simply in virtue of our being human, or in virtue of our human “dignity,” as for example in the Universal Declaration of Human Rights. Griffin therefore takes human dignity to be the ground of human rights, and seeks to identify the nature or source of this dignity. He claims that the human rights tradition does not lead to any particular substantive account of dignity, but nevertheless believes that we are able to identify the best account the tradition has to offer. According to Griffin, the best account holds that the source of human dignity lies in what he calls “personhood” or “normative agency.” This concept refers to the “capacity to choose and to pursue our conception of a worthwhile life.” (Griffin 2008, 44) On Griffin’s theory, human rights serve the function of protecting this capacity which constitutes, or is the source of, human dignity. (Griffin 2008, 33, 149) So personhood or normative agency is the primary ground of human rights.

According to the theory, this primary ground generates human rights in the following manner. Normative agency involves not just having the capacity to choose and pursue a conception of a worthwhile life, but also exercising that capacity. This means

that in order to become a normative agent, a person must be able to not only develop the capacity, but also be at liberty to use it. Furthermore, being a normative agent involves having a reasonable chance of succeeding in realizing one's aims. This implies that there must be an absence of certain impediments. Based on these considerations, Griffin believes that we can identify three aspects of normative agency: 1) having certain capacities, 2) exercising those capacities, and 3) succeeding in realizing our aims.

With the various aspects of normative agency spelled out, Griffin suggests that we can identify the three values of personhood: 1) Autonomy, 2) Liberty, and 3) Minimum Provision. These three values constitute the fundamental or basic human rights on Griffin's account. Autonomy involves our ability to form a conception of a worthwhile life. Liberty consists in being free to pursue one's conception of a worthwhile life. And minimum provision consists in various kinds of support required for a normative agent to pursue his or her conception of a worthwhile life, and to have a reasonable chance of succeeding in that aim. More specific human rights can then be derived from these three fundamental or basic human rights. (Griffin 2008, 50)

However, Griffin believes that the limits of these three fundamental human rights, as well as which specific rights can be derived from them, will remain unclear. This is because we can interpret them in ways that involve more or less expansive sets of rights and obligations. In order to eliminate this indeterminacy, Griffin claims that we need a second ground of human rights, one that will help to specify the extent and requirements of these rights. This second ground, he refers to as "practicalities." Practicalities include "empirical information about...human nature and human societies, prominently about the limits of human understanding and motivation." (Griffin 2008, 38) This information is

not particular to a certain time or place, but rather is universal information that is true of human nature and societies in general. In sum, Griffin's theory grounds human rights by appealing to personhood or normative agency as the primary ground that allows us to identify the three fundamental or basic human rights of autonomy, liberty, and minimum provision, and then relies on the secondary ground of practicalities, which allow us to determine the limits of these fundamental human rights and the more particular rights derivable from them.

Ultimately, Griffin's theory is able to justify most of the rights found in international human rights documents, such as the UDHR, and to prescribe the limits of these rights. The limits of such rights are determined by identifying the conditions necessary for normative agency, taking practicalities into consideration. A few rights listed in the UDHR, such as the right to periodic holidays with pay, are found not to be justified, and thus are not genuine rights according to Griffin's moral conception of human rights.²⁴

²⁴ This represents a significant difference between Griffin's theory and Wettstein's theory. Griffin's theory offers specific grounds for human rights and then demonstrates a particular list of human rights that are derivable or justified according to this moral conception of human rights. The list of justified human rights is found to justify most of the list of rights found in international human rights treaties, but there are a few exceptions. Wettstein's theory, by contrast, purports to offer grounds for human rights. However, Wettstein then implicitly seems to assume the list of human rights found in international human rights treaties. He needs to demonstrate that the grounds for human rights invoked in his theory do in fact justify the list of rights found in these treaties. It may be that the grounds for human rights relied upon in his theory do not justify all of the rights found in international human rights treaties, as is the case with Griffin's theory. This is precisely the worry I expressed earlier, when pointing out that Wettstein accuses Ruggie of relying on a legal or political conception of human rights, as found in international human rights treaties, but Wettstein may be guilty of the exact same things, at least when it comes to identifying a particular list of rights.

The Criterion for Distributing Human Rights Obligations

Let us now turn to the second issue raised above, which concerns how, or according to what criterion, human rights obligations should be distributed. Within his theory of justice, Wettstein divides “reasons of justice” into “primary reasons” and “secondary reasons.” Primary reasons concern not acting unjustly, and correspond to duties to respect human rights. These are universal obligations binding on all agents. Secondary reasons concern an agent’s ability to alter an injustice or to prevent its effects, and correspond to duties to protect and fulfill human rights. (Wettstein 2009, 134-135)

Traditionally, Wettstein points out, the criterion of causation has been used to determine who bears responsibility for obligations of justice. More specifically, responsibility is determined by asking who caused or contributed to an outcome. But Wettstein argues that this criterion suffers from severe shortcomings. It will only cover primary reasons of justice (duties to respect rights), and those secondary reasons of justice (duties to protect or fulfill rights) where we can determinately attribute the cause of an injustice to a specific agent. Among the problems with such an approach are the fact that causality is often not a clear-cut matter, systematic problems (such as global poverty) often render us unable to specify the exact contribution of a specific agent, and even when we can identify a causally responsible agent, that agent may not possess the capabilities to rectify the injustice. (Wettstein 2009, 135-136)

Wettstein suggests that the criterion of capability offers a more promising approach. “Capability,” he tells us, “derives from a combination of personal capacities (e.g. talents) and adequate external circumstances and arrangements to put them to use favorably.” (Wettstein 2009, 138) This criterion allows us to shift our focus from who

caused an injustice, to who failed to prevent an injustice or to aid the victims of an injustice. Wettstein does not entirely reject the criterion of causation. Rather, capability and causation can both play a role in determining obligation. “Obligations of justice grow with increasing capabilities, as well as increasing causal involvement of the responsible agent. The less clear-cut causality relations are, the more weight we must put on capabilities.” (Wettstein 2009, 140) Thus, causality is still a criterion for assigning responsibility, but at least equally important is capability, with capability actually becoming more important in cases where the causally responsible agent is incapable of rectifying the injustice or where causal responsibility is difficult or impossible to determine.

Wettstein does acknowledge that the criterion of capability could get out of hand if we do not offer some sort of cut-off point. He suggests that the cut-off criterion should be rights-based. On a theory of “justice as development,” Wettstein holds, obligation is “ultimately limited by a responsible agent’s own legitimate claim for personal flourishing and advancement.” (Wettstein 2009, 143) So the extent of an agent’s obligations (to protect or fulfill human rights), will be limited by that agent’s own right to personal flourishing and advancement. Weighing an agent’s obligations against this right cannot be determined a priori, and therefore will always be a matter of moral reasoning in particular situations.

Wettstein proceeds to connect capabilities with power, and thus power with moral responsibility. “Enhanced capabilities means enlarged freedom, and enlarged freedom means having more control over one’s actions, on the one hand, and greater power in terms of achieving certain chosen results, on the other.” (Wettstein 2009, 146) Thus,

capabilities can be understood as “actualized power.” (Wettstein 2009, 147) We must remember that capabilities are a matter not only of personal capacities, but also favorable external circumstances for exercising those capacities. This is an important element of the capabilities criterion of moral responsibility, because it means that we must take the situational external circumstances into account. “Moral responsibility arises in those situations in which an agent is effectively able to actualize latent power (capabilities).” (Wettstein 2009, 148) Wettstein suggests that we should increasingly think of these external circumstances in structural terms, as many injustices arise from global social problems that are structural in nature. (Wettstein 2009, 147)

Let us now turn to Griffin’s criterion for assigning human rights obligations. Griffin does not follow the practice of international human rights by dividing obligations into duties to respect, protect, and fulfill human rights. Instead, he divides human rights obligations into “primary” and “secondary” duties. Primary duties are defined as “duties with the same content as the related rights.” (Griffin 2008, 104) This definition of primary duties is not easy to map onto the standard trichotomy of duties found in the practice. For example, if the primary duty of the right to education has the “same content as the related right,” then it seems that the primary duty of the right to education would first and foremost be an obligation to provide education, which would be fulfillment of this right. But when we consider the right to freedom of speech, fulfillment does not seem to be the “primary duty” corresponding to this particular right. Presumably, a duty with the “same content” as this right would involve first and foremost not infringing on the right-holder’s freedom of speech. If that is correct, then the primary duty correlative to the right to freedom of speech is a duty to respect that right. Griffin’s secondary duties

come in three types: (i) duties to “promote,” which include declaring and publicizing a right, educating people about a right, and giving the right weight in society, (ii) duties to “monitor,” which entail checking on compliance, and (iii) duties to “ensure compliance,” which includes protecting against violations and punishing violators. (Griffin 2008, 104-105) Secondary duties clearly involve the duty to protect, but it’s not clear whether or how they would map onto the duties to respect and fulfill. So given Griffin’s alternative manner of dividing and describing the duties correlative to human rights, it would seem quite challenging to determine, for example, what he would say about Ruggie’s corporate responsibility to respect human rights (as opposed to obligations to also protect and/or fulfill these rights).

Fortunately, despite this idiosyncratic division of duties, Griffin’s further discussion suggests what he would say about the respect, protect, and fulfill trichotomy of duties. He considers the idea that human rights are doubly-universal, meaning that all persons have these rights, and all agents bear responsibility for the duties correlative to these rights. This obtains in the case of non-interference rights, where we all possess the right not to be interfered with, and we all have a duty not to interfere with others in virtue of their right. But Griffin points to welfare rights as an example of rights that cannot be universal on the duty-bearing side, because someone in particular must provide the object of these rights. In other words, the duties to fulfill these rights cannot be universal. He is also quick to point out that liberty rights often have high costs of implementation, and these costs must be borne by someone in particular. In other words, the duty to protect liberty rights cannot be universal. Based on this discussion, it seems clear that Griffin

believes duties to respect human rights are universal duties that fall on all agents, while duties to protect and fulfill human rights must be assigned to particular agents.

When it comes to assigning the obligations to protect and fulfill human rights, Griffin offers a criterion similar to Wettstein's: "...simple ability is one reason-generating consideration in cases of aid." (Griffin 2008, 103) While an agent's ability may be a primary source for determining the allocation of human rights duties, Griffin believes there are competing considerations that must also be taken into account. Among these other considerations are the fact that "there are limits both to human understanding and to human motivation." (Griffin 2008, 98) With respect to the former, we have only a modest ability to make large-scale calculations about how to maximize the good. With respect to the latter, we have "deep commitments to particular persons, causes, careers, and institutions," (Griffin 2008, 103) and these commitments limit our wills in serious ways. These competing considerations constitute part of Griffin's concept of "practicalities," the second ground of human rights in his theory. So we cannot simply appeal to the ability of an agent to bear duties to protect and fulfill human rights, but must also factor in these limiting practicalities. Thus, where Wettstein appeals to a right to develop a satisfying and flourishing life as a limit on his criterion of capability, Griffin appeals to "practicalities"—the limits of human understanding and motivation—as a limit on his criterion of ability.

Assigning Particular Human Rights Obligations to Particular Agents

The third issue raised above concerns which classes of agents should be eligible for bearing which particular types of human rights obligations. From our discussion of

the moral conceptions of human rights offered by Wettstein and Griffin, we can see that both theorists hold duties of respect for human rights to be universal obligations that fall upon all agents. Thus, it seems that both Wettstein's and Griffin's moral conception of human rights will endorse Ruggie's corporate responsibility to respect human rights. However, Wettstein's and Griffin's moral conceptions will differ when it comes to identifying which agents bear obligations to protect and fulfill human rights.

Wettstein draws on O'Neill's distinction between primary and secondary agents of justice. "Primary agents of justice...have the capacities to regulate, define, and allocate the contributions of secondary agents of justice...In other words, they have the capacity to govern other agent's actions or the contexts and domains in which other agents act." (Wettstein 2009, 154) As a result, secondary agents of justice merely operate within the frameworks created by primary agents, and "...contribute to justice merely by meeting the requirements and demands of primary agents." (Wettstein 2009, 154) This suggests that primary agents of justice have a qualitatively different type of moral responsibility (Wettstein 2009, 153), because they create the structures or environments in which secondary agents act. Due to the global nature of many injustices, or negative human rights impacts, Wettstein believes that we must focus on the structures that lead to these injustices. And this in turn leads to a focus on the distinctions between primary agents of justice, those who create the structures and environments in which agents act, and secondary agents, who merely act within the structures created by primary agents. Responsibilities for protecting and fulfilling human rights should be allocated to primary agents of justice.

Wettstein goes on to offer an extensive argument for the claim that multinational corporations are primary agents of justice, and thus should be eligible to bear duties to protect and fulfill human rights (in proportion to their capabilities). His case relies on the basic idea that in our contemporary social world, global competitive markets dictate political agendas and social organization, and that multinational corporations play a large role in shaping global markets.

It is under these circumstances that the multinational corporation has acquired vast amounts of power and influence over social and societal life in general. In a market-controlled society the institutions that shape and dominate the global economic sphere inevitably turn into major political forces that affect the organization of society as a whole. (Wettstein 2009, 180)

Wettstein's argument involves a rejection of the idea that there is a sharp distinction between the economic and political spheres. (Wettstein 2009, 183) His contention is that those who take a government-centric view fail to appreciate the way so-called "private" institutions actually influence political decision-making. The political power of multinational corporations is primarily structural in nature. It allows them to "determine outcomes by controlling, shaping, and influencing the structure of the global political economy." (Wettstein 2009, 195) Multinational corporations are able to exercise this structural power both because they have extensive control over the production process, which gives them the power to determine the global production structure, and because they can use the dependency that arises from this situation to influence bargains in their favor. For example, they use it to gain favorable treatment in matters such as taxes and regulation. In fact, Wettstein refers to multinational corporations as "quasi-governmental institutions." Possession of this structural power, he argues, renders multinational corporations primary agents of justice. As such, they are morally responsible, just as are national governments, for protecting and fulfilling human

rights. These obligations should be assigned to both types of institutional agents in proportion to their respective capabilities.

Let us now examine Griffin's theory concerning the issue of which classes of agents should be eligible for bearing which particular types of human rights obligations. When determining who should bear duties to protect and fulfill human rights, Griffin looks first to the history of institutional duty-bearing. Recall that Griffin appeals to the criterion of ability when assigning positive human rights obligations. At different periods in history, we find that different agencies have had the ability to help those in need. For example, in the Middle Ages and early modern period, the Church had both the resources and the organizational development to assist the needy. Later, as monasteries and religious orders dissolved, local governments would provide for those in need with money raised through local taxes. After the industrial revolution, local governments were no longer able to support the needy, and so the task fell to national governments. In light of these historical developments, Griffin concludes that the allocation of such duties will in many cases be subject to arbitrariness and convention, and will often be subject to negotiation in a particular time and setting. In our current historical period, he believes that national governments are the most apparent candidates to bear responsibility for positive human rights obligations. We are "...justified, in these times of concentration of wealth and power in central governments, to place the burden to large extent on them." (Griffin 2008, 104) But Griffin is also well aware that many central governments lack the resources necessary to protect or fulfill the human rights of all of their residents. In these cases, he says, we may be justified in placing such obligations on the wealthy governments of the world. "If poor central governments are unable to shoulder the

burden, then perhaps the time has come to consider whether the burden should not also be placed on a group of rich nations...” (Griffin 2008, 104) Griffin, throughout his discussion of human rights obligations, consistently points to central governments as the appropriate bearers of duties to protect and fulfill human rights. If a given central government is too poor to meet these obligations, then the obligations should fall to other central governments, namely, those of wealthy nations. Thus, Griffin appears to adhere to a state-centric view when it comes to assigning obligations to protect and fulfill human rights.

Moral Conceptions of Human Rights and Corporate Responsibility

It is interesting that Wettstein and Griffin appeal to a similar criterion for allocating obligations to protect and fulfill human rights, capability and ability respectively, but arrive at what seem to be quite different answers as to which agents are the appropriate bearers of such obligations. At first glance, it might seem this difference comes down to a mere empirical disagreement about which agents possess the relevant capability or ability. If this were the case, we could simply gather the relevant information concerning the capabilities or abilities of various agents, and proceed to determine the fact of the matter as to which agents are identified by the criterion as the appropriate duty-bearers. But the three issues distinguished at the beginning of this paper suggest the matter may be more complicated than this. The criterion or principle for assigning human rights obligations—the second issue that we considered—is unlikely to do all of the work by itself. This criterion or principle is likely to be supplemented by an account of which classes of agents can (potentially) bear responsibility for which types of

human rights obligations—the third issue we have considered. Thus, assigning obligations to protect and fulfill human rights is not simply a matter of identifying which agent has the greatest capability or ability in a given context, but rather of identifying which agent has the greatest capability or ability from among the class or classes of agents who qualify as appropriate duty-bearers.

Wettstein argues that multinational corporations are primary agents of justice, with extensive structural power in our globalized political economy. Being a primary agent of justice implies that multinational corporations have a qualitatively different kind of moral responsibility than secondary agents, and thus they, along with other primary agents of justice such as central governments, should (potentially) bear obligations to protect and fulfill human rights.²⁵ It is unclear exactly what Griffin would say regarding this claim. He will almost certainly acknowledge the fact that multinational corporations have quite a lot of wealth and ability, and yet he might not agree that corporations are a class of agents who should bear obligations to protect and fulfill human rights. After all, when discussing duty-bearers, Griffin never mentions multinational corporations. Rather, he points to domestic central governments, or where these agents lack the ability, wealthy foreign central governments. This persistent and exclusive focus on central governments may suggest that Griffin holds to a traditional divide between public and private agents. The traditional divide between public and private agents holds that governments are public agents who are appropriate agents for bearing obligations to protect and fulfill human rights, whereas other types of agents are private agents, and thus are inappropriate to serve as bearers of such obligations.

²⁵ Whether a given multinational corporation should bear obligations to protect and fulfill human rights in a particular context will depend on which agent has the greatest capabilities in that situation. For this reason, a multinational corporation, on Wettstein's theory, is merely a *potential* bearer of such obligations.

On the other hand, when discussing the history of duty-bearing, Griffin seems to approvingly point to the role of the Church in the Middle Ages and early modern period, as the Church at that time was the agent with the resources and structure capable of providing assistance to those in need. Presumably, according to the traditional division between public and private agents, the Church is not a public agent. So it might be argued that Griffin's discussion of the Church as a duty-bearer during the Middle Ages and early modern period indicates that he does not adhere to the traditional division between public and private agents, and that therefore if the Church can be an appropriate bearer of such obligations, then so potentially could multinational corporations. Of course, it could also be argued to the contrary, that the Church is a public agent in a way that corporations are not, because the Church has charity as one of its central goals, whereas corporations do not. Given this, Griffin might view the Church as more akin to central governments, and thus as an appropriate bearer of obligations to protect and fulfill human rights, at least during the Middle Ages and early modern period.²⁶ Corporations, on the other hand, do not have enough in common with the state or the Church, and are thus private in a sense that renders them inappropriate as duty-bearers of the human rights obligations in question.

But there may be an alternative way of understanding this issue. While Wettstein and Griffin rely on relatively similar criterion for allocating the obligations to protect and fulfill human rights, they offer quite different limiting conditions on this criterion.

Wettstein appeals to a right to "personal flourishing and advancement," while Griffin

²⁶ Griffin never mentions the Church as appropriate bearer of obligations to protect and fulfill human rights at this point in history. His comments suggest the Church was an appropriate bearer of such obligations only during the Middle Ages and early modern period, before governments came to have the resources and abilities that they currently possess.

appeals to “practicalities,” which concern the limits of our wills (due to partiality) and our lack of ability to make large-scale calculations about how to maximize the good. Both of these limiting conditions seem to make more sense in the case of human agents than in the case of corporate agents. However, we can attempt to apply them in the case of multinational corporations.

Of course, we already grant certain rights to corporations, such as property rights, the right to freedom of speech, and so forth. So, it may be easier to envision how Wettstein’s limiting condition would apply in the case of multinational corporations since his limiting condition involves a right. The problem is that not all rights we grant to ordinary persons are also rights that we grant to corporations. For example, we may grant to ordinary persons a right to education, but we do not grant this right to corporations. At least part of the reason that we do not grant this right to corporations is because it does not make sense to provide the object of this right for corporations, given their nature. While we understand the value and benefit of providing education for a natural person, we do not see the value of providing education for corporations. For example, Griffin points out that education is necessary in order for a person to become an effective agent (Griffin 2008, 52), one that is capable of developing and pursuing a conception of a worthwhile life. But it is difficult to see how this same benefit would obtain in the case of a corporation. A corporation does not begin life like the uneducated human child, who must receive education to develop competent and effective agency. Furthermore, it is not clear what it would even mean to provide education for a corporation. As a collective agent, a corporation is comprised of a multitude of natural people. Who exactly would we be providing education for, if we were to grant

corporations a right to education? The stockholders? The managers? The employees? Even the answer “all of the above” does not make sense. The corporation is presumably a distinct agent from all of the natural persons who have a role in the collective agent that is the corporation. Further, each of these natural persons is already granted a right to education.

So what of Wettstein’s limiting condition, which involves a right to personal flourishing and advancement? Does it make sense to grant this right to corporations, or is it similar to the case of the right to education? Can we make sense of the object of this right—personal flourishing and advancement—when applied in the case of corporations? Wettstein never tells us exactly. Rather, he simply refers to this right as a legitimate obligation-limiting claim, and says that we should not “force someone to give up on the idea of a personally fulfilling and satisfying life.” (Wettstein 2009, 143) On the face of it, reference to a “fulfilling and satisfying life” does not seem to fit well with the nature of a corporation. Again, corporations are collective agents, and they are treated in some legal jurisdictions as artificial persons. But neither a collective agent nor an artificial person seems a good candidate for being capable of having a “fulfilling and satisfying life.” The object of this right seems to apply only in the case of natural persons. In elaborating on the function of this limiting condition, Wettstein simply tells us that where the line is to be drawn between the legitimate rights claims of others and the assertion of one’s own legitimate claim to personal flourishing and advancement cannot be determined a priori, but must instead be determined by weighing conflicting claims through ethical reasoning in particular cases. (Wettstein 2009, 143) In other words, he does not spell out in any detail what a “fulfilling and satisfying life” would amount to.

This makes it all the more difficult to try to determine what this right could mean when applied to corporations. The vast majority of Wettstein's discussion is focused on identifying the kinds of capabilities multinational corporations have and why they may be the most capable agents when it comes to the protection and fulfillment of human rights, with no discussion of how this limiting condition would generate limits on what may be required of them. (Wettstein 2009, 180-257) It is particularly unhelpful to offer a duty-generating principle, along with a limiting condition, but then focus only on how corporations may satisfy the duty-generating principle, while giving no attention to the application of the limiting condition.

One possible way of interpreting this right in the case of a corporation, is to understand "personal flourishing and advancement" as referring to some level of profitability. On this interpretation, the flourishing and advancement of a corporation refers to it achieving and maintaining a certain level of profitability, and the corporation has a right to claim this degree of profitability as a limit on the obligations it can have to protect and fulfill human rights. However, Wettstein explicitly rejects the notion that corporations have a right to maximize profits. (Wettstein 2009, 263-269) So we know that "personal flourishing and advancement" cannot refer to a maximization of profits. Rather, he says, obligations to protect and fulfill human rights "...hold up to the point where they are trumped by the corporation's own justified claims according to the cutoff criterion of reasonableness. Beyond this point corporate responsibilities become a matter of virtues." (Wettstein 2009, 281) This passage seems to indicate that Wettstein does indeed believe his limiting condition is applicable in the case of corporations, and might presumably be understood as entitling a corporation to a "reasonable" level of

profitability, whatever that means. Given our discussion, this is very unsatisfying. It is difficult to make sense of this right in the case of a corporation. And Wettstein's resort to claiming that we cannot determine this matter a priori, but must instead engage in ethical reasoning that weighs conflicting claims in particular situations, is very unhelpful. If we cannot make sense of the limiting condition applied to corporations, then how can we weigh conflicting claims? We don't know what a legitimate claim on the part of a corporation is, given the basis of such claims (a right to personal flourishing and advancement). Thus, it is difficult or impossible to determine when a corporation would be justified in denying an obligation to protect or fulfill human rights.

Despite these concerns, if we are charitable to Wettstein, and assume that we can make sense of both the right to personal flourishing and advancement applied in the case of corporations and that this right entitles corporations to a "reasonable" level of profitability, then Wettstein will have demonstrated that a moral conception of human rights can generate obligations of corporations to not only respect human rights, but also to (in some cases) protect and fulfill human rights. A corporation will have obligations to protect and fulfill human rights in situations where it is the agent with the greatest capability to do so, up to the point that such obligations would infringe on the corporations own legitimate claim to earn a "reasonable" level of profit.

Now let us turn to Griffin's limiting condition. His notion of "practicalities," which involve the limits of our wills (due to our personal attachments and projects), presents perhaps an even more difficult case. Corporations do not have emotions and desires. Thus, while we can easily understand the limits of a natural human agent's will, due to the personal attachments and projects such a person has, it is not so easy to

understand what this would mean in the case of a corporate agent. A corporation might have a “personal project” in the form of a goal to earn a profit. Certainly, earning a profit is a desire of the investors or stockholders in a corporation. And it is likely also a desire of other stakeholders in the corporation, including managers and employees, as these people desire the corporation to be profitable for the sake of paying their salaries and advancing their careers. So there may be a vague general desire that the corporation be profitable on the part of the various natural persons who play a role in the corporation. However, beyond this vague desire for the general profitability of the corporation, different stakeholders may have different desires, some of which will conflict. For example, the investors or stockholders may have a desire for the corporation to maximize profit, while employees may have a desire to earn a larger salary, which is in some sense contrary to the desire that the corporation itself maximize profits. In fact, employees may only share the general desire that the corporation be profitable for the sake of it being able to pay their salaries. This would be quite a distinct desire from the stockholders’ desire that the corporation maximize profit, as it has an entirely different basis. Thus, the desires of the various stakeholders, or natural persons who play a role in the corporation, can differ and conflict. This feature alone would make it difficult to identify the “desires” of the corporation. But an even deeper problem arises when we realize that the corporation, as a collective agent, is not necessarily identical with the natural persons who make up, or play a role in, the corporation. For instance, Phillip Petit has demonstrated that the corporate agent can make a decision that is not identical with decision which would be chosen by the majority of natural persons who make up, or play a role in, the corporate agent, suggesting that the corporation is a distinct agent in its own

right. Thus, the corporation, as an agent, cannot necessarily be identified with desires of any of the various natural persons who are stakeholders in the corporation. And since the corporation itself would be, at best, an artificial person, this makes it very difficult to say what the partialistic attachments of the corporate agent would be, or whether it even makes sense to say that it has any.

We might take into consideration how far investors are willing to tolerate corporate expenditures on human rights, given their goal of making a profit. After all, corporations operate in a competitive environment, and investors may at some point withdraw their money and invest elsewhere, if the corporation is spending too much on human rights. We might think this consideration represents some kind of “personal” project, if not of the corporation itself, at least of a key group of stakeholders in the corporation. If this is correct, then perhaps Griffin considers corporations to be private agents, because investors or stockholders have a personal project of earning a profit through the corporation, and this limits the human rights obligations that a corporation can be expected to bear. Thus, it may be the different limiting factors in the moral conceptions of human rights offered by Wettstein and Griffin that lead them to differ when it comes to corporate human rights obligations.

Conclusion

Let us now return to the overall issue posed at the beginning of this chapter, which concerns whether moral conceptions of human rights necessarily entail any certain range of corporate human rights obligations. First, based on our consideration of the moral conceptions of human rights offered by Wettstein and Griffin, it appears that a

moral conception could prescribe either a broad range or narrow range of corporate human rights obligations. Wettstein's moral conception of human rights allows that multinational corporations can (potentially) bear the full range of human rights obligations, including obligations to respect, protect, and fulfill these rights. This is because all agents have a universal obligation to respect human rights, and where a multinational corporation is the agent with the greatest capability to protect or fulfill human rights, the corporation is the appropriate bearer of these obligations, subject to the corporation's own right to earn a "reasonable" profit. Griffin's moral conception of human rights, on the other hand, prescribes only an obligation of corporations to respect human rights. Like Wettstein, Griffin believes that the obligation to respect human rights is a universal obligation borne by all agents. However, unlike Wettstein, Griffin does not seem to believe that corporations are an appropriate type of agent to bear obligations to protect or fulfill human rights. This may be due to the practicalities that Griffin believes limit the sorts of obligations to which human rights can give rise. Second, our examination of the theories offered by Wettstein and Griffin suggest that moral conceptions of human rights will necessarily entail at least a narrow range of corporate human rights obligations. This is suggested by the fact that, despite the differences between the moral conceptions offered by Wettstein and Griffin, both theories agree that corporations have an obligation to respect human rights. Furthermore, it is difficult to conceive of a moral conception that would not imply a narrow range of corporate human rights obligations, as moral conceptions understand human rights to be based on the dignity of the human individual and as imposing at least a minimal obligation of respect on all agents. Thus, moral conceptions of human rights differ from political conceptions

of human rights when it comes to corporate human rights obligations, as moral conceptions will necessarily entail at least a narrow range of such obligations, whereas political conceptions may not entail any corporate human rights obligations at all.

However, the merely abstract distinction between moral and political conceptions of human rights will give us no guidance on the appropriate range of corporate human rights obligations, beyond these very broad determinations. For more particular guidance as to the appropriate range of such obligations, we will have to look elsewhere.

Chapter 3

Ideal Conceptions of Human Rights and Corporate Responsibility

In the two previous chapters, we have considered whether political and moral conceptions of human rights will necessarily prescribe a particular range of corporate human rights obligations. It was shown that political conceptions of human rights completely underdetermine an appropriate range of corporate human rights obligations, while moral conceptions of human rights prescribe at least an obligation for corporations to respect human rights, but underdetermine an appropriate range beyond prescribing this minimum obligation. In this chapter, we will consider the lessons that can be drawn from the examinations of the previous chapters, and identify desiderata for a conception of human rights when it comes to the issue of corporate responsibility. We will also consider the question of whether ideal versions of a political or moral conception of human rights would necessarily prescribe a particular range of corporate human rights obligations. While it may be the case that the political and moral conceptions of human rights we have examined in the previous chapters fail to necessarily prescribe a particular range of corporate human rights obligations, it could be that an ideal version of one or both types of conception will offer such a prescription. However, it will be concluded that even an ideal version of a moral and political conception of human rights will not give determinate prescriptions concerning corporate human rights obligations. Instead, the desiderata that we have identified suggest that a sort of hybrid conception of human rights will be required to produce an efficacious and determinate prescription.

Let us begin by considering our examination of political conceptions of human rights. This examination reveals that a primary desideratum of a conception of human rights, at least when it comes to the issue of corporate human rights obligations, is that it be to some degree accountable to the practice of international human rights. If a conception of human rights fails to be to some degree accountable to the practice, then it risks becoming very revisionary. A very revisionary theory of human rights is unlikely to offer constructive guidance when it comes to determining an appropriate range of corporate human rights obligations. This is because the prescriptions offered by such a theory may fail to be designed in connection with currently existing human rights institutions and activities, with the result that these prescriptions cannot be easily incorporated into the practice. In this case, it is likely that little progress will be made in terms of efficacious and implementable prescriptions concerning corporate human rights obligations.

The consequences of a theory of human rights failing to be accountable to the practice are demonstrated in certain respects by the political conceptions of Rawls and Raz. First, Rawls's and Raz's theories are very revisionary in terms of the list of human rights that they endorse. The risk in this case is that a theory will prescribe corporate human rights obligations for a severely limited, or alternative, set of human rights, rather than (more or less) the list recognized in the practice. Prescribing corporate human rights obligations for a severely limited, or alternative, set of human rights is unlikely to make much sense in the context of the practice, because the practice has been constructed around a recognized list of rights and assigns obligations to states based on that list. At least *prima facie*, it would seem odd if the practice were to assign states obligations for

one list of human rights, while assigning corporations obligations for a different list of human rights. Granted, the theories of Rawls and Raz are likely to prescribe that both states and corporations have obligations based on the severely limited, or alternative, list of human rights. But this makes the prescriptions of these theories even more unlikely to be incorporated into the practice, as it would require a general revision of the established list of human rights and the state obligations that are based on it.

It may be pointed out that the Norms attempted to identify a limited list of human rights which were thought to be particularly relevant to business, and assigned corporate obligations to respect, protect, and fulfill this limited set of rights within a corporation's "sphere of activity and influence." However, the Norms were never adopted by the U.N. and there was never an attempt to implement them in practice. Furthermore, during his initial appointment as United Nations Special Representative on business and human rights, Ruggie concluded that he should completely discard the Norms and start from scratch, because he determined that the Norms were unworkable. Among other problems, Ruggie's empirical research revealed that corporations could be found to have, or alleged to have, infringed upon virtually every internationally recognized human right. (Ruggie 2013, 20-23) The Norms attempt to identify only a limited list of human rights for which corporations will be held responsible conflicts with a key tenant of the practice that insists on the equal importance of all human rights, and it also "provide[s] inadequate guidance in practice" (Ruggie 2013, 49) because it fails to address the full range of human rights that corporations can be found to impact.

Second, Rawls's and Raz's theories are revisionary in terms of the essential feature(s) or function(s) that they attribute to human rights. These theories treat the role

that human rights play in the international relations between states as the sole or primary function of human rights. The risk here is that by offering such a one-dimensional account of the essential feature(s) or function(s) of human rights, a theory may miss certain functions that human rights play in the practice, and in turn fail to account for these functions when offering prescriptions regarding corporate human rights obligations. In fact, when Rawls and Raz treat the role that human rights play in the international relations between states as the sole or primary function of human rights, this can lead their theories to automatically rule out the possibility of corporate human rights obligations, or at the very least, to fail to consider whether corporation should have any such obligations.

On the other hand, if a conception of human rights is sufficiently accountable to the practice, then the theory has the potential to offer efficacious prescriptions regarding corporate human rights obligations. This is because the prescriptions of such a theory will be developed in light of, or in connection with, the existing institutions and activities that are conceived of as part of the practice. Prescriptions developed in this way are likely to be recognizable to, and can more easily fit within the context of, the existing institutions and activities of the practice, giving them much greater potential for actually being incorporated into the practice.

An additional reason that the prescriptions of such a theory are more likely to be efficacious, to actually be incorporated into the practice, is because stakeholders are more likely to endorse such prescriptions. Ruggie was very concerned with this aspect when developing the “Protect, Respect, and Remedy” Framework and Guiding Principles. He employed an approach that he refers to as “principled pragmatism,” which involves “an

unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people.” (Ruggie 2013, xlii-xliii) A major component of “what works best in creating change” is garnering support from all or most stakeholders, so that the Framework could achieve actual political acceptance within the practice. Indeed, Ruggie succeeded on this count, as the unanimous vote by the U.N. Human Rights Council endorsing the Guiding Principles, which occurred in 2011, marked the first time that the Council (or its predecessor body, the U.N. Commission on Human Rights) had ever endorsed any text not negotiated by state parties. (Ruggie 2013, xx) While there were obviously multiple factors involved in the political success of the Framework, one of the factors that helped to garner the support of such a broad range of stakeholders was the fact that the Framework is at least somewhat accountable to the institutions and activities of the practice.

The benefits of a theory of human rights that is accountable to the practice are demonstrated in certain respects by the political conceptions offered by Beitz and Ruggie. First, both Beitz’s and Ruggie’s theories endorse more or less the list of human rights recognized in the practice. Ruggie’s Framework appeals to the list of human rights recognized in the International Bill of Human Rights. The International Bill of Human Rights does not include the later, more specialized human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, among others. So some of the rights²⁷ recognized

²⁷ There is some overlap between the rights found in these specialized treaties and the International Bill of Human Rights. For example, the International Bill of Human Rights includes general non-discrimination rights, which includes non-discrimination against women.

in these more specialized treaties are not recognized in Ruggie's Framework.²⁸

Nevertheless, the list of rights recognized in the International Bill of Human Rights represent the central and longest-standing rights recognized within the practice. Thus, Ruggie's Framework does appeal to the majority of rights recognized in the practice. Similarly, Beitz's political conception of human rights is able to recognize more or less the list of rights recognized in the practice. Beitz's criteria of human rights as "protections of 'urgent individual interests' against 'standard threats' to which they are vulnerable" (Beitz 2009, 110), and which are matters of "international concern," is capable of justifying the list of rights recognized in most international human rights treaties, including the rights recognized in the more specialized treaties.²⁹ The fact that these theories involve more or less the list of rights recognized in the practice, helps to ensure that any prescriptions regarding corporate human rights obligations that emerge from the theories will be applicable to a list of rights similar to the one that other agents (e.g. states) are currently responsible for within the practice.

Second, at least Beitz's theory is relatively accountable to the practice in terms of the essential feature(s) or function(s) that it attributes human rights. Beitz's theory holds that the essential feature(s) or function(s) of human rights are, first, to impose obligations

²⁸ As was pointed out in the second chapter, Ruggie may be inconsistent when grounding the corporate responsibility to respect human rights on the basis of universal (or near universal) agreement regarding human rights norms, and then restricting this norm as applicable only to the list of rights recognized in the International Bill of Human Rights. This is because there may be universal (or near universal) agreement on the list, or part of the list, of rights recognized in the specialized international human rights treaties. If so, then agreement theory would also endorse the list, or part of the list, of rights found in these treaties. However, Ruggie apparently only appeals to agreement theory when it comes to justification of the corporate responsibility to respect human rights, but not necessarily when it comes to justification of the particular rights to which this norm applies. Although this is not a problem, if we allow that the method of justification for the list of human rights themselves can differ from the method of justification for the allocation of duties corresponding to those rights.

²⁹ In the second chapter, for example, I argued that Beitz's theory is able to recognize the full list of women's rights, despite his concern that a number of women's rights could not be matters of "international concern."

on the political institutions of states, and secondarily, to create matters of international concern which give *pro tanto* reason for action by the international community when states fail in their obligations. While this does not create direct human rights obligations for corporations in the domestic sphere³⁰, it leaves open the possibility that corporations, particularly multinational corporations, might be members of the “international community” and thus have human rights obligations when states fail with regard to their own obligations. And we have seen, Beitz’s theory is sensitive enough to ongoing developments in the practice that it is capable of recognizing and prescribing corporate human rights obligations as relevant developments occur.

It is less clear that the essential feature(s) or function(s) that Ruggie’s agreement version attributes to human rights is accountable to the practice. As discussed in the first chapter, we can interpret Ruggie’s Framework as holding that an essential feature or function of human rights is to attribute to corporations an obligation not to harm. Since the practice had not recognized direct corporate human rights obligations up to this point in time, it is not clear whether prescribing an obligation of corporations not to harm represents accountability to the practice. The indeterminacy we find here reveals the limitations of accountability to the practice as a desideratum of a conception of human rights. Accountability to the practice offers certain benefits, as just explained, but cannot be the only desideratum of a conception of human rights when it comes to prescribing corporate human rights obligations. This is because accountability to the practice alone can lead to indeterminacy regarding such prescriptions.

³⁰ Although, like Ruggie’s state duty to protect human rights, it implies that states have an obligation to regulate the conduct of corporations regarding human right within their jurisdiction.

Fortunately, our examination of moral conceptions of human rights suggests another desideratum that can remedy this problem. The examination of moral conceptions of human rights reveals that we need a normative principle for identifying which types of agents should have human rights obligations in general, as well as a normative principle that tells us how to distribute particular human rights obligations, such as the obligations to respect, protect, and fulfill these rights. By offering principled norms for determining these issues, a theory of human rights avoids being entirely captive to current state of the practice. Some aspects of the current practice may be at odds with these principles, in which case the theory prescribes revision of the practice in light of the principles.

The benefits of a theory of human rights including such normative principles can be seen in the moral conception of human rights offered by Wettstein. Wettstein offers a principle for determining which types of agents should have human rights obligations in general that distinguishes primary and secondary agents of justice. According to this principle all agents of justice will have some human rights obligations, but primary agents will have greater responsibilities than secondary agents. His theory also includes a principle for distributing particular human rights obligations, which appeals to the capabilities of an agent. Primary and secondary agents are under a universal obligation to respect human rights, while primary agents will also potentially have obligations to protect and fulfill human rights, depending on which primary agent has the greatest capabilities in a given situation. Griffin's moral conception of human rights does not offer a clear principle for determining which types of agents should have human rights obligations in general. However, his theory does offer something by way of a principle

for distributing particular human rights obligations, one that appeals to the abilities of agents. By providing these principles, the moral conceptions of human rights offered by Wettstein and Griffin give normative guidance as to which types of agents should have human rights obligations in general, as well as how we should distribute particular human rights obligations among the agents in question. In this way, a conception of human rights can give normative guidance to the practice, and avoid being captive to the status quo or to indeterminacy that may be present in the practice.

Now that we have identified some desiderata for a conception of human rights when it comes to determining corporate human rights obligations, let us turn to another issue. In the previous chapters, it was argued that based on the political and moral conceptions of human rights which we examined, both types of conception will underdetermine the range of corporate human rights obligations that they prescribe. However, rather than relying on an examination of existing political and moral conceptions of human rights to make this determination, we can also consider whether “fully developed” versions of these conceptions would offer determine prescriptions concerning corporate human rights obligations. By “fully developed” versions of these conceptions, I mean a version which has settled all aspects of the conception that currently remain unclear, unsettled, or unresolved.

First, let us consider the case of a fully developed political conception of human rights. It does not seem that a fully developed political conception would provide determinate prescriptions regarding corporate human rights obligations, because there would still be no definitive answer as to what activities, institutions, and agents should be conceived as part of the practice. In other words, there seems no way to definitively

determine which conception of the practice is correct. Thus, we could have different versions of a fully developed political conception of human rights, based on different conceptions of the practice. This in turn implies, as was argued in chapter 2, that different ideal political conceptions of human rights would offer different prescriptions concerning corporate human rights obligations, based on their varying conceptions of what constitutes the practice.

Next, let us consider the case of a fully developed moral conception of human rights. As with a fully developed political conception of human rights, we are likely to end up with a plurality of fully developed moral conceptions of human rights. This is because, as Rawls pointed out, we are likely to have reasonable disagreement about moral, religious, and philosophical doctrines into the foreseeable future. (Rawls 1993) As long as there is room for reasonable disagreement about moral doctrines, there will be no way to resolve the issue of which moral doctrine is correct. This implies that we can have a plurality of fully developed moral conceptions of human rights, each based on a different underlying moral doctrine (deontological, consequentialist, etc.). Thus, as we saw in the second chapter, we can have a range of answers concerning corporate human rights obligations based on the differing moral conceptions of human rights.

However, the desiderata that we identified earlier in this chapter, based on our previous examination of political and moral conceptions of human rights, suggest a way to overcome the indeterminacy found in even fully developed versions of political or moral conceptions of human rights, when it comes to the issue of corporate human rights obligations. These desiderata suggest that we need to combine various aspects of a conception of human rights, some of which tend to be more prominent in political

conceptions and some of which tend to be more prominent in moral conceptions. The result will be a sort of hybrid conception of human rights. This hybrid conception offers the best chance of providing determinate prescriptions concerning corporate human rights obligations.

I say that some of these aspects are more prominent in political conceptions and some aspects more prominent in moral conceptions, because it may be that the aspects can be found in both types of conception to an extent. For example, when it comes to accountability to the practice, it is not as though, say, Griffin's moral conception has no accountability to the practice. Griffin does attempt to situate his theory within the natural rights tradition, and understands this tradition as developing into the current international human rights movement. Furthermore, he considers his theory in comparison with the list of rights found in international human rights treaties. Nevertheless, there is a lack of attention to the institutions and activities of the practice. Griffin allows his normative theory, with a focus on human rights as protections of the interests of "normative agency," to more or less entirely drive the prescriptions of his theory, with little regard for the practice. Political conceptions, by contrast, tend to give a more prominent role to accountability to the practice. Although, as we have seen, particularly in the theories of Rawls and Raz, this can tend toward a focus on only one aspect of the practice, namely, the role that human rights play in the international relation between states. The result of such a focus is that the list of human rights recognized by such theories is confined to the rights that function in this role. Moral conceptions, in comparison, tend to justify more or less the full list of human rights, due to their focus on the normative entitlements of

individuals. Furthermore, moral conceptions are more likely to offer normative criteria for allocating human rights obligations to duty-bearers.

Our examination of both political and moral conceptions have yielded the following set of desiderata for a conception of human rights, when it comes to the issue of corporate human rights obligations: 1) It is to some degree accountable to the practice, 2) It includes a principle for identifying which agents (or types of agents) should have human rights obligations in general, and 3) It includes a principle of distribution for assigning particular human rights obligations to particular agents (or particular types of agents). The key issue then becomes how to combine these desiderata into a single conception of human rights. It is clear that the greatest tension is likely to occur between 1 and 2. This is because a principle for identifying agents (or types of agents) that should bear human rights obligations in general may pick out some agents that are not currently recognized as having such obligations within the practice. In this case, the theory prescribes revision of the practice, rather than being accountable to it. However, it may be that 2 can be developed in light of 1, that is, a principle for identifying which agents (or types of agents) should have human rights obligations in general can be developed in light of accountability to the practice. This is not to say that the principle should be captive to current practice; rather the principle might be developed in conjunction with rationales that are present in the practice. For example, if the practice holds that states should have human rights obligations based on certain reasons, the principle could be developed on the basis of these reasons. It might then be demonstrated that other types of agents should also be included in the set of agents that ought to have human rights obligations in general, because these agents are also identified by the principle. When a

principle for identifying which agents should have human rights obligations in general is developed in connection with the practice, and thus remains to some degree accountable to the practice, it has a much greater likelihood of actually being incorporated into the practice and being efficacious.

While there is the greatest likelihood of tension arising between 1 and 2, there may also be tensions that arise between 1 and 3. Suppose, for example, that the current practice recognizes two types of agents, say, states and corporations, which have human rights responsibilities in general. Furthermore, suppose that the practice assigns to states obligations to respect, protect, and fulfill human rights, and to corporations only the obligation to respect human rights. Finally, suppose that a theory of human rights includes a principle for distributing particular human rights obligations to particular agents, and this principle holds that corporations should have not only an obligation to respect human rights, but also to protect these rights. In this case, there is a tension between 1 and 3. As with tensions that arise between 1 and 2, it may be that tensions between 1 and 3 can be alleviated by developing 3 in light of 1. In other words, a principle for distributing particular human rights obligations to particular agents can be developed in light of accountability to the practice. Once again, the development of such a principle can appeal to rationales that are already found in the practice. Perhaps there are characteristics of states that serve as justification for allocating to them obligations to respect, protect, and fulfill human rights. It may be that corporations shares some of these characteristics, and thus appeal to these common characteristics can be used as the basis for a principle that prescribes allocating to corporation not only an obligation to respect human rights, but also an obligation to protect human rights. When a principle

for distributing particular human rights obligations to particular agents is developed in connection with the practice, and thus remains to some degree accountable to the practice, it has a much greater likelihood of actually being incorporated into the practice and being efficacious.

When balancing these desiderata in the development of a conception of human rights, the thing that needs to be avoided is allowing 1 to completely dominate 2 and 3. A theory should not simply be positivist, in the sense of merely creating a theory of the status quo. In other words, the theory should not simply theorize what already exists in the practice. Such a theory will offer no normative guidance, and instead will serve merely to justify what already exists. As noted previously, this can lead to either not recognizing any corporate human rights obligations at all, or at best, being unclear as to whether there should be any corporate human rights obligations. This type of theory must simply wait for real-world politics to play out, and then theorizes whatever the results of those processes happens to be. From a normative standpoint however, we should want a theory that will give us guidance as to whether or not corporations should have human rights obligations, and if so, what range of obligations. A theory that offers principles of types 2 and 3 can provide normative guidance on such issues, while developing those principles in light of 1 offers the greatest likelihood that these principles will be efficacious in practice.

The theory of human rights that comes to closest to the model I am proposing is probably Beitz's political conception. However, Beitz depends wholly on the practice as his starting point. Beitz requires that we offer a reconstruction of the practice, which results in the development of a normative model. This model identifies the normative

aims and goals that are found in the practice, which can in turn be used to make normative judgments about the current state of the practice. However, as we have seen this can result in indeterminacy regarding issues such as corporate human rights obligations, because of the lack of clarity about whether corporate human rights obligations are recognized within current practice. The model I am proposing allows for the development of normative principles not presently included in the practice, with the requirement that such principles be developed in light of the practice. In other words, the essential normative basis of these principles can be rooted in sources independent of the practice, but as the principles are developed they should connect with the institutions, activities, and rationales of the practice insofar as possible.

Chapter 4

What's So Good About Environmental Human Rights?: Constitutional Versus International Environmental Rights

Over the past few decades there has been increasing development of environmental rights at both the national (constitutional) and international level, with a corresponding increase in the number of cases involving environmental rights being adjudicated in both constitutional courts and international human rights courts (hereafter cited as IHRCs). This raises the question as to whether it is better to develop and adjudicate environmental rights at the national or international level. I seek to show that international environmental human rights offer some unique advantages that systematically benefit environmental protection and that IHRCs and adjudication are a key part of that process.

In a recent book, James May and Erin Daly (2015) argue that environmental rights are best developed at the national constitutional level, and that constitutional courts are the most effective and appropriate institutions for adjudicating such rights. Their case is based on a number of purported problems with advancing environmental claims via international human rights, and the comparative advantages of advancing these claims via constitutional rights and adjudication in constitutional courts. I respond to this challenge and also show there are unique benefits that only international environmental human rights can provide. This involves drawing on Allen Buchanan's argument (2013), which seeks to provide a justification for a system of international legal human rights by appealing to the benefits such a system can provide. I develop this argument to show that

it not only justifies a system of international legal human rights, but also provides an even stronger justification for adjudication of environmental human rights in IHRCs. More specifically, I develop the argument by showing how adjudication can provide both a mechanism for realizing the benefits, while also facilitating a mutually supportive or reinforcing relationship among them, and in this way enhance the realization of these benefits and the value that they yield. I refer to this as a “value added” approach, as it explores the value that adjudication of international environmental human rights can add to environmental protection. I conclude that international environmental human rights and the adjudication of such rights in IHRCs have a valuable and legitimate role to play in environmental protection.

It is obvious that IHRCs, with their limited mandate and capacities will not be able to address all environmental concerns. The cases they are likely to address concern environmental problems that have severe and immediate negative impacts on people. They are unlikely to address environmental problems, such as reductions in biodiversity, which do not have such impacts on people. I claim simply that IHRCs currently have a unique and justifiable role to play in environmental protection, not that they are sufficient institutions for addressing all environmental concerns.

Throughout this paper I will use the term “environmental human rights.” Environmental human rights can be divided into substantive rights and procedural rights. Substantive environmental human rights include rights that have some aspect of the environment as their object (e.g. rights to water, sanitation, etc.) or whose object can be substantially impacted by environmental conditions (e.g. rights to life, health, etc.). Procedural environmental human rights include rights that allow right-holders access to,

and participation in, environmental-related administration (e.g. rights to access to information, public participation, and access to justice).

Environmental Rights In International And Constitutional Legal Systems

When the Universal Declaration of Human Rights (UDHR) was adopted in 1948, environmental concerns had not yet become a focus of the human rights movement. Thus, the UDHR contains little explicit recognition of environmental human rights or mention of the environmental dimensions of human rights. Even by 1966, when the legally binding International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR) were drafted, environmental concerns were largely absent from the human rights agenda, so these treaties offer little explicit recognition of environmental human rights or mention of the environmental dimensions of human rights. The ICESCR recognizes the human right to food, which includes the “efficient development and use of natural resources” (Article 11), and the human right to health, which includes an entitlement to “the improvement of all aspects of environmental and industrial hygiene” (Article 12).

It was during the 1960’s that public awareness of global environmental problems began to emerge, prompted by a number of high profile ecological disasters and the publication of Rachel Carson’s *Silent Spring* (1962). By the 1970’s, world leaders had convened the first global eco-summit in Stockholm, Sweden. This summit produced the Stockholm Declaration of 1972, which marks the first formal recognition of the human right to a healthy environment in an international treaty. Principle 1 of the Declaration states:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

However, as with the UDHR, this document is merely a declaration, and hence is hortatory rather than legally binding.

During the 1970's and 80's a number of specialized international human rights treaties, which are legally binding, recognized environmental rights or environmental dimensions of rights. The Convention on the Elimination of All Forms of Discrimination Against Women (1979), in the course of discussing the rights of rural women, requires that such women "enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity, and water supply..." (Article 14). The Convention on the Rights of the Child (1989), as part of the human right to health, recognizes that children are entitled to "the provision of adequate and nutritious food and clean drinking water, taking into consideration the dangers and risks of environmental pollution" and that they have knowledge of "hygiene and environmental sanitation" (Article 24). In addition, as part of the right to education, the treaty requires that a child's education shall include "development of respect for the natural environment" (Article 29).

Another milestone in international environmental human rights came as a result of the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, which took place in Rio de Janeiro in 1992 and produced the Rio Declaration. The Declaration recognizes a human right to sustainable development (Principle 3), and also asserts that people should have procedural entitlements to public participation, access to information, and access to judicial remedies in the case of

environmental matters (Principle 10). Like the UDHR and Stockholm Declaration, the Rio Declaration is merely a hortatory document that is not legally binding.

However, many of the most important developments in international environmental human rights have occurred not at the global level, but within regional human rights systems. The African Charter on Human and Peoples' Rights (1981) was the first regional human rights treaty to explicitly recognize a human right to an adequate or healthy environment. Article 24 of the Charter states that "All people shall have the right to a generally satisfactory environment favorable to their development." In 2004, the African human rights system instituted a court, which is able to hear claims and adjudicate human rights cases, but it has not yet issued any rulings in environmental cases.

While the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) predates the environmental movement, and as a result lacks explicit environmental human rights or recognition of the environmental dimensions of human rights, in 1998 the European human rights system adopted the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Aarhus Convention is a legally binding treaty that explicitly recognizes procedural environmental human rights. Furthermore, the European system includes a court, which has not only adjudicated cases involving these procedural environmental rights, but has also developed jurisprudence that recognizes the substantive environmental dimensions of human rights included in the European Convention. Perhaps most notably, the court has developed the environmental dimensions of the human right to private and family life.

The American Convention on Human Rights (1969) was also adopted before environmental issues were really on the human rights agenda, and thus largely lacks explicit recognition of environmental rights or the environmental dimensions of human rights. However, in 1988 the parties to the Inter-American system of human rights adopted the Additional Protocol to the American Convention on Human Rights. Article 11 of the Additional Protocol recognizes a human right to a healthy environment:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The State Parties shall promote the protection, preservation, and improvement of the environment.

The Inter-American human rights system also includes both a commission and a court. When the commission is unable to resolve a case with a state party, it can refer the case to the court. While the Additional Protocol is not legally binding, as is the American Convention on Human Rights itself, the court has nevertheless cited the right to a healthy environment in a few of its decisions. Furthermore, the Inter-American Court has developed jurisprudence concerning the substantive environmental dimensions of more traditional human rights, notably in the area of the human right to property, as it concerns indigenous peoples and the right over their traditional lands.

The Arab Charter of Human Rights (2004) includes a right to a healthy environment. This regional system includes a committee that reviews state reports, but lacks a court or other complaint mechanism, and has not developed the right to a healthy environment. Finally, the most recent regional human rights treaty is the ASEAN Human Rights Declaration (2012), which also includes a human right to a healthy environment. This system has a commission, which operates through consultation and consensus, but

lacks a court. This system is quite new and has yet to be involved in environmental matters.

The 1970's were also a period when environmental constitutional rights began to be adopted. The first countries to constitutionalize a right to a healthy environment were Portugal (1976) and Spain (1978). Today, roughly three-quarters of nations in the world (as of 2012, 147 of the 193 United Nations members) have a constitution that addresses environmental matters in some form. (May and Daly 2015, 55-56) More specifically, 76 nations have constitutions that recognize a right to a quality environment (May and Daly 2015, 56), while 60 nations have constitutions that recognize rights or state duties relating to issues such as sustainable development, future generations, and climate change. (May and Daly 2015, 329-342) When we examine environmental provisions in constitutions, beyond simply environmental rights, we also find that 108 nations have constitutions that impose duties on the state to protect the environment (May and Daly 2015, 304-324), and 13 nations have constitutions that recognize environmental protection as a national policy matter. (May and Daly 2015, 325-328)

The Case For Constitutional Environmental Rights

May and Daly strongly advocate for environmental constitutionalism, which “embodies the recognition that the environment is a proper subject of protection in constitutional texts and for vindication by constitutional courts worldwide.” (May and Daly 2015, 1) Environmental constitutionalism obviously involves a broader agenda relating to the valuation and protection of the environment, with environmental constitutional rights merely one aspect of this agenda. The broader goals of

environmental constitutionalism may involve preservation and protection of the environment for its own sake. However, like human rights, constitutional rights tend to focus on protecting the interests of human individuals and groups. So both international environmental human rights and constitutional environmental rights are concerned with environmental issues as they relate to the interests of human individuals and groups. The focus of this chapter will be confined to the matter of environmental constitutional rights, rather than the broader agenda of environmental constitutionalism.

May and Daly repeatedly insist they are not claiming that constitutional law and constitutional environmental rights should predominate over international law and international environmental human rights. (May and Daly 2015, 3, 54) However, they argue at some length for the advantages of the former over the latter.³¹ They recognize three general problems with advancing environmental claims via international environmental human rights:

1. International human rights were never designed to address environmental rights. (May and Daly 2015, 26-27) Global (but not regional) human rights systems lack any direct right to a healthy environment. (May and Daly 2015, 26) Therefore, referencing human rights conventions will largely fail as a means to advance environmental rights. (May and Daly 2015, 27-28)
2. In order for environmental claims to be seriously considered in existing human rights regimes, they must be linked to a recognized human right. (May and Daly 2015, 27) If an environmental claim cannot be linked to such a right, then it will not receive serious consideration.

³¹ See especially, chapter 1.

3. While international human rights regimes are formally enforceable, they involve weak compliance mechanisms. If these regimes have trouble ensuring compliance with traditional human rights, they are even more likely to have trouble ensuring compliance with environmental claims (which they were not designed to address). (May and Daly 2015, 27)

In contrast with these general worries, environmental constitutionalism presents a number of advantages. First, about three-quarters of nations have a constitution that addresses environmental matters in some form. (May and Daly 2015, 55-56) This can provide a good framework for advancing environmental rights. Second, the fact that so many constitutions contain rights explicitly pertaining to a quality environment or to other environmental issues such as sustainable development or climate change, means that for environmental claims to be seriously considered, they do not have to be linked to more traditional rights. Finally, May and Daly contend that national courts are much better institutions for ensuring compliance with environmental rights. (May and Daly 2015, 46)

The basis for this last claim comes in large part from a deeper criticism of international environmental human rights than those mentioned so far. May and Daly suggest that environmental rights are inherently intertwined with cultural relativism, because there is no universal value that underlies the concept of environmental protection. (May and Daly 2015, 29) Each nation has its own values concerning the balance between economic development and environmental protection and governing the allocation and use of natural resources.

Each nation will want to calibrate these matters in its own way, according to its own political calculations, cultural and economic history, and contemporary

needs; each nation has a slightly different commitment to development, and ways of protecting against excessive privatization on the one hand and nationalization on the other. And each nation has its own political discourse, so the valence of environmental protection varies from country to country, even within a single region. Every political system is its own experiment, including notions of separation and sharing of powers, federalism, and individual rights and responsibilities. Naturally, this affects public and political discourse concerning environmental protection. (May and Daly 2015, 46)

These contrasting values become especially apparent when we view the world in terms of the global North-South divide. The values of the global North have come to predominate over the values of the global South. “Indeed, it seems clear that the terms of the global debate have to a significant degree been shaped by Northern priorities: the fast pace of global environmental degradation and the slow pace of its protection reflect the Northern commitment to industrial development, its addiction to non-renewable resources, and its cultural disconnection from the natural world.” (May and Daly 2015, 29) This has been facilitated by international economic institutions, such as the International Monetary Fund and the World Bank, which favor “privatization and development over ecological and cultural values.” (May and Daly 2015, 29) However, while the more politically and economically powerful nations of the global North may have shaped the terms of the debate, these priorities do not necessarily represent the values of the nations of the global South, which may favor traditional ways of life, preservation over development, and a more harmonious relationship with nature.

According to May and Daly, this issue of cultural relativism explains why constitutions and constitutional courts are best placed to develop and adjudicate environmental rights. Constitutional courts avoid cultural bias by allowing domestic judges to interpret and apply constitutional environmental rights in terms of their own domestic values and priorities, in contrast with international tribunals attempting to

develop and impose uniform values in the form of international environmental human rights. (May and Daly 2015, 46) Furthermore, since the judgments of national courts are likely to conform to the values and political culture of domestic society, these judgments are more likely to be followed by other domestic judges and to be accepted by domestic stakeholders. Finally, national courts provide better access to those asserting environmental claims. Those who wish to assert environmental rights are more likely to have access to local lawyers who can bring suit in such courts, and these lawyers are likely to better understand the cultural and political landscape within which domestic judges render their decisions. (May and Daly 2015, 47) Thus, they conclude, “National courts are better suited to implement the norms that have been articulated at the international level, given their ability to translate those universal values into local vernaculars and to do so with authority and impact.” (May and Daly 2015, 8)

Taking all of these factors into account, May and Daly conclude that developing environmental rights at the constitutional level is the best approach. “Constitutionalizing the environmental debate (as opposed to relegating it to the international level) avoids the problems of cultural bias that internationalization presents by allowing each nation to develop its own discourse with its own vocabulary and based on its own priorities and commitments.” (May and Daly 2015, 46)

There is an additional aspect of May’s and Daly’s case that bears mentioning. They rely on the method of comparative constitutionalism in their study and advocacy of environmental constitutionalism. (May and Daly 2015, 3) However, they emphasize that comparative constitutionalism is not only the methodology for their research, but also “the practice by constitutional courts of comparing and contrasting texts, contexts, and

outcomes elsewhere.” (May and Daly 2015, 4) Thus, comparative constitutionalism is an approach that can be employed by constitutional courts in adjudicating and developing constitutional environmental rights. This method offers the distinct advantage of allowing a court to look not only at its own national history, constitutional origins, and best practices, but also at the “best practices among nations.” (May and Daly 2015, 5)

The case that May and Daly develop in favor of a constitutional approach raises the following question: Do international environmental human rights have any value to add, or are environmental rights best developed at the constitutional level, perhaps in conjunction with the method of comparative constitutionalism? After all, we can conceive of a world in which constitutional environmental rights are recognized and enforced in all nations, and these rights are developed by constitutional courts with sensitivity to domestic values and considerations, while also keeping an eye on the “best practices among nations.” Given the possibility of such an approach, and its advantages as outlined by May and Daly, it may seem that international environmental human rights have little to offer. In contrast, the rest of this chapter will defend international environmental human rights, by more precisely identifying the value that such an approach can add. I do not argue that we should develop international environmental human rights instead of constitutional environmental rights, but simply that there are some benefits which can only be realized through international environmental human rights. These unique benefits provide justification for a system of international environmental human rights, independent of the existence of constitutional environmental rights.

Are International Environmental Human Rights Problematic?

Before exploring the benefits that international environmental human rights can provide, let us first consider May's and Daly's criticism. The first problem concerns the fact that many international human rights treaties do not explicitly address environmental rights and that in order for environmental claims to be given serious consideration under this framework, they must be linked to a recognized human right. A number of things can be said in response to these concerns. First, the fact that many international human rights treaties were drafted prior to the emergence of environmental protection as a political objective does not prevent the subsequent recognition of their environmental dimensions. The human rights included in the treaties can be developed by treaty bodies and human rights courts in order to give explicit recognition to the environmental dimensions of these rights. Second, many of the rights included in these treaties do not differ from the environmental rights found in constitutions. The most notable exception is the right to a safe, healthy, or adequate environment. However, while it is true that this right is not included in the major global human rights treaties, such as the UDHR, ICCPR, or ICESCR, it is included in some regional international human rights treaties, including the African Charter on Human and Peoples' Rights, the Additional Protocol to the American Convention on Human Rights, the Arab Charter of Human Rights, and the ASEAN Human Rights Declaration. Very few constitutions include more specific environmental rights, such as rights relating to climate change, sustainable development, or future generations. Typically these latter concerns, if included, take the form of state duties, rather than of individual rights. Therefore, the primary difference seems to revolve around the right to a safe, healthy, or adequate

environment. My argument will lend support to the idea that the right to a clean, healthy, or adequate environment should be added to global human rights treaties, but it is important to recognize that the inclusion of this right in many regional human rights treaties goes a long way towards realizing the benefits that this particular international environmental human right can offer.

Another purported problem concerns the claim that while international human rights regimes are formally enforceable, they involve weak compliance mechanisms. There are a variety of ways in which international human rights are enforced, ranging from “naming and shaming” states that fail in their human rights responsibilities, to review and reporting mechanisms, to economic and military sanctions. The argument I present in this chapter will focus on the role of IHRCs. Judgments by IHRCs are perhaps one of the stronger mechanisms for the enforcement of international human rights. States will generally want to avoid the reputation that comes with shirking a formal judgment by an IHRC. Furthermore, if a particular state disregards the judgment of an IHRC, it may be doubtful that the judgment of a domestic court has any greater likelihood of being efficacious. Such a state may have a general disregard for the rule of law. Thus, enforcement of environmental rights through the judgments of IHRCs may be as likely, or nearly as likely, to succeed as enforcement of such rights through domestic courts. Additionally, May and Daly contend that if the international human rights regime has difficulty enforcing more traditional human rights, then it is likely to have that much more trouble ensuring compliance with environmental human rights. However, when it comes to the judgments of IHRCs, there seems no reason that a state will be less likely to

abide by a judgment pertaining to an environmental human right, than it would be to abide by a judgment concerning a more traditional human right.

Perhaps the deepest aspect of May's and Daly's case is the claim that environmental protection is a culturally relative idea or value. The reason this aspect is so important is not merely because it underpins the purported benefits that derive from the sensitivity and understanding of domestic courts, judges, lawyers, and claimants with regard to national values and political contexts, but also because of its implications for the formulation and development of international environmental human rights. International environmental human rights cannot embody a multitude of incompatible conceptions of environmental protection, if in fact there are varying conceptions found in societies around the world. Rather, the development of international environmental human rights requires the creation and development of uniform rights that can be recognized and shared by all nations. Alternatively, there could be creation and development of international environmental human rights at the regional level, so that different regional systems have different environmental human rights. In this case, the nations of the Inter-American system could be governed by a one conception of environmental human rights, the nations of the African system governed by another conception of environmental human rights, and so forth. But even with this structure, there would need to be a uniform conception of environmental human rights that could be recognized and shared by all nations within a given regional human rights system.

May's and Daly's claim of cultural relativism seems to rest on the idea that different nations choose to balance the competing values of development and environmental protection/preservation in different ways. But balancing values is not the

same thing as values themselves, and so differences in choices about how to balance these values are not the same thing as differences concerning the values themselves. Thus, it is possible that both development and environmental protection are objective universal values, but that different nations simply make different choices about how to balance these objective values. Based on their relatively brief comments, May and Daly have certainly not established the relativity of the values themselves. Rather, they seem to point to different social and political institutions for implementing these values, different “ways of protecting against excessive privatization on the one hand and nationalization on the other...[of] including notions of separation and sharing of powers, federalism, and individual rights and responsibilities.” (May and Daly 2015, 46) There is no doubt that different nations have different institutions, processes, and political frameworks for implementing such values. But this simply implies that a system of international environmental human rights will need to take these factors into consideration; it does not show there is relativism about the values that underpin environmental human rights.

Since nations have different institutions, processes, and political frameworks for realizing the competing values of development and environmental protection/preservation, this will tend to press for a minimalism in the formulation and development of international environmental human rights. Minimalism has been a common theme in the work of many human rights theorists.³² To claim that something is a human right is to invoke a powerful political vocabulary in the contemporary world. For this reason, many political movements seek to have their concerns framed as a human rights issue, which threatens to create a vast proliferation of the types of claims

³² See for example, James Nickel (2007), 10.

recognized as human rights. If this proliferation becomes too great, and includes claims that are not plausibly considered human rights, this will tend to devalue the currency of human rights more generally. Due to this concern, many theorists have advocated for a human rights minimalism, a position that holds only the most basic human interests as rising to the level of a genuine human right. This same line of reasoning can be employed in the case of environmental human rights. Despite the aforementioned differences, there are likely to be basic objective interests of human beings relating to each of these values that can provide the basis of environmental human rights. Identifying such a basis for international environmental human rights will allow us to conceptualize rights that can be universally recognized and shared by all nations, while recognition of political and institutional differences will maintain pressure to keep the content of these rights minimal and hence compatible with an array of such arrangements.

The Case For International Environmental Human Rights

After examining May's and Daly's case for constitutionalizing environmental rights, and raising the question of whether this approach, in conjunction with the method of comparative constitutionalism, is best for instituting environmental rights, let us now turn to the case for international environmental human rights. In *The Heart of Human Rights*, Buchanan presents "The Argument from Benefits" (2013, 107-121) to justify a system of international legal human rights. Buchanan's argument appeals to a number of benefits that such a system can provide. This justification can also be applied to particular types of rights within the system, and to particular areas of adjudication by international human rights courts. In order to make the case for international

environmental human rights, I will develop The Argument from Benefits and apply it to the environmental human rights in particular. In this way, I hope to identify the distinct contributions that international environmental human rights, in contrast to constitutional environmental rights, are able to make.

In presenting “The Argument from Benefits,” Buchanan is interested in offering a justification for the kind of system constituted by the existing international human rights regime, namely, a system of international legal human rights. Before a justification of that system can be offered, it is first necessary to provide a characterization of the primary function of the system. Buchanan characterizes the general function of the system as follows: “to provide a set of universal standards, in the form of international law, whose primary purpose is to regulate the behavior of states towards individuals under their jurisdiction, considered as social individuals, and for their own sakes.” (Buchanan 2013, 86) So according to Buchanan, the general function of the system is to regulate state conduct with regard to people within its jurisdiction. The final phrase, “for their own sakes,” is meant to point out that the international legal human rights system is aimed at regulating state behavior for the sake of individuals, and not for the sake of states. Buchanan believes that we can also identify two more particular aims of this system, based on the content of the human rights norms themselves. These more particular aims are called the well-being function and the status-egalitarian function. The well-being function aims at regulating state conduct in order to help ensure that individuals have an opportunity to lead a minimally good life by providing protections and resources generally needed to lead such a life, and the status-egalitarian function

aims at regulating state conduct for the purposes of affirming and promoting the equal basic status of all people. (Buchanan 2013, 87)

It is worth pointing out the well-being function and the status-egalitarian function may provide a basis for conceptualizing and developing international environmental human rights that all nations can recognize and share. The idea would be that regardless of how nations choose to balance and implement the competing values of development and environmental protection/preservation, through various institutions, process, and frameworks, these choices are constrained by the considerations of well-being (opportunity to lead a minimally good life) and status-egalitarianism (equal basic status of all people) embodied in international human rights. This approach would involve identifying the environmental-related protections and resources generally needed to lead a minimally good life, as well as the environmental-related regulation of state conduct necessary to affirm and promote the equal basic status of all people, and formulating international environmental human rights that embody these requirements. Certainly some uniform environmental human rights can be developed on the basis of these functions. For example, we can formulate a uniform human right to water, which is an essential requirement for human well-being, by determining what the state is required to do with regard to access to clean and potable water. Beyond meeting these basic universal constraints and requirements imposed by international environmental human rights, each nation would be free to balance the competing values of development and environmental protection/preservation as it sees fit, using the institutions, processes, and frameworks that it chooses.

The motivation for Buchanan's Argument from Benefits juxtaposes nicely with the case presented by May and Daly. One reason it is important to provide a justification for a system of international legal human rights, Buchanan contends, is because we can imagine alternative approaches to achieving the goals this system is designed to achieve. For example, in the wake of World War II, when the existing international legal human rights system was founded, there were some domestic constitutional rights systems that seemed to be doing a good job of protecting the interests of individuals. Given these examples, powerful states might have exercised various forms of power to pressure states that lacked a system of domestic constitutional rights to create and implement one. So the question arises, what justifies developing a system of international legal human rights, rather than taking some other approach? (Buchanan 2013, 106) This is precisely the issue raised by May's and Daly's case for constitutional environmental rights. In answer to this concern, Buchanan's Argument from Benefits appeals to six benefits that a system of international legal human rights can provide:

- 1) Improve and develop the understanding of domestic constitutional bills of rights³³
- 2) Play a back-up role when domestic rights protections fail
- 3) Contribute to the legitimacy of states
- 4) Provide a resource for the development of international humanitarian law
- 5) Provide a unified framework for coping with global problems
- 6) Correct an inherent flaw in democracy

³³ Buchanan actually characterizes the Argument from Benefits as appealing to seven benefits. However, two of these benefits are so closely related, improving domestic constitutional bills of rights and developing a better understanding of domestic constitutional rights, that I have combined them and treat them as a single benefit.

Furthermore, Buchanan mentions an additional benefit that the system has the *potential* to offer:

7) Provide a potential resource for the regulation of international economic institutions

I examine each of these benefits and explain how they are supposed to justify a system of international legal human rights. I then argue that these benefits are realized in the case of environmental human rights. In other words, I show that the benefits which justify the system as a whole are also realized through this part of the system, or this family of rights. Finally, I show that five of these benefits are not merely realized, but also realized in an enhanced way through adjudication of environmental human rights in IHRCs. This is because adjudication facilitates mutual reinforcement among the benefits, a possibility Buchanan does not fully explore. If these benefits justify the international legal human rights system as a whole, and the degree to which the benefits are realized is enhanced by adjudication of environmental human rights, then the Argument from Benefits provides an even stronger justification for adjudication of international environmental human rights. This is because the value added by the benefits is even greater in the case of adjudication of environmental human rights in IHRCs.

The Added Benefits from Adjudication of International Environmental Human Rights

1. Improving and developing domestic constitutional rights. There are at least three ways in which a system of international legal human rights can improve domestic constitutional rights by establishing international legal obligations. First, the international human rights system establishes a list of recognized human rights that

impose legal obligations on states. This can encourage states that lack a domestic bill of rights to create one and include these rights. (Buchanan 2013, 109) Second, international human rights provide model rights for states to emulate. (Buchanan 2013, 109) The system offers both an initial formulation of the rights, and processes for interpreting these obligations in conformity with principles of legal reasoning. (Buchanan 2013, 110) Third, the system of international legal human rights helps to counter-act a tendency in international law that Buchanan refers to as a “veil of sovereignty,” (Buchanan 2013, 110) which gives states robust rights against outside interference in domestic affairs, so that they have broad discretion in terms of how they may treat individuals within their jurisdiction. (Buchanan 2013, 122) If a state is encouraged to incorporate the list of international legal human rights into its system of domestic constitutional rights, this helps to remedy the “veil of sovereignty” by creating standards that limit how a state may permissibly treat those within its jurisdiction.

A system of international legal human rights can contribute to a better understanding of domestic constitutional rights. It has sometimes been questioned whether international human rights express a cultural bias, such as “Western” values, rather than genuinely universal rights. (Buchanan 2013, 113-114) Buchanan suggests a number of reasons to believe this is not the case. First, there is ample evidence that the drafters of the UDHR took strong efforts to avoid cultural bias. For example, the drafters included a wide range of cultural perspectives, the initiative to draft an international bill of rights came from weaker states in the face of opposition from stronger states, and certain anti-colonial views were incorporated into the document. Second, the international human rights system has continued to be developed with the participation of

people from many different cultures. (Buchanan 2013, 115) This inclusion of participants from diverse cultural backgrounds gives the system what Buchanan calls an “epistemic advantage,” (Buchanan 2013, 116) because it creates safeguards against parochial bias.

May’s and Daly’s concern is not that the concept of rights represents “Western” values, but that the notion of environmental protection—which may serve as a basis for environmental rights—is culturally relative. They may be skeptical that we can develop uniform international environmental human rights on the basis of participation of people from diverse social and cultural backgrounds, because they seem to believe that cultural relativism pervades the values of development and environmental protection/preservation and this would prevent agreement. However, as argued previously, balancing these competing values is not the same thing as disagreement about the values themselves. Give this distinction, and assuming that both environmental protection and development are values which everyone shares, we might retain confidence that including the perspectives and participation of people from diverse backgrounds will allow us to arrive fundamental environmental values—in the form of rights—that all nations must comply with when striking the balance between these competing goods.

Buchanan’s model treats international human rights as a sort of “global learning platform,” as it involves institutions that are inclusive of people from different cultures and perspectives. While May’s and Daly’s comparative constitutional approach merely offers national courts the possibility of observing and incorporating “global best practices” into their decision-making, Buchanan’s global learning platform seeks to embody those global best practices in the form of international human rights themselves,

through the participation of people from a diversity of cultures and societies. Sometimes this input may come in the form of domestic constitutional rights. In such cases, there is a reflexive relationship between constitutional rights and international human rights. If a particular society's constitutional right represents a "global best practice," this can inform the conceptualization and development of an international human right. The international human right can in turn provide a model for other constitutional systems to emulate.

Buchanan suggests that rather than be concerned about parochial bias in international human rights, we should instead be concerned about such bias in domestic bills of rights. The most influential and widely imitated domestic bills of rights have been the U.S. Bill of Rights and the French Declaration of the Rights of Man and the Citizen. Yet these documents originated in particular historical-cultural contexts. By contrast, the "epistemic advantage" provided by the international human rights system can lead to a better understanding of domestic constitutional rights, because it helps to limit such bias as it influences either the initial formulation or subsequent interpretation of domestic constitutional rights. (Buchanan 2013, 114) So, while May and Daly praise the domestic values and understanding that can be embodied in constitutional environmental rights and that inform national courts, Buchanan raises the concern that these rights and institutions have a higher likelihood of involving a parochialism, which the international human rights system can help to rectify.

Now consider this benefit in the case of environmental human rights. When environmental human rights are part of the system of international legal human rights, this can encourage revision of domestic legislation accordingly. First, environmental human rights make it clear that states have legal obligations with respect to

environmental matters that impact individuals' rights. This can be particularly important in societies where protecting the environment is a laudatory goal, rather than a legal obligation. Furthermore, environmental human rights create the possibility of holding states accountable for such obligations through legal institutions. Second, inclusion of environmental human rights in the list of international human rights can provide a model for states to emulate. The issue is, however, more complex. Many environmental human rights, both substantive and procedural, involve more general rights that have implications when it comes to environmental matters. This implies that the modeling of rights involves not just those rights whose object is some aspect of the environment, such as the right to water, but also appreciating the potential environmental dimension of the objects of rights more generally. Human rights can be formulated in ways that either encompass or fail to appreciate the environmental dimensions of a right. For example, the right to health can be formulated with or without taking into account the wide array of determinants of health, including a healthy environment. The Committee on Economic, Social, and Cultural Rights took a more comprehensive perspective, for example, when it issued General Comment 14 on the right to health. The Committee interprets the human right to health as encompassing "the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment." (Committee on Economic, Social, and Cultural Rights 2000) Third, environmental human rights help to counter-act the "veil of sovereignty," as states are encouraged to incorporate domestic constitutional rights that prohibit the state from neglecting or threatening the environmental interests of individuals within the state's jurisdiction.

Environmental human rights can also be particularly important in developing new understandings of domestic constitutional rights, if domestic legislation was formulated before the current awareness of environmental problems. In other cases, domestic constitutional rights may have been formulated or developed in ways that reflect only the experiences and interests of members of certain classes or groups within society, and fail to fully account for the environmental dimensions of these rights as they affect all individuals, especially the members of marginalized groups. Environmental human rights provide a model that can be emulated in the formulation and development of domestic constitutional rights. In this way, the “epistemic advantage” embodied in international human rights can also be instantiated in the formulation of domestic environmental rights, so as to genuinely recognize and protect the environmental interests of all individuals, including members of marginalized groups.

Adjudication of environmental human rights in IHRC can facilitate this benefit in at least two ways. First, the process of adjudication serves the purpose of norm specification, as the precise duties and obligations associated with these rights are determined by applying these norms in particular cases. As IHRC carry out this process, they further develop the model provided for domestic constitutional rights. Second, the process of adjudication can help to identify the environmental dimensions of various human rights, which may not have been specified in human rights treaties or the interpretations of treaty bodies. For example, the European Court of Human Rights has identified the environmental aspects of the right to respect for private life and family life. This human right has been the chief right appealed to in the European human right system when contesting environmental pollution. In *Lopez Ostra v. Spain*, the Court

declared “severe environmental pollution [from a waste treatment facility] may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.” (1995) The Court has built on this precedent in subsequent cases, continuing to develop the jurisprudence concerning the environmental dimensions of this human right.

As discussed above, adjudication in IHRCs can provide a mechanism for the interpretation and specification of these norms. This mechanism involves an “epistemic advantage,” through its inclusion of judges from different regions and cultural backgrounds who bring internationally diverse perspectives to these courts. Furthermore, adjudication in IHRCs allows human rights norms to be applied to a diverse range of cases, drawn from the experiences of different societies and cultural settings. These aspects of adjudication in IHRCs help to ensure that environmental human rights avoid parochial bias. For example, the Inter-American Court of Human Rights has developed the human right to property as it relates to indigenous peoples and natural resource extraction. Beginning with *Mayagna (Sumo) Awas Tingni v. Nicaragua* (2000), the Inter-American Court recognized that the human right to property can constitute a communal right to ancestral lands, which protected the Awas Tingni against a timber concession the state had granted to a logging company. In subsequent cases, such as *Saramaka People v. Suriname* (2008) and *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), the Court has gone on to determine that the human right to (communal) property of indigenous peoples requires consultation and participation, receipt of a reasonable benefit, and an environmental impact assessment, if natural resources are to be extracted from their lands. So adjudication of environmental human rights in IHRCs plays a

fundamental role in facilitating the “epistemic advantage” that the international legal human rights system can provide.

2. The back-up role. Another area of added value derives from the back-up role that international human rights can play when domestic rights protection fails. Even in societies that have a system of domestic constitutional rights, there are often failures to implement these rights. Historically, this has been especially true when it comes to the rights of members of certain groups, such as women, racial and ethnic minorities, migrants, and indigenous peoples. (Buchanan 2013, 110-111) International human rights can help to remedy such failures by providing a back-up. This back-up role can function even where there are no international institutions to enforce human rights, as for example, when domestic courts appeal to international human rights in their rulings and states comply with such rulings. Domestic courts are able to make such appeals because international human rights are part of international law, and not simply policy goals or some other type of non-legal norm. The back-up role also does not necessarily require external pressure. For example, there is evidence that domestic groups that appeal to human rights have been able to pressure some states into responding. (Buchanan 2013, 111-112)

May and Daly’s comparative constitutional approach allows a national court to consider or examine jurisprudence from other countries, but this jurisprudence is not legally binding on the domestic court. On the other hand, international human rights involve norms that are legally binding on all nations, and thus must be taken into account by domestic courts. Similarly, domestic individuals or groups might appeal to the constitutional environmental rights of a foreign nation, but such an appeal is unlikely to

create much pressure in the domestic context. On the other hand, appeal to international human rights involve international standards that apply to all nations, and such appeals are much more likely to create pressure within the domestic context.

In the case of environmental human rights, the benefit provided by the back-up role can be particularly important. States can have strong interests in, for example, development projects that threaten the environmental interests of individuals. Furthermore, powerful private interests, such as corporations, often have great resources and influence in society, and may be able to pressure the state to proceed with such projects. In such cases, environmental human rights function as back-ups that explicate the state's legal duty to respect and protect the environmental interests of individuals within their jurisdiction, even in the face of the state's own interests or pressure and influence from powerful private agents such as corporations. Such obligations can be particularly beneficial in the case of members of marginalized groups. The "environmental justice" movement has long noted that the bulk of environmental harms tend to be borne by members of minority groups.³⁴ The back-up role of environmental human rights can help to ensure that states properly respect and protect the environmental interests of all individuals in their jurisdiction, including those who have historically tended to be the victims of domestic rights failures.

While Buchanan emphasizes that the back-up role does not require an external enforcement mechanisms or external pressure, adjudication in IHRCs provides one of the strongest forms the back-up role can take. IHRCs are able to render a legal judgment that explicitly declares a state's obligations in a given case. This provides both an enforcement mechanism and powerful external pressure for a state to comply, often in

³⁴ See Mohai et al. (2009).

terms of the state's international reputation. For the reasons mentioned above, this enforcement mechanism can be especially important in the case of environmental human rights. It creates an enforcement mechanism that better ensures these rights are implemented and enforced domestically. It helps to ensure compliance with the environmental human rights obligations of the state in cases where the state or powerful private agents can have strong interests, and in the case of members of groups who have traditionally borne environmental harms.

The back-up role is well illustrated by Inter-American Court of Human Rights case of *Kawas Fernandez v. Honduras* (2009), which involves the murder of a Honduran environmental activist and human rights defender. Ms. Kawas Fernandez formed a foundation to improve the lives of the people of the Tela Bay region of Honduras through protection of the environment and preservation of natural resources. Through the work of her foundation, she succeeded in having the Punta Sal area designated as a national park. She went on to report cases of illegal wood exploitation and damage to the national park, and organized demonstrations against state initiatives to grant land titles and economic development projects in the area. (2009, para. 50-52) In 1995, Ms. Kawas Fernandez was murdered in her home. The subsequent investigation of the case involved obstruction by police authorities, threats against investigators and witnesses, and the cover-up of evidence. (2009, para. 85-89) There was also groundless annulment of arrest warrants issued by a domestic court. (2009, para. 57, 65-66) The result was that fourteen years later, in 2009, when the Inter-American Court finally ruled on the case, the investigation was still stalled at the preliminary stage. (2009, para. 68)

In 2003, a petition was filed with the Inter-American Commission on Human Rights. The Commission was unable to reach a settlement with Honduras in the matter, and eventually submitted the case to the Inter-American Court seeking a judgment. The Court found that Ms. Kawas Fernandez was murdered in connection with her work as an environmental activist (2009, para. 98), that state agents had colluded with private interests who caused her murder (2009, para. 99), and that the state failed to properly investigate the case. (2009, para. 100-108) Furthermore, the Court recognized that the murder of Ms. Kawas Fernandez occurred within the context of a series of murders of environmental activists in Honduras. (2009, para. 5, 69)

The Court held that there was a violation of Ms. Kawas Fernandez's right to life (Article 4, ACHR), as well as her right to freedom of association (Article 16, ACHR),³⁵ connecting the violation of her right to life with the violation of her right to freedom of association:

the impairment of the right to life or of humane treatment attributable to the state, may, in turn, give rise to a violation of Article 16(1) of the Convention when such violation arises from the victim's legitimate exercise of the right to freedom of association. (2009, para. 150)

After affirming a positive duty of the state to protect the right to freedom of association, the Court specifically mentions this with regard to human rights activists:

the States have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigation of any violations against them, thus preventing impunity. (2009, para. 145)

Furthermore, the Court treats environmental activism as a form of human rights activism,

³⁵ The Court also found that Ms. Kawas Fernandez's next of kin had suffered violations of their right to due process and right to judicial protection. (Article 8(1) and Article 25 of the American Convention on Human Rights).

stating that:

there is an undeniable link between protection of the environment and the enjoyment of other human rights... The recognition of the work in defense of the environment and its link to human rights is becoming more prominent across the countries of the region, in which an increasing number of incidents have been reported involving threats and acts of violence against and murders of environmentalists owing to their work. (2009, para. 147, 149)

As remedies in the case, the Court required that the state to pay compensation to the relatives of Ms. Kawas Fernandez, hold a public ceremony recognizing responsibility in the matter, conclude the investigation and have it settled within a reasonable period, and additionally, required the state to “carry out a national awareness and sensitivity campaign regarding the importance of the work performed by environmentalists in Honduras and their contribution to the defense of human rights.” (2009, para. 162-214)

The *Kawas Fernandez* case provides an excellent example of how adjudication of environmental human rights in IHRCs can provide a back-up role. This case involved collusion between Honduran authorities and private interests concerning environmentally threatening projects, which ultimately led to the murder of Ms. Kawas Fernandez due to her activism against these projects. Adjudication of this case in an IHRC allowed recognition that Ms. Kawas Fernandez’s rights were violated and led to a judgment against the state. Furthermore, it demonstrates the severe limitations of domestic courts in some countries, particularly when it comes to the rights of environmental activists who may create problems for powerful economic and political interests.

Now let us consider the way in which adjudication of environmental human rights facilitates a mutually supportive or reinforcing relationship between the first and second benefits. In the case of the first benefit, adjudication allows for the development and specification of human rights, which can then contribute to improving and developing the

understanding of domestic constitutional rights. But as human rights are developed and specified through adjudication, they are better able to provide the second benefit, the back-up role, due to their being better developed and specified. This shows that adjudication facilitates a supportive relationship from the first benefit to the second. But adjudication can also facilitate support in the other direction, from the second benefit to the first. If individuals bring claims in IHRCs when domestic rights protections fail, adjudication of such cases helps to develop and specify human rights. In other words, pursuing the back-up role through adjudication in IHRCs helps to develop and specify better model rights. Better model human rights can then contribute to the improvement and understanding of domestic constitutional rights, through inclusion and emulation of these model rights. So, adjudication facilitates a mutually supportive or reinforcing relationship between the first and second benefits.

3. Contributing to a state's legitimacy. The legitimacy of a state depends in part on providing adequate protection of its citizens' human rights. There are two types of legitimacy: normative and sociological. Normative legitimacy refers to the actual authority of a state to rule, and involves a public standing that warrants certain types of respect. Sociological legitimacy involves widely held belief that a state has such authority and warrants respect, which can be important when it comes to the ability of an institution to properly function. (Buchanan 2013, 112) The back-up function of international legal human rights can contribute to both types of legitimacy. The back-up function can contribute to a state's normative legitimacy by ensuring that a state does provide adequate protection of its citizens' human rights. It can contribute to a state's

sociological legitimacy by allowing citizen's to know that the state is not arbiter in its own case when human rights claims are made against the state. (Buchanan 2013, 113)

This benefit also applies in the case of environmental human rights. Since the state itself can have strong interests in development projects that threaten the environmental interests of individuals, and there can also be pressure and influence from powerful private agents with interests in projects that threaten the environmental interests of individuals, both the normative and sociological legitimacy of the state can be in doubt. The back-up role can contribute to a state's normative legitimacy by helping to ensure that a state does respect and protect the environmental human rights of its citizens, and it can contribute to a state's sociological legitimacy by allowing citizen's to know that the state will not be arbiter in its own case when environmental human rights claims are brought against the state. Thus, the back-up role can make an important contribution to a state's legitimacy in the case of environmental human rights.

If environmental rights are developed only at the national level and adjudicated by constitutional courts, the added contribution to the normative and sociological legitimacy of the state could not be realized. The state would remain arbiter in its own case and citizens would not have the benefit of knowing a judicial body independent of the state can adjudicate environmental claims brought against it. Furthermore, constitutional courts would be the last body of appeal in terms of ensuring that environmental rights are actually respected and protected, with no possibility of assurance from an independent international court making this determination.

As discussed previously, adjudication is one of the strongest forms that the back-up role can take, and thus can make some of the greatest contributions to the normative

and sociological legitimacy of the state. Adjudication in IHRCs can make a powerful contribution to the normative legitimacy of a state by creating an external enforcement mechanism and external pressure to ensure that the state does fulfill its human rights obligations, including respecting and protecting its residents' environmental human rights. Adjudication in IHRCs can contribute to the sociological legitimacy of a state by providing an institution where citizens can bring claims against the state, including environmental human rights claims, and know the state is not arbiter in its own case.

After the ruling in the *Kawas Fernandez* case, Honduras recognized responsibility in the matter and paid compensation to the next of kin. In this way, the normative legitimacy of Honduras was enhanced, because there was recognition and compensation for the rights violation that occurred. Furthermore, the sociological legitimacy of Honduras was enhanced because this ruling by an IHRC allows the citizens of Honduras to know that the state is not the ultimate arbiter in its own case in such situations.

Now let us turn to the relationship between the third benefit and the first and second. Buchanan discusses the relationship between the second and third benefits: the back-up role enables the system of international legal human rights to contribute to the legitimacy of states. This relationship works in just one direction; the second benefit supports the third. However, as with the first and second benefits, adjudication can facilitate a mutually supportive relationship between the first and the third benefits. Adjudication in IHRCs contributes to the normative legitimacy of a state by ensuring that the state does in fact respect and protect the human rights of its residents, which is a key component of normative legitimacy. And adjudication contributes to the sociological legitimacy of states by allowing citizens to know that the state is not arbiter in its own

cases when human rights claims are brought against it. In the process of adjudicating these cases, IHRCs develop and specify human rights, which in turn creates better model rights that can contribute to the improvement and understanding of domestic constitutional rights. So adjudication facilitates a supportive relationship from the third benefit to the first. But adjudication can also facilitate support in the other direction, from the first benefit to the third. If adjudication in IHRCs helps to develop and specify better model human rights, it can then contribute to the improvement and understanding of domestic constitutional rights. And if domestic constitutional systems include and emulate these model human rights, this makes it more likely that states will respect and protect the human rights of their residents, which is a key component of normative legitimacy. So adjudication facilitates a mutually supportive relationship between the first and third benefits.

4. Provide a resource for the development of international humanitarian law.

International humanitarian law (the law of armed conflict) originated prior to the recognition of individuals as subjects of international law. Rather, the origins of international humanitarian law lie in an attempt to regulate the behavior of states towards each other, and primarily with the interests of states as the aim. This can be thought of as a statist bias in the origins of international humanitarian law, which may continue to influence the content and development of this body of law. A system of international legal human rights can help to rectify this, by reconceptualizing international humanitarian law as a branch of international human rights law. This would make it clear that the constraints on armed conflict are not for the benefits of states, but for the benefit of individuals. Furthermore, it would make clear that respect for the interests of

individuals is not conditioned upon reciprocity, but an unconditionally owed respect for human rights. (Buchanan 2013, 116) Finally, this would allow the enlistment of the resources of the international legal human rights system in pursuance of this goal. In fact, there is already evidence of international human rights law having an impact the development of international humanitarian law, even absent a merger of the two branches of law. This can be seen, for example, in the expansion of the concept of war crimes to include mass rape, with rape being recognized as a violation of human rights prior to mass rape being recognized as a war crime. (Buchanan 2013, 117)

In the case of environmental human rights, these can certainly be used to inform the conceptualization and development of international humanitarian law. For example, the Additional Protocol to the Geneva Convention, adopted in 1977, recognizes a limit to damage that may be inflicted on the environment in Article 55:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

(International Committee of the Red Cross 1977)

While 55(2) may be more focused on the environment as an element in the general principles governing legitimate warfare, 55(1) clearly recognizes human life and health as the reason that warfare should not be conducted in a manner that imposes “widespread, long-term, and severe damage” to the environment. Thus, we can understand the human rights to life and health as the justification for these environmental limitations on the

conduct of war, and make it clear that it is respect for the interests of individuals, and not the interests of states, that impose such limitations.

It is important to point out that if environmental rights exist only at the constitutional level, there would be no uniform international environmental human rights on which to reconceptualize international humanitarian law. We need uniform standards provided by international environmental human rights to inform international humanitarian law. If the values that underpin environmental rights are truly culturally relative, this would preclude the possibility of formulating universal environmental standards, in the form of individual rights, which can serve as a basis for conceptualizing international humanitarian law. Fortunately, as we have seen, May and Daly have failed to establish that the values underpinning environmental rights are themselves culturally relative.

5. Provide a unified framework for coping with global problems. Human rights can provide a unified legal framework for coping with global problems. In particular, this applies to problems which involve harms states individually are unable to cope with, but that it would be inappropriate to hold them responsible for in the absence of any voluntarily assumed international legal obligation. The solution to these sorts of problems requires states to cooperate, and to coordinate their cooperation using a single set of standards. Human rights provide an excellent standard for this purpose, both because they have greater legal weight than goals, and because they allow for the enlistment of the extensive political and legal resources of the international human rights system. (Buchanan 2013, 118)

Environmental degradation is often a problem of this variety. Many environmental threats transcend national borders, because problems such as pollution do not recognize political boundaries. Furthermore, they can present a problem that states individually are unable to solve, and thus would be inappropriate to treat as the responsibility of a single state. Human rights will not always be the best set of standards for coordinating state action concerning such problems. However, there are certainly some types of pollution that negatively affect populations, and may be usefully dealt with in terms of environmental human rights protections. In such cases, environmental human rights offer a number of advantages: they provide a way of conceptualizing the impacts as harms and create a presumption that such harms should be remedied, in addition to the greater legal weight of these norms and the ability to enlist the extensive political and legal resources of the human rights system.

In order for environmental rights to provide a framework for coping with global environmental problems, uniform international environmental human rights will be required. If environmental rights are developed only at the constitutional level, then we will lack uniform norms that are capable of facilitating international coordination and cooperation among nations. Once again, while nations may choose to balance the values of development and environmental protection/preservation differently, international environmental human rights should be able to embody basic environmental interests that can be recognized and shared by all nations. It is these universal values that can facilitate international coordination and cooperation.

Adjudication of environmental human rights in IHRCs would provide a mechanism to help ensure that states comply with these coordination norms.

Furthermore, adjudication of environmental human rights allows for the enlistment of individuals as part of the enforcement structure since individuals can bring suit in IHRCs. Thus, this approach enables individuals to become a part of the policing structure that ensure states comply with their obligations.

Climate change is an example of an environmental problem that is global in scale and yet cannot be treated as the responsibility of a single state. Human rights may be able to offer a legal framework for coordinating action to deal with this problem, or at least comprise part of such a framework. Indeed, there have been attempts to bring the issue of climate change before a human rights tribunal. In 2005, Shelia Watt-Cloutier, International Chair of the Inuit Circumpolar Council, along with 62 Inuit Elders, filed a petition before the Inter-American Commission on Human Rights, concerning the impact of climate change on the human rights of the Inuit. (Earthjustice 2005) The petition claimed that the United States, at the time the world's largest producer of green house gases, had "repeatedly declined to take steps to regulate and reduce its emissions of the gasses responsible for climate change," and that this resulted in the violation of various human rights of Inuit communities, including "rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home." The Inter-American Commission declined to consider the petition, stating that it had received insufficient information for making a decision. However, the Commission decided to hold hearings on the impact of climate change on human rights, and invited representatives of the Inuit communities to testify at these hearings in 2007.

Subsequent to the Inuit petition to the Inter-American Commission, the U.N. Human Rights Council has adopted a number of resolutions recognizing the impact of climate change on human rights. Resolution 10/4, adopted in 2009, recognized that “Human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.” (United Nations Human Rights Council 2009) In 2011, the U.N. Framework Convention on Climate Change arrived at a set of decisions, known as the Cancun Agreements, which included a number of references to human rights, and “Emphasizes that Parties should, in all climate change related actions, fully respect human rights.” (United Nations Framework Convention on Climate Change 2011) Finally, the Paris Agreement of 2015 includes in its Preamble the first mention of human rights in an international environmental treaty, which states

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity. (United Nations Framework Convention on Climate Change 2015)

These developments show progress towards incorporating a human rights approach into international action to deal with climate change, including recognition that human rights can provide norms for policy coherence, legitimacy, and determining appropriate outcomes, as well as that actions dealing with climate change must respect, promote, and consider human rights. While more precise obligations need to be defined in this regard, this demonstrates the potential for human rights to provide a standard or benchmark for

coordinating state actions in response to climate change and setting permissible limits on emissions.

Adjudication of human rights relative to climate change could provide a mechanism for helping to ensure compliance with these norms. This is true with respect to both substantive environmental human rights and procedural environmental human rights. In the case of substantive environmental human rights, right-holders could bring suit when their substantive human rights have been violated or impacted by the effects of climate change, and receive redress for such impacts. In the case of procedural environmental rights, suit can be brought to gain access to governmental information and to demand public participation, which can enlist individual right-holders to help ensure that states comply with their climate change-related human rights obligations through transparency and participation.

6. Correcting an inherent flaw in democracy at the national level. Democracy makes governments almost exclusively accountable to their citizens, and leads them to disregard the legitimate interests of non-citizens. (Buchanan 2013, 119) A system of international legal human rights provides a mechanism for exerting pressure on governments to take account of the legitimate interest of foreigners and to counter-act the bias of democracy. This shows that a system of international legal human rights provides added value even for states where the back-up function is rendered superfluous because the state has such a good record of domestic rights implementation. (Buchanan 2013, 120) While current human rights law is more successful in assigning duties to states regarding those under their jurisdiction, there has been development in the direction of assigning extraterritorial duties. This can be particularly seen over the past decade, with

the elaboration of the Responsibility to Protect (R2P) doctrine, which entails both an obligation to help other states build capacity to protect the human rights of those under their jurisdictions, as well as an obligation of the society of states to act when a state egregiously fails to protect the human rights of those under its jurisdiction. (Buchanan 2013, 121)

If environmental rights are realized at only the constitutional level, they will remain subject to this inherent flaw in democracy and fail to take into account the legitimate environmental interests of non-citizens. This is not a problem that can be corrected through comparative constitutionalism, which simply allows a domestic court to consider the judgments and legal opinions of foreign courts that bear on the constitutional rights of the citizens of the country. While May and Daly believe it is an advantage that national courts can make decisions which are sensitive to domestic values and political contexts, this can involve a bias on the part of such courts that allows them to ignore the legitimate environmental interests of foreigners.

Counter-acting this bias in democracy can be particularly important in the area of environmental concerns, since pollution and other environmental problems commonly transcend national boundaries. If the structure of democratic government causes governments to be accountable to the interests of their citizens while ignoring the interests of foreigners, environmental human rights provide a set of universal international norms that protect the interests of all people beyond national boundaries. The Responsibility to Protect (R2P) doctrine could be particularly useful in the case of environmental human rights concerns, where certain states either are not concerned with environmental harms affecting their citizens' human rights or lack the resources to

address such issues. Thus, international environmental human rights, as they develop, have the potential to mobilize international resources and action regarding environmental harms related to these rights.

Adjudication of environmental human rights in IHRCs provides one of the best mechanisms for exerting pressure on democratic states to recognize the legitimate environmental interests of foreigners. These institutions allow suit to be brought by individuals against a state, regardless of a plaintiff's citizenship. Further, IHRCs can render legal judgments against a state, making it clear that the state has a legal obligation to address violations of the environmental human rights of foreigners.

So far, there have been no extraterritorial environmental human rights cases decided by IHRCs. However, John Knox, the U.N. special rapporteur on human rights and the environment, states that "there is no reason why a state should not bear responsibility for actions that otherwise would violate its human rights obligations, merely because the harm was felt beyond its borders." (United Nations Human Rights Council 2013, para. 63) Furthermore, most of the human rights instruments that he reviewed indicate that states have "obligations to protect human rights, particularly economic, social and cultural rights, from the extraterritorial environmental effects of actions taken within their territory." (United Nations Human Rights Council 2013, para. 64) He cautions that the application of human rights in cases of trans-boundary environmental harms will not always be clear, due primarily to the fact that different human rights instruments treat the issue of jurisdiction differently. (United Nations Human Rights Council 2013, para. 63) Thus, Knox's report offers support for the idea

that adjudication of environmental human rights can indeed provide the benefit of counteracting the bias inherent in democracies.

Now let us consider the way in which adjudication can facilitate a mutually supporting relation between the last two benefits. The first three benefits are ultimately concerned with the role of human rights in the relationship between states and their domestic residents. The fourth fifth, and sixth benefits, by contrast, are internationally-focused. Thus, it is not surprising that we would find supportive relations among the first three benefits on the one hand, and among some of these latter benefits on the other. Adjudication of environmental human rights can facilitate a mutually supportive relationship between the fifth and sixth benefits. Adjudication can function as a policing mechanism to ensure that states comply with human rights when they are used as coordination norms for addressing global or international problems. When such cases involve issues that affect the human rights of foreigners, adjudication can also help to correct the inherent bias in democracy and lead states to address the legitimate interests of foreigners. This shows that adjudication facilitates a supportive relationship from the fifth benefit to the sixth. But adjudication can also facilitate a supportive relationship in the other direction, from the sixth benefit to the fifth. Adjudication in IHRCs provides a mechanism for ensuring that states respect the legitimate interests of foreigners, by allowing individuals to bring suits against foreign states. In cases where the human right at issue is also one used as a coordination norm to address a global or international problem, such adjudication also be used to police and ensure state compliance with the coordination norm. Thus, adjudication can facilitate a mutually supportive or reinforcing relationship between the fifth and sixth benefits.

Now that we have discussed the six benefits, we can see that adjudication of international environmental human rights actually enhances most of these benefits, and thus provides additional value. Adjudication is able to enhance the benefits in at least two ways: first, it provides a stronger mechanism for realizing some of the benefits; and second, it facilitates a mutually supportive or reinforcing relationship among some of the benefits. Given that adjudication is able to enhance the benefits in these ways, it is likely to increase the degree to which the benefits are realized, and thus the value that they add. If the benefits are realized to a greater degree by adjudication of human rights in IHRCs, then the Argument from Benefits provides an even stronger justification for adjudicating environmental human rights, than it does for having a system of international legal human rights as whole, which might or might not include such courts. Buchanan emphasizes that many of these benefits could be realized, at least to some degree, in the absence of external pressure or an external enforcement mechanism, such as IHRCs. However, we should recognize the way in which adjudication of environmental human rights in such courts can enhance these benefits, and thus the greater value that it can add.

7. Provides a *potential* resource for regulating global economic institutions.

Finally let us consider one more potential benefit that a system of international legal human rights could contribute. Buchanan points out that a limitation of existing international human rights law is that it allows only for the regulation of states, and not for the regulation of other international actors, such as international economic organizations and multi-national corporations. However, in principle there is no obstacle to an agreement among states to modify the international human rights system in this way. Thus, the international legal human rights system has the potential to provide the

benefit of imposing human rights obligations on international economic institutions, such as the International Monetary Fund and World Bank. (Buchanan 2013, 283-284)

This potential benefit could be very important in the area of environmental rights. May and Daly argue that the terms of the global environmental debate have been dictated by the values of the global North, and that these terms have been facilitated in particular through the policies and actions of global economic institutions such as the International Monetary Fund and World Bank. International human rights law could be modified to constrain and regulate the policies and actions of these institutions. Obviously, this benefit can only be realized through uniform international environmental human rights, and could not be achieved if there are only a myriad of different conceptions of constitutional environmental rights. Furthermore, the fact that international human rights are developed with the input of people from a variety of cultures and societies means that environmental human rights can embody environmental values that are non-parochial, and thus provide constraints on these institutions that do not represent the values of only certain societies or cultures.

Conclusion

It should be clear that the Argument from Benefits provides a very strong justification for international environmental human rights and the adjudication of such rights in IHRCS. Most of the added value that helps to justify the international legal human rights system generally, is also manifested in a particular family of rights which are a part of that system, namely, environmental human rights. Furthermore, these same benefits are realized, and enhanced, by adjudication of environmental human rights in IHRCS. So the very benefits that justify the system of international legal human rights

also justify to an even stronger degree the adjudication of environmental human rights in IHRCs. The justification works all the way down. This is because the same benefits add value in all of these domains. Therefore, since the Argument from Benefits offers good reason to create and implement a system of international legal human rights, it also provides strong justification for the adjudication of environmental human rights in IHRCs. Furthermore, it demonstrates why environmental constitutional rights alone cannot provide the benefits that a system which includes international environmental human rights has the ability to offer.

Chapter 5

Conceptualizing the Corporate Responsibility to Respect Human Rights

In the previous chapter, it was suggested that environmental human rights could be based on universal values that place constraints on the ways in which societies may choose to balance the competing values of environmental protection and development. In this chapter I will develop an account of the corporate responsibility to respect human rights, which further considers the relevance of cultural and institutional differences. However, in the previous chapter the focus was on how cultural differences could be constrained by the content of (environmental) human rights, whereas in this chapter the focus will be on cultural difference being constrained by, but also informing, the obligations that arise from human rights. In the first section, I will examine the precise obligations created by Ruggie's corporate responsibility to respect human rights. In the second section, I will consider a criticism of Ruggie's corporate responsibility to respect human rights, namely, that it involves only negative obligations. While the first chapter addressed the criticism that political conceptions of human rights will necessarily prescribe only an obligation for corporations to respect human rights, the criticism addressed here is that the concept of respect for rights entails only negative obligations. I will reject this claim by showing that Ruggie's corporate responsibility to respect human rights does include positive obligations, and that (most of) these positive obligations are justified on the basis of respect for rights. In the third section, I will further develop the idea that respect for rights can involve positive obligations, arguing that in the case of certain rights and types of relationships, a corporation may have positive obligations that

Ruggie did not anticipate. Taken together, the second and third sections offer a particular interpretation and critique of Ruggie’s corporate responsibility to respect human rights, in some ways defending it, in other ways criticizing it, while finally showing that it may create more expansive obligations than he realized. In the fourth and final section, I will argue that respect for human rights is a universal obligation, but that some aspects of this obligation—primarily the positive aspects—can only be determined in the context of the various social and institutional arrangements of particular societies. I will draw on the Integrative Social Contract Theory developed by Thomas Donaldson and Thomas Dunfee to help situate this claim.

The Corporate Responsibility to Respect Human Rights

Let us begin by considering the precise obligations created by the corporate responsibility to respect human rights, as specified in Ruggie’s “Protect, Respect, and Remedy” Framework and Guiding Principles. The scope of the corporate responsibility to respect human rights is defined by the following two general requirements:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to operations, products or services by their business relationships, even if they have not contributed to those impacts.

(United Nations Human Rights Council 2011, 14)

These requirements show that the responsibility pertains to two spheres: a corporation’s own activities and a corporation’s business relationships. The obligations created by the corporate responsibility to respect human rights will vary to some extent across these spheres.

First, at the most general level, Ruggie’s Protect, Respect, and Remedy Framework holds that “to respect rights essentially means not to infringe on the rights of others—put simply, to do no harm.” (United Nation Human Rights Council 2008, 9) As part of this general obligation, corporations are required to have the following:

- (a) A policy commitment to meet their responsibility to respect human rights.
- (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

(United Nations Human Rights Council 2011, 16)

The policy statement is designed to provide a public statement of the responsibilities and commitments of the corporation, and to communicate these things both internally to the corporation’s own personnel, as well as externally to those entities the corporation has a contractual relationship with, along with stakeholders who may potentially be affected. (United Nation Human Rights Council 2011, 16-17)

The requirement of a due diligence process is based on the idea that a corporation must be able to “know and show” that it is in fact respecting human rights. To this end, a corporation must have in place a due diligence process that involves “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.” (United Nation Human Rights Council 2011, 17) Furthermore, the due diligence process should cover actual and potential negative human rights impacts that the corporation may cause itself, as well as negative impacts that it may contribute to or be directly linked to through its business relationships. If the due diligence process reveals that a corporation is causing or contributing to negative human rights impacts, or may do so, then the corporation has an

obligation to cease causing or contributing to, or to prevent, these impacts. (United Nation Human Rights Council 2011, 21)

Finally, there is a requirement for a corporation to have in place a remediation process for addressing negative human rights impacts that it has caused or contributed to. As part of this process, a corporation must have operational-level grievance mechanisms that “are accessible directly to individuals and communities that may be adversely impacted by a business enterprise.” (United Nation Human Rights Council 2011, 31) These mechanisms should allow those with complaints to directly engage the corporation about their grievances, and not require that they first access other means of recourse. In situations where crimes are alleged, a corporation will typically be required to cooperate with judicial mechanisms. (United Nation Human Rights Council 2011, 25) As part of the remediation process, a corporation is required to remediate negative human rights impacts that it has directly caused or has contributed to. (United Nation Human Rights Council 2011, 24)

Obligations in the sphere of business relationships require further elaboration. Business relationships include relationships with entities such as partners, suppliers, governments, and non-government entities, among others. The due diligence process requires that a corporation monitor and make efforts to be aware of these potential aspects of its business relationships, through among other things, human rights impact assessments. A corporation may find that it has a business relationship with another entity that is involved with negative human rights impacts. There are two possible ways that a corporation can be related to negative human rights impacts through a business relationship: (i) the corporation *contributes* to the negative human rights impacts caused

by the other entity, or (ii) the corporation is *directly linked* to the negative human rights impacts through the other entity. Ruggie does not offer precise definitions of the concepts “contribute” and “directly linked,” but he does provide an example of each to help illustrate their meanings. The example of “contributing” to the negative human rights impacts of another entity is providing financing to a construction project that will result in forced evictions or fails to adhere to international labor standards. In this case, the corporation—presumably a bank or financial company—provides financing to another entity, which directly facilitates the other entity in causing negative human rights impacts. The example of being “directly linked” to negative human rights impacts is when a supplier of a corporation subcontracts work to another entity that uses forced labor, without the corporation’s knowledge that the supplier is subcontracting to such an entity. In this case, the corporation is unaware that the supplier is contributing to negative human rights impacts, but is nevertheless linked to those impacts through its operations, products, or services. (United Nations Human Rights Council 2011, 31) The difference between these two types of involvement seems to center on two factors: (i) knowledge, and (ii) nature of contribution. In the case of “contributing,” the corporation knows, or at least should know through its due diligence process, that its relationship with the other entity will facilitate the other entity in causing negative human rights impacts. Furthermore, there is a very direct sense in which the corporation enables the other entity to cause the negative human rights impacts (e.g. financing the project through which the other entity will cause the negative impacts). In the case of being “directly linked,” the corporation does not initially know that the other entity is involved with negative human rights impacts, but may eventually discover this through the due diligence process.

Furthermore, the corporation has a less direct relationship in terms of facilitating or contributing to the negative impacts. For example, the corporation's relationship with the supplier provides some revenue to the supplier, which in turn helps enable the supplier to use the subcontractor that causes negative human rights impacts. However, the supplier may have many other customers. For this reason, it is difficult to claim that the corporation's particular relationship with the supplier provides the means that facilitate the supplier in using the subcontractor that engages in forced labor practices. All of the supplier's customers—including the corporation—marginally facilitate this, and hence all of them are “directly linked” (rather than “contribute”) to the negative impacts.

It is worth pointing out one final possibility concerning the distinction between “contributing” and being “directly linked.” In the example given, it seems that we can understand the supplier as “contributing” to the negative human rights impacts caused by the subcontractor that engages in forced labor practices, at least if the supplier is financing the operations or project in which the subcontractor employs the forced labor. If that is true, then we may be able to understand a corporation as being “directly linked” to negative human rights impacts, when it has a business relationship with another entity that “contributes” to those impacts. In other words, to be “directly linked” is to be one-step removed from “contributing.”

Now let us examine the precise obligations entailed by the corporate responsibility to respect human rights in the case of the each type of business relationship. When a corporation contributes to negative human rights impacts caused by another entity, the corporation has an obligation to cease and prevent its contribution to those negative impacts, and to mitigate any remaining impacts. (United Nations Human

Rights Council 2011, 21) One way in which the corporation can accomplish this is by exercising leverage over the other entity, where leverage is defined as “the ability to effect change in the wrongful practices of an entity that causes a harm.” (United Nations Human Rights Council 2011, 21) The corporation also has an obligation to actively engage in remediation of the negative impacts, by itself or in cooperation with other entities. (United Nations Human Rights Council 2011, 24)

When a corporation is directly linked to negative human rights impacts through its business relationship, a number of factors will determine the required course of action, including the corporation’s leverage over the other entity, how crucial the relationship is to the corporation, the severity of the human rights abuse, and whether termination of the relationship would itself lead to negative human rights impacts. (United Nations Human Rights Council 2011, 21-22) Perhaps the most important factor is leverage. If a corporation has leverage in such a situation, then the corporation has an obligation to exercise that leverage to prevent or mitigate the negative impacts. Furthermore, if the corporation lacks leverage over the other entity, the corporation is required to look for ways to increase its leverage. Possible ways of doing that include offering “capacity-building or other incentives” to the other entity, or “collaborating with other actors.” A final possibility is that the corporation has no leverage over the other entity and is unable to increase its leverage. In this case, the corporation should consider terminating the business relationship, while considering whether termination would itself have negative human rights impacts. In some cases, the business relationship is “crucial” to the corporation, meaning the product or service provided by the other entity is essential to the corporation and no alternative source is available. If the situation involves a crucial

business relationship, then the corporation must consider the severity of the negative human rights impact caused by the other entity. The more severe the negative impact, the more quickly the corporation will need to see change before deciding to terminate the relationship. Furthermore, if the corporation continues the business relationship, the corporation should be able to show that it is making ongoing efforts to mitigate the negative human rights impacts caused by the other entity, and be prepared to accept any consequences (reputational, financial, or legal) that come with continuing the relationship. (United Nations Human Rights Council 2011, 22) A corporation is not required to remediate negative human rights impacts that it is merely directly linked to through a business relationship. (United Nations Human Rights Council 2011, 24)

Now that we have an outline of the precise obligations required by Ruggie's corporate responsibility to respect human rights, let us turn to a criticism of this norm, as well as a consideration of the concept of respect for rights, upon which these obligations are supposed to be based.

Respect for Rights and Negative vs. Positive Obligations

One criticism that has been made of Ruggie's corporate responsibility to respect human rights is that it is too restrictive, because it involves only negative human rights obligations and fails to impose any positive human rights obligations on corporations. Florian Wettstein, for example, contends that Ruggie's focus on requiring corporations merely to respect human rights creates "an overly narrow focus on corporate obligations of a negative kind, that is, on obligations of non-interference and 'do no harm.'" (Wettstein 2012, 745) The result, Wettstein contends, is that "...Ruggie's tripartite

framework defines human rights obligations of corporations exclusively in negative terms as duties to *respect* human rights, while assigning all duties in the positive realm to the state alone.” (Wettstein 2012,745) But does this criticism have merit? It seems to be contradicted by at least three explicit aspects of the corporate responsibility to respect human rights: the due diligence process, remediation and the remediation process, and the obligation to use leverage in the context of business relationships. Let consider each of these in turn.

As previously discussed, Ruggie’s corporate responsibility to respect human rights requires that companies have in place a due diligence process that includes assessing potential human rights impacts, integrating, tracking, and acting upon this information, and communicating how the corporation is doing so. These requirements seem to clearly involve positive obligations. In other words, the requirement of a corporation to have a due diligence process is not merely an obligation to refrain from doing something; rather, it is requirement to take positive actions to “know and show” that a corporation is respecting human rights. Such “knowing and showing” requires that a company develop and implement mechanisms for monitoring and ensuring compliance with respect for human rights, as well taking action to prevent any negative impacts that might occur. Critics such as Wettstein are no doubt aware that the corporate responsibility to respect human rights includes the due diligence process and the positive obligations that it entails. So is there a way to reconcile this awareness with the criticism that the corporate responsibility to respect human rights defines obligations in “exclusively in negative terms”?

One possible way of reconciling this apparent discrepancy is to draw a distinction between *direct* and *derived* obligations. Direct obligations are requirements directly created by the obligation to respect human rights. This might involve simply an obligation to refrain from causing or contributing to negative human rights impacts. Derived obligations, on the other hand, are obligations created by, or derived from, direct obligations. Rather than derived obligations directly arising from an obligation to respect human rights, such obligations arise only after direct obligations have been identified and are based on the direct obligations. Using this distinction, it might be argued that the positive obligations involved in the due diligence process are merely derived obligations. Critics such as Wettstein might then sustain the contention that the corporate responsibility to respect human rights creates only negative obligations by arguing that the direct obligations created by this responsibility are purely negative, even if additional positive obligations, such as the due diligence process, can be derived from those direct obligations. However, even if this distinction offers a way of preserving Wettstein's criticism, it nevertheless includes an acknowledgment that respect for rights can ultimately entail positive obligations, at least in a derived sense.

Finally, the requirement of a due diligence process seems justifiable on the basis of respect for rights. Even if this requirement is not directly entailed by respect for rights, it is quite understandable that the direct obligation created by respect for rights, to not cause or contribute to negative human rights impacts, can entail a derived obligation to ensure—that is, to “know and show”—that the corporation is in fact meeting that direct obligation.

Let us now turn to the second type of positive obligation included in Ruggie's corporate responsibility to respect human rights, the obligation to remediate negative human rights impacts when they have occurred and to have available a remediation process. We will need to treat each of these separately. First, remediation itself should be understood as a direct obligation. This is because the corporate responsibility to respect human rights includes both a direct obligation not to cause or contribute to negative human rights impacts, and a direct obligation to remedy such impacts when the corporation has caused or contributed to them. Of course, this obligation to remediate will arise only in circumstances where a corporation has caused or contributed to negative impacts. Here it is helpful to introduce the distinction between a contingent and a universal obligation. A contingent obligation is one that arises only under certain circumstances, whereas a universal obligation is one that is always present regardless of particular circumstances. The obligation to remediate negative human rights impacts is a *contingent* direct obligation, as it arises only in circumstances where the corporation has caused or contributed to such impacts. The obligation not to cause or contribute to negative human rights impacts, on the other hand, is a *universal* direct obligation, because a corporation is always under such an obligation. We can also note that the requirement for a due diligence process is a *universal* obligation, because a corporation is always under an obligation to "know and show" that it is in fact respecting human rights, although the due diligence process is a universal derived obligation.

Next we can consider the requirement to have available a remediation process. This requirement is like the requirement for a due diligence process, in that it is derived and universal. The requirement to have available a remediation process is derived

from the direct obligation to remediate any negative human rights impacts the corporation has caused or contributed to, just as the requirement to have a due diligence process is derived from the direct obligation not to cause or contribute to negative human rights impacts. And the requirement to have a remediation process available is universal, just like the requirement to have a due diligence process, because a corporation is under this requirement at all times. In other words, while the obligation to remediate itself is contingent, because it only arises in circumstances where the corporation has caused or contributed to negative human rights impacts, the requirement to have available a remediation process is universal, as a corporation must always have this process available as an avenue for grievance to anyone who may suffer a negative human rights impact that the corporation causes or contributes to.

Both the obligation to remediate and the obligation to have available a remediation process seem justifiable on the basis of respect for rights. As stated above, respect for rights directly entails that a corporation not cause or contribute to negative human rights impacts, and it therefore seems logical that it will also directly entail an obligation to remediate such negative impacts if the corporation causes or contributes to them. Furthermore, while the requirement to have a remediation process available is not directly entailed by respect for rights, similar to the case of the due diligence process, it is entirely understandable that the direct obligation created by respect for rights—to remediate any negative human rights impacts that a corporation has caused or contributed to—can entail a derived obligation to have available such a process. The remediation process is a means of facilitating its direct obligation to remediate negative impacts.

The final type of positive obligation included in Ruggie's corporate responsibility to respect human rights is the requirement to exercise leverage to prevent or mitigate negative human rights impacts in the context of business relationships. The requirement to exercise leverage, which is "the ability to effect change in the wrongful practices of an entity that causes a harm," is clearly a positive obligation, as it requires the corporation to take certain positive actions with regard to another entity. It will be helpful to compare this obligation with the requirement for remediation. As with the requirement to remediate negative human rights impacts, we can understand the requirement to exercise leverage as a contingent obligation, because it arises only in circumstances where the corporation contributes to or is directly linked to negative human rights impacts through a business relationship. To determine whether the requirement to exercise leverage is a direct or derived obligation, we will need to examine whether this obligation can be justified on the basis of respect for rights. However, as it will turn out, the answer may differ in the case of contributing to negative impacts and the case of being directly linked to negative impacts, so let us examine each case in turn.

Recall that contributing to negative human rights impacts involves cases in which a corporation knows, or should know, that the other entity in a business relationship is causing negative human rights impacts, and the corporation in some way directly facilitates those impacts. The example that Ruggie offers involves a corporation financing another entity in carrying out a project that causes negative human rights impacts. In such cases, it is fairly easy to understand the corporation as failing in its direct obligation to respect human rights, because even though the corporation itself is not causing the negative impacts, it is knowingly (or should know) and directly

facilitating another entity in causing those impacts. So in the case of contributing to negative human rights impacts, we can again see the similarity between the requirement to exercise leverage and the requirement to remediate negative human rights impacts. In both cases, these contingent obligations arise when the corporation has failed in its direct obligation not to cause or to contribute to negative human rights impacts. And just as the obligation to remediate negative impacts is a direct obligation entailed by respect for rights, it seems reasonable to understand the requirement to exercise leverage in order to prevent or mitigate negative impacts to which the corporation contributes as a direct obligation. In other words, if a direct obligation to remediate negative impacts the corporation has caused or contributed to can be justified on the basis of respect for rights, it would seem that a direct obligation to prevent or mitigate negative impacts the corporation has contributed to can also be justified on the basis of respect for rights. So the requirement to exercise leverage over another entity to prevent or mitigate negative human rights impacts, where the corporation contributes to—knowingly and directly facilitates—those impacts, is a contingent direct obligation.

In the case where a corporation is directly linked to negative human rights impacts caused by another entity, it is less clear that we can understand the requirement to exercise leverage as justified on the basis of respect for human rights. Recall that being directly linked with negative human rights impacts caused by another entity involves the corporation being (at least initially) unaware that the other entity in a business relationship is involved with a third party that causes these impacts. Furthermore, there is in some sense an absence of facilitation of—or causation or contribution to—the negative impacts on the part of the corporation. Let us consider

these two aspects of being directly linked to negative human rights impacts, the degree of facilitation/contribution and the degree of knowledge, and how they bear on respect for rights.

In terms of the degree of facilitation/contribution, it is notable that Ruggie distinguishes the concepts “directly linked” and “contributes.” Ruggie claims that a corporation can be “directly linked” to negative impacts through its operations, products, or services, and implies that a corporation is in some way complicit in these circumstances. However, being linked to negative impacts via operations, services, or products clearly involves some type of lesser relation than contributing to those negative impacts. This difference is underlined by the fact that Ruggie’s corporate responsibility to respect human rights requires a corporation to provide remediation in cases where it is contributing to negative human rights impacts, but not in cases where it is merely directly linked to those impacts. In the example of contributing, the corporation directly facilitates the other entity in causing the negative human rights impacts, by financing the project through which the other entity causes those impacts. However, in the example of being directly linked, the corporation is not directly facilitating or contributing to the negative impacts. Rather, a supplier used by the corporation has subcontracted work to a third entity that causes negative impacts. The corporation may be one of many customers who use this supplier, in which case it is difficult to meaningfully say that the corporation in particular is facilitating or contributing to the negative human rights impacts caused by the supplier’s subcontractor. Rather, each customer of the supplier may be marginally contributing to the supplier’s facilitation of the subcontractor. The reason this lack of facilitation or contribution is important, is that without that element, it is difficult to

understand the requirement to exercise leverage as being derived from a failure to meet the corporation's obligations to respect human rights. And if it is difficult to understand the requirement to exercise leverage as a result of these obligations, then it is difficult to understand the requirement to exercise leverage as obligation based on respect for rights. It does seem reasonable to hold that in virtue of whatever marginal contribution the corporation makes to the situation, respect for human rights requires that the corporation take certain actions towards ending its relationship with the supplier. But it seems less justified to require, as Ruggie does, that a corporation exercise leverage to mitigate and prevent these negative impacts caused by the third party, and even almost certainly unjustified to require that a corporation attempt to develop such leverage if it does not currently have it. This will become clearer as we turn to the other aspect of being "directly linked" to negative impacts, the degree of knowledge.

The issue of knowledge appears to play a significant role in the distinction between contributing to and being directly linked to the negative impacts, given Ruggie's examples. In the case of contributing to negative human rights impacts through a business relationship, the corporation knowingly (or should know that it) facilitates the other entity in causing those impacts. By contrast, being directly linked to negative human rights impacts through a business relationship involves an absence of knowledge that the other entity is involved with negative impacts. Perhaps we can distinguish two types of cases: 1) the case where a corporation should have known, and 2) the case where it is not reasonable to expect the corporation to have known. In the first type of case, where a corporation is directly linked to negative impacts and *should* have known the other entity was involved with negative impacts, we can think of this as a failure of the

corporation to meet its obligations entailed by the due diligence process. This is because if the corporation had been properly meeting the requirements of the due diligence process, then it would have known the supplier was involved with an entity causing negative human rights impacts and could have avoided entering or continuing a business relationship with the supplier. This failure to properly meet the requirements of the due diligence process can be understood as a failure to satisfy this aspect of the corporate responsibility to respect human rights, and therefore suggests that the requirement to exercise leverage in such cases can be justified on the basis of respect for rights. The requirement to exercise leverage in these cases is in some sense a remedial obligation, which is required to help rectify a failure of respect for rights that the corporation should have known about and could have avoided. This obligation is contingent and derived, because it only arises in cases where the corporation is directly linked to negative impacts that it should have known about, and derives from (a failure to meet the requirements of) the due diligence process. Now let us turn to the second type of case, where it is not reasonable to expect the corporation should have known the supplier was involved with another entity causing negative human rights impacts. These are cases in which despite having conducted an adequate due diligence process, the corporation could not have reasonably known about a third-party entity that is causing negative human rights impacts, and to which the corporation is “directly linked” in Ruggie’s sense of that term. In this case, it is quite difficult to claim the corporation has failed to respect human rights, as it did not cause or contribute to the negative human rights impacts, and has at most an indirect and negligible degree of facilitation of these impacts. Furthermore, it properly carried out its positive obligations concerning the due diligence process, and could not

reasonably have known these impacts were being caused by a third party. In such cases, it does not seem reasonable to claim that a corporation is required to exercise leverage to prevent and mitigate these negative impacts, at least on the basis of respect for rights. Instead, a requirement to exercise leverage in such cases looks more like an obligation based on protection of human rights. That is, if the corporation is at best marginally and indirectly facilitating negative human rights impacts, and could not reasonably be expected to have knowledge of this via the due diligence process, then the only basis for claiming that the corporation is required to exercise leverage to prevent and mitigate these impacts, would be an independent obligation of the corporation to protect human rights. And that is obviously even more true of Ruggie's requirement that if the corporation does not have leverage in such a situation, it must attempt to develop and exercise that leverage. Thus, we can conclude that the obligation to exercise, or to develop and exercise, leverage in cases where a corporation is merely "directly linked" to negative human rights impacts and could not have reasonably known about this through an adequate due diligence process, are not requirements that can be justified on the basis of respect for rights. Ruggie is wrong to include these obligations in his corporate responsibility to respect human rights. If Ruggie continues to hold that corporations should have such obligations, then he will need to develop and specify a corporate responsibility to *protect* human rights.

Respect for Rights and Direct Positive Obligations

As we have seen, respect for rights can entail positive obligations, as explicitly recognized (and in most cases justified) by Ruggie's corporate responsibility to respect

human rights. Perhaps even Wettstein would acknowledge that most of the positive obligations Ruggie explicitly includes are justified on the basis of respect for rights. However, I believe respect for rights can include positive obligations that Wettstein, and perhaps even Ruggie himself, does not recognize. These are not derived positive obligations, such as the requirement to have a due diligence process or a remediation process, nor a direct positive obligation in the sense of the requirement to remediate negative human rights impacts that a corporation has caused or contributed to. Rather, these positive obligations that arise out of the direct obligation not to cause or contribute to negative human rights impacts, and are determined by the object of the right and relationship between the right-holder and the duty-bearer. In explaining how these positive obligations arise based on respect for rights, I hope to show the corporate responsibility to respect human rights is more demanding than Wettstein, and probably also Ruggie, realize.

While Ruggie does indeed characterize the corporate responsibility to respect human rights as an obligation to first and foremost “do no harm,” and holds that “‘respecting’ rights means to not violate them, to not facilitate or otherwise be involved in their violation,” (Ruggie 2013, 95) we need to see that this generates different types of obligations depending on the object of the right and the relationship between right-holder and duty-bearer. In order to illustrate how these positive obligations arise, we need to examine some specific human rights, rather than continue discussing respect for human rights in general. So let us use as our example what may be called “work-related human rights.” Work-related human rights are those human rights concerned with work and employment, and thus are among the human rights most likely to be encountered in the

course of business activity, as essentially any corporation is going to employ workers. In terms of the international Bill of Human Rights, work-related human rights are found primarily in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). We can divide these work-related human rights into six categories, and then consider the positive obligations created by the rights in each category.

A first category of work-related human rights can be referred to as “liberty work rights,” because these rights are concerned with work-related liberties. This category includes rights to free choice of employment, freedom to form and join unions, and freedom to strike. Within this category, the corporate responsibility to respect primarily obligates companies to refrain from interfering with workers’ choices and actions. With respect to the right to free choice of employment, a company should not attempt to coerce or obstruct a person from engaging in the work of his or her choice. For example, a company must not attempt to coercively prevent a current employee from leaving the company in order to pursue other work, nor should a company attempt to prevent someone from competing in the marketplace, and thereby interfere with the person pursuing her chosen type of work. When it comes to the right to form and join unions and the right to strike, the corporate responsibility to respect human rights demands that a company refrain from interfering with individual workers’ choice to form or join a union, or to undermine workers’ rights to engage in collective bargaining, or to go on strike as a means of negotiation. The corporate responsibility to respect also places limitations on a company’s right to relocate operations in response to union demands and strikes. If a company relocates operations simply as an effort to undermine unions and their right to

strike, then the company has failed to respect these human rights. The corporate responsibility to respect human rights obligates a company to demonstrate, through its due diligence process, that relocation of operations is not intended simply to undermine these rights. In the case of liberty work rights, the corporate responsibility to respect generates primarily negative duties. Although, as we can see, the due diligence process involves a positive duty to “know and show” that these negative duties are being complied with.

A second category of work-related human rights can be referred to as “non-discrimination work rights.” This category includes rights to equal pay for equal work, and equal opportunity for promotion. When it comes to the corporate responsibility to respect, these rights will create obligations similar to those created by liberty work rights. Of course a company is obligated to refrain from engaging in discriminatory practices among its workers when it comes to issues of pay and promotion, which is a negative duty. But when it comes to actually refraining from such practices, this will generally require policies and monitoring. In other words, the due-diligence process will once again have an important role to play. Decisions concerning pay and promotion will need to be governed by policies and monitoring to ensure that all levels of management comply with respect for non-discrimination rights. Furthermore, it will be important for a company to have in place processes of remediation available to workers who may have complaints regarding infringements of their non-discrimination rights. So when it comes to non-discrimination work rights, as with liberty work rights, the corporate responsibility to respect generates not only negative duties, but also positive duties to have policies that involve monitoring and ensure compliance with those negative duties.

A third category of work-related human rights comprise a group that can be referred to as “conditions and terms of work rights.” This category includes rights to safe and healthy working conditions, reasonable limits on working hours, fair wages and a decent living, and rest and leisure (including periodic holidays with pay). When it comes to determining obligations under the corporate responsibility to respect, this category of rights presents greater difficulties than the previous two categories. This is because some of these rights require positive *provision* to achieve their fulfillment. As we have seen in the case of the previous two categories of work-related rights, respect for human rights can give rise to derived positive obligations, like the role of the due diligence process. For example, a company must perform due diligence to ensure that negative obligations of respect are being complied with. But some of the rights in this third category are different, because they require positive *provision* in order to respect the right in the first place. In other words, positive obligations arise not simply as derived obligations of ensuring compliance with negative duties, but rather providing the object of the right is an essential part of respecting the right in the first place.

Let us begin by examining the relatively easy right in this category, which is the right to reasonable limits on working hours. As with the two previous categories of work-related rights, there is no positive provision required to place reasonable limits on the number of hours employees are required to work each day. A company can respect this right simply by refraining from requiring employees to work unreasonably long hours. And as with the two previous categories of work-related rights, derived positive obligations arise because a company will need to create policies for monitoring and ensuring compliance with its direct negative obligations.

But the remaining rights in this category require positive provision for their realization. First, consider the right to safe and healthy working conditions. Notice that in order to make sense of respect for the right to safe and healthy working conditions, a company must not only refrain from doing something (requiring workers to work in unsafe or unhealthy working conditions), but also provide something positive (investment in, and maintenance of, safe and healthy working conditions). Similarly, respect for the right to fair wages and a decent living requires a company not only to refrain from doing something (requiring workers to work for unfair wages or less than a decent living), but also to provide something positive (fair wages and a decent living). Finally, respect for the right to rest and leisure, including periodic holidays with pay, creates a similar set of duties. A company must not only refrain from doing something (denying workers rest and leisure time, and periodic holidays with pay), but must also provide something positive (periodic holidays with pay). In the case of each of these rights, a corporation cannot respect the right without providing the object of the right. It is not clear, for example, what it would mean to respect the right to safe and healthy working conditions if a corporation does not provide such working conditions. In the absence of providing such working conditions, a corporation could simply not employ anyone and there would be no failure of respect for this right. In that case, the corporation would not be requiring anyone to work in unsafe or unhealthy working conditions. But assuming the corporation is going to employ some people, the only way it can respect these workers' rights to safe and healthy working conditions is by actually providing such conditions. And the same is true for fair wages and a decent living, and periodic holidays with pay. In addition,

each of these rights, as with the previous categories of rights, will give rise to the derived positive obligations entailed by the due diligence process.

The positive duties of provision generated by respect for these particular rights are direct duties. The nature of these rights is such that we cannot make sense of “respecting” them apart from positive action to provide the objects of the rights. And this derives from the type of object these are rights to. The object of certain rights, such as non-discrimination rights, are something that a corporation can respect, at least in terms of direct obligations, simply by refraining from infringing on the object of the right. But the object of other rights, such as safe and healthy working conditions or fair wages, are not something a company can respect simply by refraining from doing something. The very nature of respect, when it comes to these rights, requires that a company actually provide something. And thus, respect for such rights creates positive duties of provision.

Before moving on to the final three categories of work-related human rights, let us recall the second aspect of Wettstein’s critique. He offers an alternative account of corporate human rights obligations, which proposes to distribute positive human rights obligations based on the degree of an agent’s capabilities. The proposal is to assign positive human rights obligations to corporations based on their level of capability, rather than limiting corporate human rights obligations to mere respect for these rights. The final three categories of work-related human rights can help to illustrate why Ruggie’s corporate responsibility to respect human rights may be preferable to such a capabilities-based distribution.

A fourth category of work-related human rights can be referred to as “unemployment-related work rights,” as these rights are most likely to concern those who

are unemployed or are threatened with unemployment. The rights in this category include rights to unemployment protection, technical/vocational training programs, and the right to work. Once again, the rights in this category require positive provision in order to fulfill the right. However, there are many unemployed people who need unemployment protection as a means to survive, and could use technical/vocational training to help them enter or re-enter the workforce. So the question arises, does respect for rights require corporations to provide the object of these rights? In order to answer this question, we need to compare respecting a right with fulfilling a right. Respecting a right means not infringing upon or violating the right. Fulfilling a right, on the other hand, means providing the means for the realization of the right. Up to this point, we have examined several rights that require positive provision. But each of these rights have related to employment (safe and healthy working conditions, fair wages and a decent living, and periodic holidays with pay). And, as we have seen, if a corporation is going to employ workers, then it cannot respect these rights of workers, without also fulfilling them. In other words, in the case of these rights, respect for the rights entails the same obligation as fulfillment of the rights.

However, the rights in this fourth category relate to unemployment either directly or indirectly. Unemployment protection and technical/vocational training directly relate to unemployment. Unemployment protection is designed to provide a means to subsistence for those who are unemployed, while technical/vocational training is intended to provide training for those who are unemployed, in order to assist them in entering or re-entering the work force. Does respecting these rights entail the same obligation as fulfilling them? The answer is no, for the following reason: A company can respect these

rights by not interfering with the state's effort to provide the objects of these rights. For example, a corporation should refrain from lobbying against government legislation or taxation that is intended to provide unemployment protection or technical/vocational training programs for the unemployed. So long as a corporation refrains from infringing on these rights, by for example interfering with the means that the state employs to fulfill these rights, then the corporation has respected the rights. Respect for these rights does not require a corporation to provide the object of the rights, because the corporation does not have a special relationship with the unemployed. By contrast, it does have a special relationship with its employees. As we have seen, the corporation cannot respect its employees' rights to safe and healthy working conditions, fair wages and a decent living, or periodic holidays with pay, without providing the object of those rights. But the corporation can respect an unemployed person's right to unemployment protection and technical/vocational training without providing the object of those rights. In other words, respecting a right will not entail the same obligations as fulfilling the right, in the absence of the employment relationship. For this reason, the corporate responsibility to respect human rights does not create an obligation on the part of business to provide unemployment protection or technical/vocational training programs for unemployed workers.³⁶

The human right to work deals with unemployment in an indirect manner. This is because when the Committee on Economic, Social, and Cultural Rights issued General

³⁶ A corporation might have an obligation to provide technical/vocational training for a current employee who the corporation is considering laying off. Similarly, a corporation might have an obligation to set aside money as unemployment protection for a current employee, in case it decides later to layoff and terminate an employee. But in these cases, the employment relationship between the corporation and current employee presently exists. I will not explore these possibilities in this paper, as they concern more detailed examination of the rights in question.

Comment No. 18, which deals with the right to work among other work-related topics, the Committee made it clear that the right to work does not entitle the right-holder to a job. “The right to work should not be understood as an absolute and unconditional right to obtain employment.” (Committee on Economic, Social, and Cultural Rights 2006, 3) Rather, the human right to work entitles people to certain protections and policies. These protections include the right to freely choose or accept work, not to be forced in any way to perform work, to have guaranteed access to employment markets, and not to be unfairly deprived of employment. (Committee on Economic, Social, and Cultural Rights 2006, 3) The aforementioned protections concern the form of work, but the right to work also puts certain requirements on the substance of work. The human right to work requires that the work given to a right-holder be decent work.

This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment. (Committee on Economic, Social, and Cultural Rights 2006, 3)

So “decent work” is defined primarily in terms of work that conforms to other work-related human rights (safe and healthy working conditions, fair and decent wages), but also adds that the work must respect the physical and mental integrity of the worker. In addition to these protections concerning both the form and substance of work, the human right to work entitles right-holders to certain policies. First, the state must “take the requisite measures to, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection.” (Committee on Economic, Social, and Cultural Rights 2006, 4)

Second, the state must take “measures aiming at achieving full employment.”

(Committee on Economic, Social, and Cultural Rights 2006, 6)

Now that we have a detailed account of the content of the human right to work, we can determine what obligations this right imposes when it comes to the corporate responsibility to respect. Some of the obligations created by the right to work do not require positive provision as the object of the right, and thus when it comes to the corporate responsibility to respect human rights, will create only negative duties. These obligations include a right-holder’s ability to freely choose or accept work, not to be forced in any way to perform work, to have guaranteed access to employment markets, and not to be unfairly deprived of employment. In other words, a corporation can respect these obligations by refraining from interfering with a person’s free choice of work, from forcing a person to perform any work, or from blocking a person’s access to employment markets. A corporation can also respect a person’s right not to be unfairly deprived of employment by refraining from unfair termination of any current employee. While the first three obligations pertain to non-employees as much as employees, the latter obligation will apply only to employees. And there is a sense in which we might think of the last obligation as requiring a form of positive provision. Once the corporation has provided something, in this case a job, the corporation then has a negative obligation to not unfairly deprive a person of this job. However, this obligation does not entirely require positive provision of something (a job), because a corporation can terminate an employee when it is done in a fair manner, and thus the corporation has the right to take away the positive provision under the right circumstances. So, we can think of this obligation as sort of a hybrid between a negative and positive duty, because it is not an

unconditional positive duty such as providing safe and healthy working conditions, but nor is it a purely negative duty, such as refraining from interfering with a person's right to join a union. Of course, there will also be positive derived obligations of due diligence to ensure the corporation is meeting its direct obligations.

Other obligations created by the right to work clearly require positive provision. This includes the provision of "decent work." The obligation to provide "decent" work functions much like the human right to a safe and healthy work environment. In both cases, respecting the right generates the same obligation as fulfilling the right. If a corporation is going to hire employees, then it must provide them with "decent" work, just as it must provide them with a safe and healthy work environment.³⁷ A corporation could respect these obligations, and avoid providing the object of the rights, if it did not hire any employees. But assuming that the corporation is going to hire employees, it will only be able to respect this right by providing the object of the right to those whom it employs.

There are two additional obligations created by the right to work, which require positive provision. These are the obligations to ensure that, insofar as possible, workers are incorporated into the formal economy, and that measures be implemented which aim at full-employment. The corporate responsibility to respect human rights can create positive direct duties with regard to the first of these obligations. This is because incorporating workers into the formal economy may demand that a corporation convert informal employees into formal ones. In this case, positive provision would be required in the form of a formal (rather than informal) job. However, a corporation could also

³⁷ As previously noted, "decent" work is defined partly in terms of a safe and healthy work environment, though it adds additional elements, such as respect for the physical and mental integrity of the worker.

respect this right by simply not employing any informal employees, or ending informal employment practices in which it currently engages (assuming that such a move would not violate the obligation to not unfairly deprive a worker of employment). The second obligation, to implement measures that aim at full-employment, is something that a corporation can respect by simply refraining from action. The state is the agent with the ability to set policies aimed at employment and hence the positive obligation to implement such measures, while an individual corporation lacks such an ability. In the case of this aspect of the human right to work, a corporation can simply refrain from interfering with the state's efforts to implement such measures, and in doing so will meet its obligations of respect when it comes to this aspect of the right to work.

A fifth category of work-related human rights can be referred to as "Policy-Related Work Rights," because the rights in this category relate to policies governing the economy. This category includes the right to economic policies that achieve steady development and full-employment. In other words, this right has been specified as an independent right, but the object of this right has since then been recognized by the Committee on Economic, Social, and Cultural Rights as part of the right to work. As mentioned above, it is government that has the ability to set economic policy. So it is government, and not a corporation, that has the obligation to provide the object of this right. However, it is worth reiterating that a corporation may have strong influence over government policy. Given this fact, the corporate responsibility to respect human rights obligates a corporation not to interfere with, or attempt to prevent government from, setting economic policies that help to achieve steady economic growth and full-employment. For example, there may be a dilemma between choosing economic policies

that will lead to very rapid, but unstable growth or choosing economic policies that will lead to steady and stable economic growth. A corporation should not attempt to lobby or influence government to implement the former, simply because this is in the interest of the corporation. Some might argue, however, that the former type of economic policy will more quickly achieve, or attempt to achieve, full-employment. In reply, it should be argued that such policies create not only rapid, but also unstable growth, which is likely to be short-lived and end in economic collapse. An economic collapse will result in increased unemployment, and thus such policies cannot really be construed as an attempt to achieve full-employment. In other words, a short-lived realization of all or most people's right to work does not constitute provision of the object of the right, if this soon results in the loss of the object of the right. More is done to realize human rights if we ensure steady growth that securely provides the object of the right for a greater and greater number of people over time.

A final category of work-related human rights can be referred to as "Group Work Rights," as these rights apply to members of specific groups. In this category are rights of women to paid maternity leave, and rights of children to a minimum work age and not to perform dangerous or harmful work. In the case of work-related rights of children, the corporate responsibility to respect human rights simply requires the corporation to refrain from hiring children who are below the minimum work age and not allowing them to work in dangerous or harmful jobs. There is no positive provision required by these rights, and hence no possibility of respect entailing fulfillment. A corporation will have positive indirect obligation to ensure through the due diligence process that it is complying with its direct obligation. By contrast, women's human right to paid

maternity leave does require positive provision. In order to respect this right of female employees, a corporation must provide the object of the right. Thus, this right does create positive direct obligations of provision, as well as indirect obligations of due diligence to ensure it complying with its direct obligation.

Allocating Obligations of Positive Provision Based on Respect for Rights

In the previous section, I argued that respect for human rights can entail not merely positive obligations to conduct a due diligence process, to have available a remediation process and to remediate negative human rights impacts a corporation has caused or contributed to, and to exercise leverage in certain cases to prevent or mitigate negative impacts, all of which Ruggie explicitly includes in his corporate responsibility to respect human rights, but also that respect for rights can sometimes entail obligations of positive provision. In cases where respect for rights generates obligations of positive provision, it can generate the same duties that a responsibility to fulfill human rights will generate. In other words, there are times when the responsibility to respect human rights and the responsibility to fulfill human rights will generate overlapping obligations. However, it is important to distinguish these obligations, as the responsibility to fulfill human rights is an obligation of positive provision in the case of all rights, whereas I suggested that two factors help to determine when obligations of positive provision will arise based on respect for rights: 1) the particular object of the right, and 2) the relationship between the right-holder and the duty-bearer. However, more needs to be said about this, as these two aspects will be contextualized by particular circumstances institutions, which will in turn help to determine when obligations of positive provision

arise. The result is that the corporate responsibility to respect human rights will not create one uniform set of obligations that applies globally. Instead, we will find that this general norm creates different obligations in different societies and settings.

Consider the following example: The human right to health is generally held to entitle a person to at least some basic medical services. In the developed countries of the world, these services are either provided by a public healthcare system or paid for by a person's health insurance. Let us set aside those countries where this right is fulfilled through a public healthcare system, and focus on those countries where the services are paid for by a person's health insurance. In cases where a person cannot afford to pay for these services out of their own resources, the person's human right to health will not be satisfied without insurance to cover the cost of the services. In virtually all developed countries that take an insurance-based approach, there is a public health insurance system that universally provides its citizenry with health insurance. However, the United States is an exception. In the United States, the majority of working-age people receive health insurance through their employer. In countries where the government provides universal health insurance, the government is meeting its responsibilities to respect, protect, and fulfill human rights. However, in the United States, assume that a corporation employs a worker and does not provide health insurance. Furthermore, assume this is a relatively low-wage worker with a large family, and the person is simply unable to afford necessary medical services that are included in the human right to health. In such a case, it seems plausible to hold that the corporation has failed to respect the worker's human right to health.

The reason it is plausible to make this claim has to do with the two aspects that can give rise to obligations of positive provision based on respect for rights. First, the object of the human right to health is not the sort of object that can be respected merely by refraining from interference. As mentioned above, the human right to health entitles a person to some basic medical services when necessary, which will have to be provided by some agent. Second, there is an employment relationship that exists between the corporation and the worker. In countries where the government provides universal health insurance coverage for all, this relationship will not be relevant. In such countries, the corporation will have no obligation of positive provision when it comes to the human right to health. However, in the United States, there is a social convention or arrangement, where employers normally provide health insurance for their employees. This is how most workers in the U.S. obtain health insurance coverage, and only the unemployed and elderly tend to receive insurance coverage through the government. So just as a corporation would fail to respect the human rights to safe and healthy working conditions if it does not provide such conditions for its workers, so a corporation in the United States would fail to respect the human right to health if does not provide health insurance for its workers. But the significance of the employment relationship, with regard to the human right to health, only becomes relevant in the contingent social arrangements of the United States. This example shows us how particular social arrangements and institutions contextualize relationships and render them relevant or irrelevant when it comes to generating obligations of positive provision based on respect for rights.

I believe that Integrative Social Contract Theory (ISCT), which was developed by Donaldson and Dunfee (1999) and offers a social contracts approach to business ethics, can be helpful in framing how obligations of positive provision arise in the case of corporate respect for human rights. ISCT involves two types of contracts, which are called “macro-social contracts” and “micro-social contracts.” Micro-social contracts are the implicit agreements that exist in actual societies, and these obviously differ from society to society. Since a corporation must conduct its operations and affairs within one or more societies or social settings, the implicit agreements that exist in these domains are a reality that a corporation must operate within. In other words, the micro-social contract will define the social norms and institutional arrangements with in which a corporation actually operates. The macro-social contract includes trans-cultural truths that define the permissible limits of particular micro-social contracts. In other words, the macro-social contract specifies norms to which all micro-social contracts must conform by laying down objective moral boundaries for any micro-social contract. The objective norms that comprise the macro-social contract are called “hypernorms.” There are three types of hypernorms: Structural hypernorms are principles that establish and support essential background institutions in society. Procedural hypernorms are conditions essential to support consent in micro-social contracts. Finally, substantive hypernorms are fundamental concepts of the right and the good. In this latter category, Donaldson and Dunfee will include human rights. So human rights comprise part of the macro-social contract, which defines the permissible limits of any micro-social contract.

I want to suggest that we should understand the corporate responsibility to respect human rights as a hypernorm included in the macro-social contract. In other words, no matter what implicit agreement defines the social norms and institutional structures of a given society, the corporate responsibility to respect human rights must be included in that agreement. So there is a universal responsibility of corporations to respect human rights, regardless of which particular society (or societies) they operate and conduct affairs within. However, the micro-social contracts of societies are free to vary beyond compliance with this (and the other) hypernorms. This sort of variation can be seen in the fact that most developed nations have agreed to have publicly supported universal health insurance, whereas in the United States most workers are covered by private health insurance provided by one's employer. In all of these societies, a corporation has a responsibility to respect human rights. However, in the former societies, corporate respect for human rights will not require positive provision in the case of the right to health, because the micro-social contracts that exist in those societies include an agreement that the government will provide universal health insurance for all. Thus, within the institutional framework or division of labor created by this agreement, there is no need for the corporation to offer positive provision when it comes to respect for the right to health. However, the micro-social contract in the United States is such that a corporation will need to provide health insurance for its workers in order to respect those worker's right to health.

ISCT provides a framework that helps us to see obligations of positive provision based on respect for rights can only be determined within the micro-

social contracts, or implicit agreements that specify the social norms and institutional arrangements of an actual society. While corporations always have a responsibility to respect human rights, and this will always include the positive obligations that Ruggie explicitly recognizes, obligations of positive provision must be identified based on the object of a given rights and the social situated or contextualized relationship that exists between the right-holder and duty-bearer (corporation).

Conclusion

The adoption of Ruggie's Framework and Guiding Principles by the U.N. Human Rights Council marked a consensus among all stakeholders that corporations should have at least some human rights obligations. However, it remains a matter of debate exactly what range or sorts of human rights obligations corporations should have. We began by examining the issue of the appropriate range of corporate human rights obligations in light of the current debate between political and moral conceptions of human rights. The first chapter argued that political conceptions completely underdetermine the appropriate range of corporate human rights obligations. This is because political conceptions rely on different conceptions of the practice. Depending on the range of institutions, agents, and activities that are included in a conception of the practice, a political conception may prescribe anything from no corporate human rights obligations at all to the full range of such obligations. The second chapter considered the issue in light of moral conceptions of human rights. It argued that moral conceptions impose on all agents, including corporations, at least an obligation to respect human rights. However, moral conceptions underdetermine the appropriate range of corporate human rights obligations beyond this minimum requirement; they may prescribe only a corporate obligation to respect human rights, or they may also prescribe an obligation to protect and/or fulfill human rights. In light of this examination, it was concluded that the general distinction between political and moral conceptions of human rights is too abstract to give concrete guidance as to the appropriate range of corporate human rights obligations.

In the third chapter we identified desiderata for a theory of human rights when it comes to the issue of corporate human rights obligations. The desiderata include some

degree of accountability to the practice, a normative principle for identifying which agents (or types of agents) could have human rights obligations in general, and a normative principle for distributing particular human rights obligations to particular agents (or types of agents). We also considered whether an ideal or fully developed version of a moral or political conception could give us concrete guidance concerning the issue of corporate human rights obligations. It was determined that even fully developed versions of either type of conception would be incapable of doing this. In the case of political conceptions, this is due to the fact that a decisive and authoritative conception of the practice cannot be determined, and in the case of moral conceptions this is due to the fact there will be reasonable disagreement about the correct normative theory for the foreseeable future. In light of these findings, it was proposed that we need a hybrid conception of human rights, which draws on the desiderata derived from both political and moral conceptions of human rights. The hybrid conception would follow political conceptions in having some degree of accountability to the practice, which makes it more likely that the prescriptions of the theory will be incorporated into the practice and be efficacious. The hybrid conception would follow moral conceptions in offering principled normative grounds for identifying which agents (or types of agents) can bear human rights obligations in general, as well as principled normative grounds for allocating particular human rights obligations to particular agents (or types of agents). These latter features ensure that the hybrid conception would not simply theorize existing practice, but would be capable of offering normative prescriptions in light of which the practice could be reformed.

The fourth and fifth chapters are joined by a consideration of the influence that social and institutional variation can have on the content and obligations created by human rights. The fourth chapter focused on this issue with regard to a particular family of human rights, environmental rights. It considered a debate as to whether environmental rights are best instituted at the national (constitutional) or international level. While some have argued that cultural differences suggest environmental rights are best developed and adjudicated at the national level, it was argued that there are distinct advantages of developing and adjudicating environmental rights at the international level. However, it was also recognized that the social and institutional differences among nations will create pressure to minimize the content of international environmental human rights. These differences require that we identify universal values that can be recognized and shared by all nations or societies, which can serve as the basis for uniform international environmental human rights.

The fifth chapter undertook a close examination of Ruggie's corporate responsibility to respect human rights. It began with a consideration of the claim that the corporate responsibility to respect human rights creates only negative duties. It was argued that this claim is false, given certain positive obligations that Ruggie explicitly includes, such as the requirement to have a due diligence process, to remediate negative human rights impacts, and to exercise leverage in the context of business relationships. However, it was also argued that this is false because respect for rights can generate obligations of positive provision. In the case of certain rights and certain types of relationships, respect for rights can generate a positive obligation of corporations to provide the object of the right for the right-holder. Finally, it was argued that

determining when respect for rights will generate this latter type of positive obligation will depend on the social norms and institutional arrangements of particular societies. It is only in the context of these background conditions that we can determine exactly what obligations respect for rights will impose on corporations. In this way, cultural differences help to determine not only the content of human rights, but also the precise obligations to which human rights give rise.

It was also argued that at least some of the obligations Ruggie assigns to corporations seem to be justified only on the basis of protecting human rights. This suggests that Ruggie has either over-reached in the obligations that his Framework assigns to corporations, or the Framework should include a corporate responsibility to protect human rights. In the latter case, more work would need to be done in order to determine the precise obligations entailed by a corporate responsibility to protect human rights, including how to divide obligations to protect between corporations and the state. However, in order to make the determination as to whether corporations should have only an obligation to respect human rights, or additionally an obligation to protect, or even to fulfill, human rights, work should be done with an aim to developing the hybrid conception of human rights that has been proposed. Specifically, close attention should be given to principles for identifying which agents (or types of agents) should bear human rights obligations in general and for allocating particular human rights obligations to particular agents (or types of agents). This suggests that a fruitful direction for future research would involve extensive debate concerning the comparative advantages and disadvantages of different principled approaches to these issues.

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