7

International Human Rights Law: Concepts and Grounds of Human Rights

As we saw in the first part of this book, before responding to an international legal skeptic we must first identify the source of our interlocutor's doubt. What assumptions regarding the concept or the nature of law lead her to infer from certain empirical observations that what we commonly refer to as international law is not really a genuine example of law? Is her concept of law a sound one, or does her skepticism rest instead on a misunderstanding? We noted as well that international legal skepticism rarely expresses a concern with classification for its own sake. Rather, individuals advance it as a premise in a normative argument; for instance, to justify the claim that the reasons for action provided by so-called international law differ in kind from those provided by genuine law (or, perhaps, by legitimate law).

Our philosophical investigation of human rights in this chapter proceeds along the same lines. Skepticism provides its impetus. Is there really a human right to social security, to the highest attainable standard of physical and mental health, or to periodic holidays with pay?[1] Does every person have a right not to marry unless he or she freely and fully consents to do so?[2] If so, how should we reconcile such a right with a human right to freedom of religion if a particular religion confers on fathers the right to select their daughter's spouse?[3] Do people have a human right to engage in sexual intercourse with someone of the same sex?[4] Are all people entitled to

[1] Articles 9, 12, and 7, *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, United Nations, Treaty Series, vol. 993, p. 3, available at https://treaties.un.org/doc/Publication/UNTS/Volume%20993/v993.pdf.

[2] Article 16, *Universal Declaration of Human Rights*, December 10, 1948, 217 A (III), available at www.un.org/en/universal-declaration-human-rights/.

[3] Article 18, *International Covenant on Civil and Political Rights*, December 16, 1966, United Nations, Treaty Series, vol. 999, p. 171, available at https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.

[4] UN Office of the High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, September 2012, HR/PUB/12/06, available at www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf; UN Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity: Resolution/Adopted by the Human Rights Council*, July 15, 2016, A/HRC/RES/32/2, available at https://digitallibrary.un.org/record/845552?ln=en.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

public treatment on the basis of the gender with which they self-identify?[5] These are all examples of local human rights skepticism; they express doubts regarding the existence of a specific human right either recognized in international law, or that some argue *should* be recognized in international law. In contrast, global human rights skepticism challenges the existence of any human rights whatsoever. For global human rights skeptics, international human rights law is either a form of Western imperialism or merely empty words.

Just as an assessment of international legal skepticism requires that we first identify the concept of law on which it relies, and determine whether we should accept it, so too an assessment of human rights skepticism requires that we identify the concept of a human right it presupposes and evaluate the reasons offered in its defense. This is particularly true if different concepts of a human right provide different criteria for the existence of a human right; that is, competing accounts of the conditions that must be satisfied in order to justify the claim "A has a human right to X." In this chapter, we will investigate the conceptual question "what is a human right?" and the normative question "in virtue of what considerations does A enjoy a human right to X?" by examining the recent debate between two schools of legal and political philosophers.

Orthodox theorists argue that human rights are a moral right possessed by all human beings simply in virtue of their humanity. In contrast, political-practice theorists argue that human rights are constitutive elements of an ongoing attempt to reconceive state sovereignty and the international political order to which it is integral. This political undertaking, which includes the creation, application, and enforcement of international human rights law, provides the proper object of a philosophy of human rights. These descriptions may suggest that the debate between orthodox and political-practice theorists concerns how we ought to understand a single concept – *the* concept of a human right. There is some truth to that claim. However, I maintain that the dispute is more productively understood as a disagreement regarding the relevance of orthodox theories of human rights, or what I will sometimes refer to as moral human rights, to the justification of political human rights, by which I mean the human rights norms constitutive of the recently emerged international human rights practice, including international human rights law. By and large, political-practice theorists accept the existence of some moral rights possessed by all human beings simply in virtue of their humanity. However, they maintain that a theory of such rights, in other words, an orthodox account of human rights, is quite different from the sort of theory that interests them, namely, one that takes the international human rights practice as its object. Moreover, some of them argue that we need not, or even that we cannot, appeal to moral human rights in order to justify many of the norms constitutive of this practice. If so, then an

[5] Neela Ghoshal and Kyle Knight, "Rights in Transition: Making Legal Recognition for Transgender People a Global Priority," last modified 2016, available at www.hrw.org/world-report/2016/rights-in-transition.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

orthodox theory of human rights is far less useful for those interested in justifying or criticizing international human rights law, or the international political practice of which it is a part, than we might first assume.

Our exploration of the debate between orthodox and political-practice theorists of human rights begins in section I with a description of the answers each offers to the conceptual question, "what is a human right?" We then turn in section II to several attempts by political-practice theorists to demonstrate the limited relevance of orthodox accounts of human rights to morally justifying the norms that constitute (or that should constitute) the international human rights practice; again, including international human rights law. We also consider a number of objections to these arguments advanced by orthodox theorists, as well as some rejoinders to those objections put forward by political-practice theorists. In section III, we briefly consider the role that appeal to objective moral principles should play in the international human rights practice.

We should note at the outset that the discussion in this chapter will not yield a response to any of the skeptical challenges to human rights just canvassed. What it will do, however, is clarify the fundamental conceptual and justificatory matters on which any answer to those challenges ultimately depends.

I THE CONCEPT OF A HUMAN RIGHT

A *The Orthodox Concept of a Human Right*

The orthodox account characterizes human rights as "moral rights possessed by all human beings simply in virtue of their humanity."[6] Each element of this analysis requires explanation, beginning with the idea that human rights are rights. Many human rights are (or at least include) claim rights; the rightholder has a claim against at least one other agent, the duty bearer, that he or she perform or refrain from performing some act. The duties correlative to a right determine its content. Put another way, to answer the question "what does the right to religious freedom, or to free-speech, or to health include?" we need to determine the specific duties that correlate to it, and who bears them. Barring a justification, nonperformance of a duty correlative to a right constitutes a distinctive wrong done to the rightholder. It does not simply harm her; indeed, it may not make her any worse off than she would have been otherwise. Neither does it merely manifest a disregard for the impact that nonperformance has on the rightholder's interests (in bodily integrity, religious practice, and so on). Rather, it involves a failure to *respond*

[6] John Tasioulas, "On the Nature of Human Rights," in *The Philosophy of Human Rights: Contemporary Controversies*, edited by Gerhard Ernst and Jan-Christoph Heilinger (Berlin: Walter de Gruyter, 2011), p. 26.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

appropriately to her title or claim to the duty bearer performing or refraining from performing some act.[7]

Rights, or the duties to which they correlate, provide categorical reasons for action. This means that the duty bearer's reason to perform or refrain from performing some action does not depend on any particular goal or preference she may have. My property right in my computer generates a duty on my neighbor not to use, take, damage, or transfer it to another person without my permission, a reason for action that does not depend on her having the goal of remaining my friend, avoiding jail, or any other consideration she takes to be constitutive of a good life. One way to understand rights (or the duties to which they correlate) is as exclusionary reasons for action; my property right provides my neighbor with a reason not to act on certain reasons, such as the fact that she would finish her work more quickly if she used my computer.

Next, consider the claim that human rights are essentially *moral* rights. While individual human rights may be recognized in international human rights law or the constitutional law of a particular state, orthodox theorists argue that human rights exist independently of any body of law, or for that matter, any social or customary rule.[8] Moreover, orthodox theorists offer two objections to depicting human rights as moral rights that ought to be recognized in law. The first is that law is necessarily ill-suited to protecting or promoting certain moral rights that all human beings possess simply in virtue of their humanity, for example, the right not to suffer personal betrayal. The second is that even where it is possible to use law to protect or promote a human right, there may be other mechanisms that are more effective, less costly, or both. In sum, orthodox theorists caution against too close an association between the concept of a human right and legal practice.

Orthodox theorists divide over how to properly characterize the universality expressed in the claim that human rights are possessed by all human beings. Some maintain that this includes human beings at every point in the past, present, and future, while others argue that human *rights*, as opposed to the interests that ground them, are indexed to modernity. For example, John Tasioulas argues that human rights are those possessed by all human beings who live in circumstances characterized by "significant levels of scientific and technological expertise and capacity; heavy reliance on industrialized modes of production; the existence of a market-based economy of global reach; a developed legal system that is both efficacious and broad-ranging; [and] the pervasive influence of individualism and secularism in shaping forms of life."[9] Which of these two interpretations a theorist adopts often has

[7] Note that nonperformance of a duty exhibits this wrong-making feature only where performance is owed to a specific actor, the rightholder. We will revisit this point later in the chapter.

[8] "Independently" may not mean antecedent to law, or not conditional on the existence of law. Rather, it may mean only that moral human rights provide a reason for action distinct from the reason for action provided by a legal human right. See the discussion in section II.

[9] Ibid, 36.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

implications for the list of specific moral human rights he or she recognizes, or at the limit, his or her willingness to acknowledge the existence of any moral human rights at all.

The qualifier "simply in virtue of their humanity" indicates that the possession of certain moral rights depends on neither membership in a particular community or relationship nor any particular type of interaction.[10] Thus, human rights differ from the moral (and legal) rights individuals possess in virtue of their citizenship in a particular state, or membership in a sporting club, or marital relationship. They also differ from moral (and legal) rights that individuals acquire when they enter a contract or suffer harm as a result of another agent's failure to exercise due care. Human rights are grounded in certain features or interests possessed by all human beings as such, although the duties correlative to those rights may depend on other considerations, including membership in a particular political community. Orthodox theorists agree on this *conceptual* claim even though there is some dispute among them as to which interests ground human rights, and why they do so.

There are many questions we can pose regarding human rights, understood as orthodox theorists do. In this chapter, however, we will largely focus on the concept of a human right as political-practice theorists understand it, or what is the same, the concept of a human right as it figures within the international human rights practice that emerged following the Second World War. In general, proponents of the latter view do not deny the existence of moral rights possessed by all human beings simply in virtue of their humanity; indeed, many explicitly acknowledge their existence.[11] Nevertheless, they challenge the relevance of orthodox theories of human rights to the project of understanding or modeling the international human rights practice, or to morally justifying the norms that constitute it, or both. The main question, then, is not which of these two accounts of the concept of a human right is correct, but whether political-practice theorists are right to insist that theorizing the international human rights practice requires a break from orthodoxy.

B *Political-Practice Conceptions of a Human Right*

Political-practice theorists take the international human rights practice that began to emerge following the Second World War to be the proper object of a philosophy of

[10] Reference to "the human family" in certain human rights documents suggests one reading of "in virtue of their humanity" that does reference membership in a particular community. Even if we set aside suspicions regarding the extent to which all human beings comprise a family in the morally relevant sense (as opposed to the biological notion of descent from a common ancestor), I suspect orthodox theorists of human rights would reject this reading. It is nonrelational features or interests possessed by all human beings that ground human rights.

[11] See, for instance, Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013), pp. 10–14; Joseph Raz, "Human Rights Without Foundations," in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp. 334–7.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

human rights. In order to grasp the concept of a human right, they maintain, we must understand the role that concept plays within this political practice. Put another way, to know what human rights are we need to identify the ways in which participants in the international human rights practice use human rights as action-guiding norms.[12] As we will see, international human rights law figures centrally in political-practice theorists' description of the international human rights practice.

Political-practice theorists occasionally suggest that their approach offers the only defensible analysis of the concept of a human right. For example, Joseph Raz maintains that there is not enough commonality in the use of the phrase "human rights" across the various contexts in which people use it to sustain a project of identifying the elements of a single concept employed by all those who speak the language of human rights.[13] Setting that concern aside, Raz also expresses skepticism regarding the idea of a moral right that all human beings possess simply in virtue of their humanity. As he observes, few of the rights recognized in the UDHR or the Human Rights Conventions are ones we can plausibly attribute to cave dwellers in the Stone Age.[14] Orthodox theorists of human rights offer a variety of responses to this challenge.[15] Yet the success of these arguments may not matter much to the dispute between orthodox and political-practice theorists of human rights. That is because the latter's primary concern is not with the question of whether there are any moral rights that all human beings possess simply in virtue of their humanity. Rather, they emphasize the following two points. First, an orthodox theory of human rights is not a theory of the international human rights practice. Second, some political-practice theorists contend that we should not assume that the norms constitutive of either the existing or the morally best international human rights practice must be justified by appeal to moral human rights. Rather, our analysis of the concept of a human right should treat as an open question what sort of (moral) considerations serve, or can serve, to justify those norms. If we do so, then when we turn to the task of justifying specific norms constitutive of the emerging international human rights practice, or the morally best version of it, we may find that while some can be justified by appeal to moral human rights many others need not or cannot be defended on those grounds.

[12] Similarly, in order to grasp the concept of a "strike" in baseball we need to understand how competent participants in that game use it as an action-guiding norm.

[13] As he puts the point, there "is not enough discipline underpinning the use of the term 'human right' to make it a useful analytical tool." Raz, "Human Rights Without Foundations," 336.

[14] Joseph Raz, "Human Rights in the Emerging World Order," in *Philosophical Foundations of Human Rights*, eds. Rowan Cruft, S. Matthew Liao, and Massimo Renzo (Oxford: Oxford University Press, 2015), pp. 224–5. But see Raz, "Human Rights Without Foundations," 334.

[15] See, among others, the aforementioned proposal by Tasioulas that we characterize human rights as historically indexed. See also David Miller's response to Raz in "Joseph Raz on Human Rights: A Skeptical Appraisal," in *Philosophical Foundations of Human Rights*, eds. R. Cruft, S.M. Liao, and M. Renzo (Oxford: Oxford University Press, 2015), pp. 232–43.

Perhaps the most forceful advocate of the importance of distinguishing a theory of moral human rights from a moral or political theory of the international human rights practice is Allen Buchanan. He argues that certain philosophers of human rights appear to subscribe to the "Mirroring View," according to which "international legal human rights are simply moral human rights in legal dress."[16] Even allowing that international law may serve to specify moral human rights, or provide a valuable means for realizing them, the bulk of the work involved in identifying the content and justification for genuine human rights is an exercise in moral philosophy. The implication is that those charged with applying existing international human rights law, or enacting changes to it, should simply transcribe the conclusions of the correct (orthodox) philosophy of moral human rights into law. No attention need be paid to the various ways in which legal and political practice may introduce both facts and moral considerations that bear on the question of what the content of international human rights law ought to be.[17] While Buchanan rightly cautions against this approach to theorizing international human rights law (and, presumably, the broader international human rights practice of which it is a part), it is not clear that many or even any philosophers writing on human rights make this mistake.[18] In any case, regardless of what anyone might have claimed or implied at an earlier stage in the philosophical discourse on human rights, there is now widespread agreement that a philosophy of moral human rights is not the same as a philosophical theory of the international human rights practice. Specifically, all agree that the justification of international human rights law requires attention to facts and moral considerations besides those that figure in a moral theory of human rights.

The second point political-practice theorists press does remain a matter of dispute, however. That point, recall, is that in theorizing the constitutive norms of the international human rights practice we should not assume that they must be justified by appeal to moral human rights. Rather, we should begin by mapping how those norms function within the human rights practice. With that task complete, we can take up the task of justifying specific human rights norms, and indeed the international practice of human rights as a whole, including international human rights law. It is at this point where the most significant (and perhaps the only substantive) disagreements between political-practice and orthodox theorists of human rights arises. Before we consider these disputes, however, we must first get clear on how political-practice theorists understand the concept of a human right.

[16] Buchanan, *Heart of Human Rights*, p. 18. In accusing various philosophers of subscribing to the Mirroring View of human rights, Buchanan charges them with failing to recognize both of the points set out in the previous paragraph. I discuss the first point briefly here, and the second at greater length later in this section.

[17] Ibid, 51.

[18] For discussion, see John Tasioulas, "Exiting the Hall of Mirrors: Morality and Law in Human Rights," in *Political and Legal Approaches to Human Rights*, eds. Tom Campbell and Kylie Bourne (London, Routledge, 2017), pp. 77–80.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

i Charles Beitz

A practical conception of human rights, Charles Beitz writes, "understands questions about the nature and content of human rights to refer to objects of the sort called 'human rights' in international practice."[19] To understand the concept of a human right is to understand the role that it plays in that practice, or what is the same, to grasp how competent participants in the practice use the concept. Since human rights are action-guiding norms, competent participants in the practice must invoke them as reasons for particular actors to take particular actions. Therefore, the questions a practical conception of human rights must answer are what kinds of action, in what kinds of circumstance, and for which agents, do human rights norms (purport to) provide reasons for action?[20]

To answer these questions, we need to construct a model of the practice, one that is consistent with those elements that are uncontroversially part of it and that offers an overarching purpose or rationale that unifies those elements and renders them individually and collectively intelligible. On Beitz's account, the elements of the practice includes major international human rights texts such as the Universal Declaration of Human Rights and the Human Rights Conventions, the activities of the reporting and monitoring bodies established by the latter, and also less formal or institutionalized activity such as "critical public discourse, particularly when it occurs in practical contexts involving justification and appraisal; evidence of the public culture of international human rights found in its history and in contemporary public expression; and prominent examples of political action justified and reasonably regarded as efforts to defend or protect human rights, such as those which are subjects of historical and ethnographic studies."[21] Reflection on the practice constituted by these elements yields the conclusion that its overarching purpose is "to protect individuals against threats to their most important interests arising from the acts and omissions of their governments (including failures to regulate the conduct of other agents) . . . by bringing these aspects of the domestic conduct of governments within the scope of legitimate international concern."[22]

As this synoptic statement indicates, a proper grasp of the purpose of the international human rights practice requires attention to both its ultimate end and the specific means by which it seeks to achieve it. Beitz contends that human rights norms constitute a practice of reason giving that has as its goal the protection of "urgent individual interests against certain predictable dangers ('standard threats') to which they are vulnerable under typical circumstances of life in a modern world order composed of states."[23] Urgent interests are those that are valuable for individuals in a wide range of lives that occur in contemporary societies, but not

[19] Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 103.
[20] Ibid, p. 18.
[21] Ibid, p. 107.
[22] Ibid, p. 197.
[23] Ibid, p. 106.

necessarily every way of life that is or could be lived in contemporary societies, or every way of life that could be lived at some point in the past or future. Moreover, human rights norms only protect individuals against reasonably predictable threats they might face to their urgent interests. This constraint may reflect the fact that only such threats are amenable to, or are capable of justifying, an institutional response.

The international human rights practice adopts a two-tiered approach to achieving the goal of protecting urgent individual interests against standard threats. States bear the primary responsibility for complying with human rights norms. This requires them to "(a) respect the underlying interests in the conduct of the state's official business; (b) to protect the underlying interests against threats from non-state agents subject to the state's jurisdiction and control; and (c) to aid those who are non-voluntarily victims of deprivation."[24] States can fulfill these responsibilities through various combinations of constitutional commitment, ordinary law, and public policy. In the event that a state fails to comply with human rights norms, "appropriately placed and capable 'second level' agents outside the state" may have a reason to act.[25] Specifically, other states and certain international organizations have a *pro tanto* reason to hold that state accountable for its failure, while both state and non-state actors "with the means to act effectively" have a *pro tanto* reason assist those states whose failure to comply with a human rights norm reflects a lack of capacity to do so, and a *pro tanto* reason to intervene where the failure reflects states' unwillingness to comply with human rights norms.[26] The rights and responsibilities the international practice of human rights assigns to second level agents outside the state accounts for the description of human rights violations as a proper subject of international concern.

In sum, human rights are those norms (reasons for action) that are or should be invoked by participants in the recently emerged and still developing global political discourse that (a) aims to protect individuals' urgent interests against standard threats posed by the acts and omissions of the states that govern them, and that pursues this aim by (b) requiring states to conform to international standards in their domestic rule, and (c) treating states' failure to do so as a proper subject of international concern. Like any analysis of the concept of a human right, this one purports to clarify the justificatory burden borne by those who assert or deny the existence of a specific human right, or of any human rights at all. It does so by identifying those considerations that are relevant or irrelevant to successfully defending such claims.

[24] Ibid, p. 109.

[25] Ibid.

[26] Ibid. Both assistance and intervention should be understood broadly here. For example, the former may include capacity building in a failing state but also changes to international law and the domestic law of developed countries that enable developing ones to gain a larger share of the gains created by international trade. Intervention may include the use of force within another state's borders, but also (and more often) public documentation of a state's deliberate failure to comply with international human rights norms, inducements in the form of development aid or military cooperation, and targeted sanctions. For a detailed discussion, see ibid, pp. 31–42.

Consider, first, the task of justifying the existence of a specific human right, the right to freedom of religion, to emigration, or to health, say. Beitz's analysis of the concept of a human right entails that to do so a person must defend three claims:

> (1) that the interest protected has a kind of importance that it would be reasonable to recognize across a wide range of possible lives; (2) that in the absence of the protections embodied in the right, there is a significant probability that domestic-level [government] institutions will behave, by omission or commission, in ways that endanger this interest; and (3) that there are permissible means of international action such that, if they were carried out, the interest would be less likely to be endangered and that these means would not be unreasonably burdensome for those who have reason to use them.[27]

As Beitz notes, the first claim can be defended in a variety of ways. For instance, the interest a person identifies may be sufficiently generic that its urgency is immediately obvious to others despite many differences between the ways of life they lead and the one lead by the person who asserts the human right. The interest in (access to) adequate nutrition is an example. In other cases, such as the right to freedom of religion, an agent may need to characterize her interest in a way that abstracts a bit from the specifics of her own way of life in order to defend it as one it is reasonable to recognize as important or urgent across a wide range of possible lives. The essential point, Beitz maintains, is that "the importance of the interest, seen from the standpoint of a reasonable beneficiary, should be intelligible to reasonable persons who might be called upon to protect it."[28]

Satisfying this criterion does not suffice to justify a human rights norm, however. In addition, its defenders must make the case that domestic law or policy is an appropriate vehicle for protecting that interest. Is the interest even one that can be respected, protected, or advanced by the state? If so, is it morally desirable all-things-considered that the state be tasked with doing so? This is the point in the argument where specific claims regarding the content of the right, or what is the same, the specific duties it imposes on the state, must be defended. Finally, a proponent of a specific human right must establish that a state's failure to fulfill the duties correlative to that right is a proper subject of international concern. At a minimum, this requires that she show that there are forms of "interference" that are both possible and morally permissible for outside actors to perform in order to mitigate or correct a state's failure to fulfill the duties correlative to that human right. In addition, there must be outside actors who are generally capable of engaging in those forms of "interference," and for whom the burden involved is reasonable given the importance of the interests at stake. Here, too, the success of an argument for a human right depends on the specific actions it provides outside actors with a reason to perform.

[27] Ibid, p. 111. See also ibid, p. 137.
[28] Ibid, p. 138.

As we noted in the introduction to this chapter, skeptical challenges to human rights may take either a local or a global form. Given Beitz's political-practice account of human rights, local skeptical challenges must aim to demonstrate that an existing or proposed human right norm fails to satisfy one or more of the three conditions outlined earlier. For example, a skeptic may argue that the interest the putative right serves to protect is not (sufficiently) urgent, or that there are no feasible and morally permissible means by which outside actors can attempt to remediate any state's failure to respect or protect that interest. Global human rights skepticism, in contrast, challenges the moral justifiability of the entire international practice constituted by human rights norms, not just one or another of its constitutive norms. Here, too, a clear-eyed understanding of what human rights are serves to frame the skeptical challenge, and so what sort of argument is needed to meet it. For example, Beitz argues that we should address global skepticism vis-à-vis human rights on the assumption that the primary or central unit in the global political-legal order is the state. As he observes, for political-practice theorists the purpose of a philosophical investigation of human rights is not to defend an ideal theory of global justice. Rather, it is to describe and critically evaluate a specific historically located practice that "as it has developed so far can only be understood as a revisionist appurtenance of a world order of independent, territorial states."[29] Therefore, the global skeptical challenge to human rights must take one or both of the following two forms. Either it is the view that the development of the international human rights practice has not produced an overall moral improvement to the international legal order and the conduct of international relations.[30] Or it is the view that some alternative international political-legal practice consistent with a world of states would be morally superior to the one that the participants in the international human rights practice are trying, with some success, to create.[31] Beitz does not address the second challenge, but in response to the first he argues that the emergence of the international human rights practice is one of two developments that serve to legitimate the global political-legal order. That is, the existence of human rights norms that protect individual interests by imposing duties on states to treat their subjects in certain ways, and that make a state's failure to do so a proper subject of international concern, provide reasonable people with a weighty reason to accept and support the global political-legal order.[32] Global human rights skepticism, then, should be understood as the claim that the attempt by participants in the international human rights practice to legitimate the international legal order is doomed to fail.

[29] Ibid, p. 128.

[30] One might draw this conclusion if one views international human rights law as a form of Western imperialism.

[31] Neorealist scholars of international relations frequently defend this claim.

[32] Ibid, p. 131.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

ii Joseph Raz

In many respects, Joseph Raz's answer to the question "what are human rights?" mirrors the one that Beitz defends. Perhaps most importantly, Raz also maintains that a philosophy of human rights should investigate "the use of the term in legal and political practice and advocacy."[33] The two theorists sometimes differ in matters of emphasis and detail, however, so a brief consideration of Raz's view may prove worthwhile.

Raz foregrounds the analytical relationship between human rights and state sovereignty. The actual or anticipated violation of human rights, Raz contends, "is a (defeasible) reason for taking action against the violator in the international arena, even when – in cases not involving violation of either human rights or the commission of other offences – the action would not be permissible, or normatively available, on the grounds that it would infringe the sovereignty of the state."[34] At a minimum, then, a philosophy of (the practice of) human rights should provide criteria for determining which standards of right conduct are such that their violation by a state provides a *pro tanto* justification for outside interference. These criteria can then be used to argue that the international legal order is defective either because 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 ... [or because it] fails to recognize the legitimacy of sovereignty-limiting measures when the violation of rights morally justifies them."[35]

The international human rights practice reconceives state sovereignty, and so the international legal order to which that concept is integral, in two distinct but related ways. First, it makes states accountable to outside actors for their failure to respect, protect, or advance the human rights of their subjects. Other states, international organizations, NGOs, and ordinary people everywhere have the standing to publicly criticize a state for its violations of human rights standards. Of course, the advent of the human rights practice is not a prerequisite for publicly criticizing states' treatment of those they rule. But as Raz emphasizes, its significance lies in the fact that those criticized for violating their subjects' human rights cannot respond that those actions are purely a domestic concern, ones they need not justify to outsiders. As he puts the point, "the ability of states to block interference in their internal affairs, to deny that they are responsible in certain ways to account for their conduct to outside actors and bodies, is what traditionally conceived state sovereignty consists in. But human rights, as they function in the world order, set limits to sovereignty."[36]

[33] Raz, "Human Rights Without Foundations," 337. See also Joseph Raz, "On Waldron's Critique of Raz on Human Rights," in *Human Rights: Moral or Political?*, ed. Adam Etinson (Oxford: Oxford University Press, 2018), p. 140.

[34] Raz, "Human Rights Without Foundations," 328.

[35] Ibid, 329.

[36] Raz, "Emerging World Order," 226–7.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

Moreover, Raz maintains that the human rights practice is evolving to include more than simply holding states accountable for their violations of human rights standards. When undertaken to compel states to respect, protect, or advance their subjects' human rights, emerging norms sanction conduct that would otherwise count as impermissible interference with state sovereignty. This claim may appear hard to square with actual practice. After all, states frequently fail to do anything more than condemn other states for their failure to conform to human rights norms, if they even do that. The permanent members of the UN Security Council block any attempt at the collective enforcement of human rights norms when they believe that doing so will best advance their national interest. And recent attempts to make explicit a responsibility on all states to protect individuals against violations of certain of their human rights does not appear to add any teeth to the existing mechanisms for inducing compliance with international human rights law. But, in fact, these observations may not challenge Raz's constructive interpretation of the human rights practice. For, as he emphasizes, "the moral limits of sovereignty depend not only on the conditions within the [domestic] society ... [but] also depend on who is in a position to assert the limitations of sovereignty, and how they are likely to act as a result."[37] In the absence of impartial institutions capable of reliably applying and enforcing human rights norms, Raz maintains that we "should refrain from attempts to use any coercive measures to enforce the right ... given the common and serious harms attending the use of coercion on the international scene, and the risks that purported enforcement measures are no more than misguided presumptions."[38] In other words, at this point in the development of the international legal order other moral considerations will often defeat the *pro tanto* justification for interference in the internal affairs of a state generated by its violations of its subjects' human rights.[39] Nevertheless, because in Raz's view human rights should be enforced by supra-state law (that is, regional or global legal orders) the existence of a human right entails "a duty to establish and support impartial, efficient, and reliable institutions to oversee its implementation and protect it from violations."[40] If this is impossible in the current circumstances then the putative human right is not a genuine one.

Raz's characterization of the human rights practice as an ongoing attempt to reconceive state sovereignty explains why he maintains that we should identify as human rights only those rights that should be legally enforced. The very point of the practice is to redesign a legal entity – the state – and the legal system of which it is a part – the international legal order – so that they will better or best serve the goal of protecting or

37 Raz, "Human Rights Without Foundations," 330.

38 Raz, "Emerging World Order," 228.

39 While Beitz makes the same claim, he also offers a much more comprehensive account of the types of actions that outside actors can and do take to contribute to the implementation of human rights. Consequently, he argues that some form of "interference" in the internal affairs of another state may be justifiable much more frequently than we may think if we focus only on compulsion or the use of force, as may be true of Raz.

40 Ibid.

promoting individual's secure enjoyment of their moral rights. Given this understanding of the practice of human rights, a philosophy of (the practice of) human rights should aim to offer an account of the constitution of legitimate global government. Indeed, the case for conceiving of human rights as those that should be legally enforced is not only conceptual, an implication of the fact that the human rights practice concerns the construction of legal institutions, but also normative. As we saw in Chapter 6, Raz contends that law necessarily claims legitimate authority, a claim that is normally borne out when those the law addresses will do better at acting on the moral reasons that apply to them by acting as the law directs than by acting on their own judgment. In general, law ought to be designed or developed so that it normally possesses the authority it claims. Raz construes the international human rights practice as just such a development, an attempt to reconceive states' legal rights and responsibilities vis-à-vis their own subjects and the subjects of other states in ways that make it (much) more likely that international law actually enjoys the moral authority it necessarily claims.

The defining role Raz assigns to the project of reconceiving state sovereignty also explains his claim that "the distinctive element of human rights practice is its role in international relations."[41] While Raz does not deny that the human rights practice may have deepened our understanding of interpersonal morality and constitutional government, its collapse would not spell the end of either of these normative practices. The same is not true for the emerging international legal order, one that is gradually replacing a society of states that enjoy (nearly) complete freedom in the conduct of their domestic affairs with an international community in which states have specific responsibilities to their subjects that constrain their rule in various ways, and for which they can be held accountable by various outside actors. This vision of global politics would not survive a widespread loss of faith in the human rights practice, or so Raz maintains.[42]

iii Allen Buchanan

While Buchanan broadly shares Beitz's and Raz's understanding of the elements that compose the international human rights practice, he focuses his normative

[41] Raz, "On Waldron's Critique," 142.

[42] Raz's observation provides a response to the argument advanced by both John Tasioulas and James Nickel that human rights would have a place even in a world without international relations. See Tasioulas, "Nature of Human Rights," and James Nickel, "Human Rights," *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/sum2019/entries/rights-human/. If an asteroid strike killed every human being except those living in New Zealand, there would be no international human rights practice to theorize, only New Zealand's practice of constitutional government, including its recognition of individual rights. Of course, the individual interests and social conditions that call for their protection might well justify constitutional rights that closely resemble the content of human rights. But they would differ in one key respect, namely not providing a *pro tanto* justification for interference by outside actors in the event the New Zealand government fails to respect and protect its citizens' rights. On Raz's account, we should distinguish rights on the basis of the particular relationships they regulate, not the interests that ground them or any specific duties they generate.

theory on just one part of it, namely international human rights law. His reason for doing so is that international human rights law (henceforth, IHRL) "is the universally accessible *authoritative* version of the global moral lingua franca," and so "provides a uniquely salient global standard to which various parties – from international and domestic judges to NGO workers to protestors against tyrannical governments or opponents of the rapacity of global corporations – can appeal."[43] One might accept this claim while also maintaining that it is a mistake to focus too narrowly on the international legal element of the human rights practice.[44] Be that as it may, Buchanan's approach does have the virtue of avoiding disputes over the concept of a human right, at least vis-à-vis theorists who share his legal positivist conception of law. All can agree that *legal* human rights are elements of a conventional normative order that purports to constrain the exercise of government within a state's borders by according individuals rights they hold primarily against their own state.[45] This is so even if they disagree on the question of whether human rights should be understood to include only those norms that figure in the recent global movement to reconceive state sovereignty, or whether human rights should be understood as practice-independent moral norms that can and do figure in many discursive contexts besides international law and politics.

On Buchanan's account, the overarching purpose of IHRL is to "constrain sovereignty for the purposes of affirming and promoting the equal basic status of all people (the status egalitarian function) and helping to ensure that all have the opportunity to lead a minimally good or decent life by providing protections and resources that are generally needed for such a life (the well-being function)."[46] He maintains that this characterization improves on Beitz's in part because it recognizes IHRL's "robust commitment to affirming and protecting the equal basic moral status of all individuals" as an end in itself, and not merely on equal treatment serving to advance individual's well-being.[47] In fact, the difference between the two theorists is better explained in terms of how far they abstract from the practice when describing its overarching aim. On the face of it, it seems quite plausible to maintain that individuals have an urgent interest in the public recognition of their equal basic moral status, one that is subject to reasonably predictable threats from the acts and omissions of states. The same is true for the claim that states can use legal and policy instruments to protect this interest, and that their failure to do so is a proper subject of international concern. If so, then Beitz could agree with Buchanan's depiction of IHRL's overarching purpose. The reason he does not advance this claim, or for that

43 Buchanan, *Heart of Human Rights*, p. 7.

44 See Beitz, *Idea of Human Rights*, p. 210.

45 Allen Buchanan and Gopal Sreenivasan, "Taking International Legality Seriously: A Methodology for Human Rights," in *Human Rights: Moral or Political?*, ed. Adam Etinson (Oxford: Oxford University Press, 2018), p. 213.

46 Buchanan, *Heart of Human Rights*, p. 68. Presumably, Buchanan thinks this is also the overarching purpose of the broader international human rights practice of which IHRL is (alleged to be) the heart.

47 Ibid, p. 82.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

matter a claim regarding what Buchanan labels IHRL's well-being function, is that he aims only to provide us with a method for critically theorizing human rights, and to illustrate how we might use it. Buchanan simply takes the process of critically theorizing the goal of the human rights practice a bit further than Beitz does.[48]

II JUSTIFYING INTERNATIONAL HUMAN RIGHTS NORMS

As should now be abundantly clear, political-practice theorists offer an analysis of the concept of a human right in terms of the role or function that human rights norms play in a distinctive and novel global political practice of relatively recent origin. At least for Beitz and Buchanan, one virtue of this approach is that it treats as an open question what sort of considerations can and do serve to justify human rights norms. In particular, we should not assume that every (or even any) norm constitutive of the international human rights practice depends for its moral justifiability on its reflecting, specifying, or indirectly advancing a moral human right.[49] In what follows, we first consider attempts by Buchanan and Beitz to demonstrate that appeal to a corresponding moral human right is not necessary to justify some of the norms that constitute the international human rights practice. We then consider the stronger claim that some political human rights *cannot* be justified by appeal to corresponding moral human rights because no such moral human rights exist.

Buchanan argues that no appeal to individual moral human rights is necessary to justify many international legal human rights. For example, he maintains that "a legal entitlement to goods, services, and conditions that are conducive to health, which include but are not limited to healthcare, can promote social utility, contribute to social solidarity, help to realize the ideal of a decent or humane society, increase productivity, and to that extent contribute to the general welfare, and provide an efficient and coordinated way for individuals to fulfill their obligations of beneficence."[50] Collectively, and perhaps in some cases individually, these

[48] Beitz's more abstract characterization of the overarching goal of the international human rights practice may also reflect his reticence to allow theory to get ahead of practice. He worries that "any relatively specific set of interests to be protected by human rights might be undesirably exclusive. A schema that seeks to organize our reasoning about the contents of human rights should identify the standards of judgment appropriate to the subject matter without artificially constraining the normative open-endedness we have observed in practice" (Beitz, *Idea of Human Rights*, p. 139). See also Beitz's skeptical remarks regarding the utility of conceiving of human rights norms as conditions for a minimally good life, which may mark a point of disagreement with Buchanan's claim that one of IHRL's two guiding purpose is ensuring that all have the opportunity to lead a minimally good or decent life. Ibid, pp. 141–4.

[49] On this point, Beitz and Buchanan differ from Raz, who maintains that the justification of a human right depends on three arguments, the first of which is that some individual interest, often in combination with a demonstration that social conditions require its satisfaction in certain ways, establishes an individual moral right. See Raz, "Human Rights Without Foundations," 336.

[50] Buchanan, *Heart of Human Rights*, p. 53.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

considerations provide a sufficient moral justification for an international legal human right to health.

Considerations such as social utility, social solidarity, and the general welfare may seem a problematic moral basis for international legal human rights. After all, international law accords these rights to individuals, yet the aforementioned benefits do not appear to be similarly individualized. Social solidarity is a valuable feature of communities, not individuals. Of course, solidarity is typically of value to individuals insofar as they are members of a community, such as the one constituted by the state of which they are a citizen or a resident. Nevertheless, Buchanan's claim is that international legal human rights can be justified by appeal to the value of states of affairs that people can only achieve or enjoy collectively, even if the correct account of what makes those states of affairs valuable must appeal to the benefit each of the individual community members receives. Likewise, increased productivity may contribute to the general welfare without making every individual better off. It seems odd, then, to offer social solidarity or increased productivity's contribution to the general welfare to justify the claim that every individual ought to enjoy an international legal human right to health. In response, Buchanan argues that this conclusion rests on the very assumption political-practice theorists challenge. To justify international law according every human being a right to health, we do not need to demonstrate that each has an interest in health weighty enough to justify certain correlative duties on others, beginning with his or her fellow citizens. Rather, all we need to demonstrate is that according every human being an international legal right to health is a morally defensible means for advancing one or more morally desirable goals. If increasing productivity is a goal that states morally ought to pursue, and if equipping each of their citizens with an international legal right to health provides an all-things-considered morally permissible means to ensuring that they do so, then that international legal right is morally justifiable. No individual moral right to health is necessary.

Perhaps the description of increased productivity as a *morally desirable goal* pinpoints the shortcomings with any attempt to justify the norms constitutive of the international human rights practice without appealing to moral human rights. The problem is twofold. First, morally desirable goals cannot justify the sort of resistance to tradeoffs commonly associated with the concept of a right. Second, and relatedly, human rights norms play a constitutional role within the international legal order that cannot be justified on the basis of merely morally desirable goals. Let us consider each of these in turn.

Investment in health is not the only means by which a political community might pursue the goal of increased productivity or social solidarity. Why, then, should a state not be permitted to invest all of its resources in other avenues for realizing these goals, such as education or transportation infrastructure? The problem is not merely that this is unlikely to be the optimal means to promoting social solidarity or the general welfare. The problem is that states are not morally permitted to treat the

protection and promotion of their subjects' health as simply one among the many morally valuable ends it can pursue. Rather, states have a moral duty to protect and promote their subjects' health. That duty is not absolute; it allows for tradeoffs in cases of conflict with the state's other duties. However, states may not choose to invest nothing in the protection of their subjects' health while, say, plowing resources into the construction of facilities to host the Olympics, even if the latter generates much social solidarity. Moreover, either the moral duty to protect and promote its subjects' health or the duty to treat its subjects as equals, or both, prohibit states from adopting laws or policies that advance social solidarity or the general welfare in ways that conflict with the equal protection and promotion of every individual subject's health. Instead, states must pursue goals like solidarity and increased productivity in a manner consistent with their duty to protect and promote all of their subjects' health.

The argument from IHRL's constitutional role proceeds in a similar manner. From the standpoint of international law, IHRL partly constitutes state sovereignty, specifying the responsibilities states have to their subjects, and the rights and responsibilities that certain outside actors (mainly other states) have to those individuals in the event that their state fails in its duties to them. Constitutional rights serve the same purpose in many domestic legal orders. Both serve to constrain the conduct of state officials, partly by delimiting the outer boundaries of their right to rule and partly by mandating that they use the rights conferred on them to pursue certain ends. In the case of IHRL, as well as most domestic constitutions, the two constraints do not perfectly coincide. Rather, state officials may exercise the powers that attach to their office for a range of ends besides those they are constitutionally required to pursue. From the standpoint of international law, the choice of whether to pursue these ends and (within certain limits) how to do so is a matter for each state's discretion, or what is the same, a matter that is *not* a proper subject of international concern. Intuitively, morally desirable goals seem to be the sort of considerations that should figure in a state's determination of how to exercise the discretion international law and its own constitution afford it. In contrast, the justification for constraints on the very constitution of the state's sovereignty seems to require an appeal to moral duties.

One response to these two arguments is to maintain that they rest on a false assumption regarding the nature of the reason for action that human rights norms provide. Careful attention to the actual workings of the international human rights practice reveals that many of the norms that constitute it do not have the properties we commonly associate with duties or rights. Rather, human rights norms often function as goals or aspirational standards that serve to orient political organization and contestation rather than as peremptory norms that individuals can invoke to demand specific conduct, as a person might do in a court or similar setting.

A second response concedes that human rights norms must be justified by appeal to moral duties, not simply morally desirable goals, but argues that these duties need

not correlate to individual moral human rights. For example, Beitz appeals to a duty of beneficence to justify the international human right to health and other anti-poverty human rights.[51] Duties of beneficence are generally understood to be owed by those capable of protecting or promoting others' urgent interests to those whose urgent interests are or will be at risk without others' assistance. Crucially, none of those in need has a claim against any particular member of the set of actors able to assist them, and so none can justifiably level a complaint against a member of the latter set if he or she chooses to aid someone else. Put another way, no recipient of beneficence has a right against any particular potential benefactor that he or she help him. Furthermore, duties of beneficence are often thought to obtain only where the cost of aiding another is relatively low. Here, too, they differ from the duties correlative to a (moral) right, which generally obtain unless the cost of discharging them is quite high. If the justification for a human right to health and other anti-poverty rights rests on a duty of beneficence, then at least some human rights are grounded in moral duties that do not correlate to individual moral rights.

On closer inspection, it is not clear that Beitz's justification of an international human right avoids an appeal to an individual moral right to health. That is because his argument does not depend on the normal duty of beneficence but instead on the special case of "strong beneficence." Duties of strong beneficence arise when (1) "the threatened interest is maximally urgent, in the sense that the realization of the threat would be devastating to the life of anyone exposed to it," (2) "there is a set of 'eligible' agents with the resources, position, and capacity to act so as to alleviate the threat or mitigate its consequences," and (3) "the costs of action, if shared among these agents, and regarded from their perspectives, would be only slight or moderate, and when added to the costs previously borne by these agents for similar purposes would not be unreasonably great."[52] But then why not maintain that those whose urgent interests in health are threatened by poverty have a moral right against each and every member of the set of eligible agents that he or she contribute his or her fair share to the collective task of alleviating that risk or mitigating its consequences? Furthermore, the claim that a duty of "strong beneficence" obtains only if the cost to each of the eligible agents is slight or moderate is contestable. More importantly, most rights theorists agree that the cost to the duty bearer always figures in the specification of the duty correlative to a right. The more fundamental question is whether the value of the rightholder's interest suffices to justify *any* limit on the duty bearer's freedom. Beitz's description of the interest in health as "maximally urgent" suggests it does.

Beitz's appeal to a duty of strong beneficence to defend anti-poverty human rights purports to demonstrate the *possibility* of justifying international human rights in moral duties that do not correlate to individual moral rights. Buchanan makes

[51] Beitz, *Idea of Human Rights*, pp. 166–9.
[52] Ibid, p. 167.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

a stronger claim, namely, that there are no moral human rights that correspond to many international legal human rights, and therefore the latter cannot be morally justified by appeal to the former. States do have moral duties to respect their subjects' equal status and to ensure they have the opportunity to lead a decent life, and specific international legal human rights may be justifiable as a means for enabling states to (better) perform their duties, or ensuring that they do so. Nevertheless, Buchanan thinks these moral duties do not correlate with individual moral human rights because, *morally speaking*, the state does not owe the required conduct to each of the individuals it governs. *Legally speaking*, the state may owe the required conduct to each of the individuals it governs, but that is because attributing a legal right to demand the conduct is morally justifiable as a means for getting the state to perform its moral duties.

Buchanan maintains that "in the case of moral rights, the corresponding duties must be justifiable by appealing solely to some morally important aspect of the individual to whom the right is ascribed, because the duties are supposed to be owed, morally speaking, to the individual to whom the right is ascribed."[53] But in many cases, the duties that IHRL imposes on a state cannot be justified solely by appeal to the moral value of protecting or promoting a single individual's interest. For example, signatories to the International Covenant on Social, Economic, and Cultural Rights "recognize the right of everyone to the highest attainable standard of physical and mental health," which, among other things, requires that they take steps to prevent, treat, and control epidemic, endemic, occupational, and other diseases.[54] Making good on this duty requires investment in public health, health-care delivery, medical education and research, and other costly institutions. Clearly these costs cannot be justified by appeal to the value of a single individual's interest in health. But it does not necessarily follow that the international legal human right to health is morally unjustifiable. Individuals' interests in health still matter morally, and their cumulative value may well suffice to justify, indeed morally require, the investments in health listed above. If so, then the moral justifiability of the individual *legal* human right to health depends essentially on the contribution the state's fulfillment of the correlative legal duties makes to protecting and promoting the interests of individuals other than the rightholder. Put another way, the reason I ought to enjoy a legal human right to health is not because my interest in health alone suffices to morally justify the legal duties correlative to that right. Rather, it is because according me a legal human right to health enables me to take actions that serve to advance many people's interest in health, and taken together our interests in health warrant these legal requirements on the state.

[53] Buchanan, *Heart of Human Rights*, p. 62.

[54] Article 12, *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, United Nations, Treaty Series, vol. 993, p. 3, available at https://treaties.un.org/doc/Publication/UNTS/Volume%20993/v993.pdf.

One concern with Buchanan's moral defense of an international legal human right to health is that it seems to leave the door open to a form of consequentialist moral reasoning that many find problematic. Absent a moral duty the state owes to each of its individual subjects, it may seem we lack any moral basis for criticizing the adoption of laws or policies that generally do quite well at protecting or promoting health but that also treat the health of some subjects as less important than that of others, or even of no concern at all. Buchanan responds that any such law or policy falls afoul of the state's moral duty to affirm and protect the equal basic moral status of all individuals.[55] Thus, the complete moral justification for an international legal human right to health invokes both of the purposes that inform this body of law, namely the status egalitarian function and the well-being function. Read in light of these two overarching aims, IHRL should be understood to accord every human being an equal right to health.[56]

A second concern, advanced by David Luban, is that absent an appeal to individual moral human rights we cannot account for the power IHRL has to mobilize shame.[57] This capacity matters not only for IHRL's utility as a means for realizing justice but for its very status as law. This is so because the existence of genuine legal rights depends on their being upheld, at least with adequate frequency, by the political community whose law it is. In the case of IHRL, however, there is often no court or adjudicatory body with the authority to hold states or other actors accountable for their violations of the law; neither is there any actor with the right, ability, or willingness to compel wayward actors to comply with it. Instead, adjudication largely takes place in the court of public opinion; various actors publicize (alleged) violations of IHRL with the hope that the resulting negative attention from other states, international organizations, multinational corporations, and so on will motivate the rights violator to alter their behavior. But Luban asks:

> [I]f legal human rights are just another bit of positive law, then why should anyone invest time and money, let alone risk their lives, to mobilize around ILHRs [International Legal Human Rights]? Why should state leaders (pretend to) feel ashamed about violating them, any more than they feel ashamed about violating technical regulations about the size and shape of cartons in international shipping?[58]

Although morally valuable, considerations such as increased economic productivity and greater social solidarity lack the qualities of necessity and urgency that moral human rights possess. It is the association of IHRL with moral norms that have these

[55] *Heart of Human Rights*, p. 64.
[56] Ibid, pp. 28–9.
[57] David Luban, "Human Rights Pragmatism and Human Dignity," in *Philosophical Foundations of Human Rights*, eds. Rowan Cruft, S. Matthew Liao, and Massimo Renzo (Oxford: Oxford University Press, 2015), pp. 266–70.
[58] Ibid, p. 268.

qualities that makes it possible to shame rights violators into modifying their behavior.

In response, Buchanan might agree that Luban provides a compelling reason to limit the content of IHRL to morally mandatory aims, that is, to those states of affairs that states, international organizations, and perhaps other actors have a moral duty to protect or promote. Other moral purposes, such as increasing economic productivity, would play only a supplementary role in the justification of international legal human rights norms. Nevertheless, for the reason just discussed Buchanan would deny that that every international legal human right must be morally justifiable as either a specification of, or a necessary means to, an individual moral human right. Rather, many may be justified by appeal to moral duties that states have to protect or promote certain of their subjects' interests, duties that reflect the moral importance of those interests but that not are not owed to each individual taken one by one.

Luban also worries that if we divorce IHRL from "moral claims every human being is entitled to make, where the entitlement and the content of the claim flows from our human status itself," we lack a rationale for referring to the rights this body of law creates as *human* rights.[59] Similarly, Tasioulas argues that IHRL's integrity depends on a recognition that it serves essentially to protect and promote moral human rights.[60] Absent this rationale or recognition, legal officials and other actors may develop IHRL in ways that distort or corrupt it. Christina Lafont and Jean Cohen both argue that recent conferrals of human and constitutional rights to corporations constitute just such a distortion.[61]

In response, Buchanan (and Beitz) can argue as follows. As a descriptive matter the international (legal) practice of human rights has as its overarching aim protecting or promoting the interests of individual human beings for their own sake.[62] This reading of the international human rights practice warrants rejecting attributions of human rights to corporations on the grounds that they do not fit the practice. No plausible interpretation of a body of law that has as its goal protecting and promoting the urgent interests of individual human beings can yield the conclusion that it also confers legal rights on a radically different type of agent such as a corporation. Unlike human beings, corporations have no existence apart from their recognition in law. Neither are setbacks to the interests of a corporation bad for the corporation itself, as opposed to bad for its shareholders, employees, customers, and so on; that is, bad for various individual human beings. Thus, any finding in favor of

[59] Ibid, p. 269.

[60] Tasioulas, "Exiting the Hall of Mirrors," 80–2.

[61] Cristina Lafont, "Should We Take the 'Human' Out of Human Rights? Human Dignity in a Corporate World," *Ethics and International Affairs* 30, 2 (2016): 233–52; Jean L. Cohen, "The Uses and Limits of Legalism: On Patrick Macklem's *The Sovereignty of Human Rights*," *University of Toronto Law Journal* 67, 4 (2017): 529, 534–43.

[62] This last clause makes explicit that the international practice of human rights treats the protection or promotion of health, religious freedom, and so on, as valuable for the individuals who enjoy them, and not merely as beneficial to others, including the state.

a corporation's claim to possess legal human rights reflects a confused and fundamentally mistaken understanding of the law. Crucially, this argument does not depend on an appeal to moral human rights to justify the norms constitutive of the international human rights practice.

Of course, political-practice theorists must acknowledge the possibility that the attribution of (legal) human rights to corporations might be morally justified on instrumental grounds. For example, doing so might result in an overall institutional order that better enables the members of the political community constituted by a given state to fulfill their moral duty to collectively promote and protect one another's urgent interests. As a matter of moral justification, this development would not accord corporations legal human rights because they are morally entitled to them in their own right. Nevertheless, it would still mark a radical change in the existing practice of IHRL, one that might be precluded if we conceive of the IHRL as necessarily concerned with protecting and promoting individual moral human rights. Political-practice theorists of human rights see it as a virtue of their approach that the question of whether to accord legal human rights to corporations must be settled on the basis of substantive moral arguments. Both Buchanan and Beitz maintain that it is a mistake to settle this question by conceptual fiat, in other words, by assuming or stipulating that international legal human rights must correspond to moral human rights. Rather, the question should be answered on the basis of empirically informed hypotheses regarding the promise and peril that conferring legal human rights on corporations poses for the protection and promotion of individual's urgent interests (and perhaps also social solidarity, increased productivity, and other morally desirable goals).

In the preceding paragraphs, we considered criticisms of Buchanan's argument that focus on one or another of the problematic consequences that allegedly follow from denying that moral human rights provide the justification for political and legal human rights. A different set of objections challenge the argument Buchanan gives to support his conclusion that many international legal human rights cannot be justified by appeal to corresponding moral human rights because the latter do not exist. For example, John Tasioulas argues that we need not demonstrate that the value of a single individual's interest in health warrants the full cost the state must bear in order to protect or promote that interest. Rather, that cost should be distributed across all of the individuals whose interest in health the state promotes when it invests in medical research, provides access to free or subsidized healthcare, enacts and enforces mandatory vaccination laws, and so on. As he writes, "what needs to be justified by the right-holder's interest is the right holder's *proportionate share of the costs* of securing his right as one among many other right-holders who also benefit in the same way from the system."[63] Crucially, because the interest in question is of great value to all human beings, the cost of protecting or promoting

[63] Tasioulas, "Exiting the Hall of Mirrors," 84.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

a human right will always be distributed across the state's entire population. The question we need to answer, then, is "does the notional benefit to any individual right holder of securing the putative duties for all justify a proportionate share of the costs involved in doing so?"[64] Tasioulas maintains that the answer will be "yes" for many of the international legal human rights Buchanan identifies as impossible to justify solely by appeal to individual moral human rights.

Buchanan's criticism of a moral human right to health appears to entail that moral human rights are limited to those that individuals can possess even in the absence of moderately well-functioning political-legal institutions.[65] To reiterate, where the protection or promotion of an interest requires large-scale social institutions, no individual's interest alone suffices to justify the substantial costs involved in creating and maintaining those institutions. Hence there can be no moral human right that correlates to a moral duty to create and maintain these institutions, only a legal right that is justified instrumentally on the basis of the contribution it makes to advancing the interests of the many individuals who benefit from those institutions. However, philosophers such as Raz and Samantha Besson argue that the existence of moral rights may be conditional on the existence of conventional practices or institutions, including legal ones, without being reducible to legal rights.[66] Rather, we can distinguish moral from legal rights on the basis of the reason for action each provides. In the case of a legal right, the reason is "there is a positive legal norm that confers a right to X (e.g. health) on citizens or residents, to which correlates the state's duty to A, B, and C" and "this positive legal norm enjoys legitimate authority over the duty bearer (i.e. the state official), meaning that he or she has a moral duty to obey the law." In the case of a moral right, the reason is "given certain non-evaluative facts, which may be contingent and may include certain social conditions including but not limited to the existence of (or feasibility of creating) a conventional practice or institution, each individual's individual interest in X (e.g. health) is sufficiently valuable to justify a moral requirement on the state to protect or promote that interest in certain specific ways." Thus, a legally constituted practice or institution may play an essential role in providing a background or context in which the value of an individual's interest suffices to justify duties on others to advance that interest in specific ways. But it is the value of the agent's interest that grounds the moral right to which the duty correlates – a reason distinct

[64] Ibid.

[65] Or, what is not quite the same, Buchanan's argument entails that the duties correlative to a moral right are limited to those that that can be justified even in the absence of moderately well-functioning political-legal institutions.

[66] Raz, "Emerging World Order," 219–20; Samantha Besson, "International Human Rights Law and Mirrors," *ESIL Reflections* 7, 2 (2018): 3–5; Besson, "In What Sense Are Economic Rights Human Rights? Departing from Their Naturalistic Reading in International Human Rights Law," in *Economic Liberties and Human Rights*, eds. Jahel Queralt and Bas van der Vossen (New York: Routledge, 2019), pp. 45–68.

from the moral duty to obey the law, which might also provide a duty to perform the same action.

III WHAT PLACE FOR MORAL ARGUMENT IN THE PRACTICE OF HUMAN RIGHTS?

The discussion in the previous section concerned the moral justification of human rights, understood as the norms constitutive of the international human rights practice (including, but not limited to, international legal human rights). Specifically, we asked whether a moral defense of these norms must invoke an individual moral human right, or whether it might depend instead on moral duties that do not correlate to individual moral rights, or even on the contribution that human rights norms make to advancing morally desirable but not mandatory goals, such as increased productivity. But what role should moral justifications of international human rights norms play in the international human rights practice? The answer may seem obvious: participants in the practice should use whichever one of these justifications is correct to defend the existing human rights it entails, to critique those it does not, and to call for the development of any new norms this justification warrants. Several theorists challenge this claim, however. Rather, as the philosopher Jacques Maritain famously said of the members of the UNESCO Committee on the Theoretical Bases of Human Rights: "[W]e agree about the rights but on condition that no one asks us why."[67] Beitz maintains that this is not a bug but a feature of the international human rights practice, a fact a philosophy of human rights ought to reflect. That is one reason why Beitz defends a concept of human rights that enables participants in the practice to agree on what it means to invoke a human right while disagreeing about the specific duties it generates or the (moral) considerations that justify it. As he observes: "[T]his does not mean that we need no reasons to care about human rights – only that it is not part of the practice that everyone who accepts and acts upon the public doctrine must share the same reasons for doing so."[68]

The norms constitutive of the international human rights practice are the product of incompletely theorized agreements or, on one understanding of that idea, norms of global public reason. For human rights to play the role Beitz maintains they do, participants in the practice they constitute must agree that those norms are morally justifiable; that is, that there exists a moral justification for norms that requires states to protect or promote certain of their subjects' interests, and that make their failure to do so a proper subject of international concern. However, it does not require that the participants agree on *why those norms are morally justifiable*. Indeed, what ultimately matters is not agreement on any justification of the norms constitutive of the international human rights practice, such as those contained in the Human Rights

[67] Cited in Beitz, *Idea of Human Rights*, p. 21.
[68] Ibid, p. 104.

https://doi.org/10.1017/9781316481653.007 Published online by Cambridge University Press

Conventions. Rather, what matters is participants' *successful use* of the norms to provide other participants in the practice, especially but not only states, with reasons for action. A participant in the practice successfully deploys a human rights norm when the agent he or she addresses takes that norm as a reason for action. But again, the success of the practice does not depend on why the addressee does so, and in particular, whether she does so for the reason that the person deploying the norm thinks she should do so.

David Luban offers a similar account of the reasoning or argumentation constitutive of the international human rights practice. References to the inherent dignity possessed by all human beings (or all "members of the human family") in various human rights instruments express a commitment on the part of all participants to a particular moral ideal; in Luban's words, "that every human being should count as an object of concern" and "that no one should have to beg for their rights."[69] That commitment does not refer to some practice-independent feature of the world, one we can investigate via conceptual analysis, philosophical reflection, or empirical study, and from which we can derive specific human rights. Rather, that commitment serves as a presupposition for the international human rights practice. In arguing over the norms the practice should include, and the duties to which they correlate, participants advance claims regarding the best way to make good on a shared commitment to the abstract ideal that every human being is entitled to certain forms of treatment (by the political communities to which they belong). The success of these claims, for instance, the assertion or denial of a human right, depends on their acceptance by other participants in the international human rights practice. Acceptance, again, is exhibited in participants' actual treatment of a human rights norm as a reason for action. It is successful uptake by participants in the international human rights practice that provides the grounds for human rights norms, not their correspondence to some practice-independent fact, or to the normative practice (partly) constitutive of some other community, such as the constitutional rights recognized within a particular state's domestic legal order. As Luban puts it, "the meaning of the phrase 'human dignity' is not defined by a philosophical theory, but rather determined by its use in human rights practice."[70]

But how can the mere fact that others accept my claim that there is a human right to health, or that the human right to health generates a duty on all states to take specific steps to protect against epidemics, *morally* justify such a claim? Neither Beitz nor Luban is necessarily committed to claiming that it does so. Rather, their arguments are pragmatic, meaning they aim to give an account of how to use human rights norms to accomplish certain ends. Put blithely, they offer a theory of how to play the human rights game. But suppose a person asks

[69] Luban, "Human Rights Pragmatism," 277. See also Cohen, "Uses and Limits of Legalism," 534.
[70] Luban, "Human Rights Pragmatism," 275.

why she should accept a particular rule of this game, such as the existence of a human right to health, or indeed, why she should play the game at all. One way to answer those questions is by demonstrating that the moral principles she (perhaps implicitly) accepts in other spheres of her life also warrant her acceptance of a human right to health, or the existence of human rights in general. One need not accept those principles oneself in order to make this argument; this is the point about human rights norms functioning as the product of incompletely theorized agreement. But suppose *you* are the person entertaining local or global human rights skepticism? Presumably, you will want human rights norms to rest on moral principles that really are justified, not just on moral principles you or anyone else happens to accept or believe are justified. At this point, you may appeal to practice-independent considerations such as moral facts or the principles that suitably specified ideal agents would agree to under suitably specified ideal conditions. Or perhaps you might conclude that the justification of moral norms bottoms out in the abstract ideals of specific historically situated communities that cannot and need not be justified from an Archimedean point outside the practice itself. These justificatory accounts provide your reason to participate (or not) in the international human rights practice. But while you may also think these accounts provide all human beings with a (or the only) reason to do so, and while they may influence the sort of claims you advance or resist within the practice, they do not determine its content; that is, the specific human rights the practice accords individuals, or the duties to which they correlate. Rather, the practice itself does so via a process of uptake or the failure thereof on the part of its participants.

***

Our focus in this chapter has been on the question of how we should understand the concept of a human right, and what sort of considerations can or do serve to justify their invocation or denial in contemporary international and domestic politics. The value of this investigation lies in the clarity it brings to the task of determining which human right norms ought to be recognized by participants in this recently emerged and still evolving political practice. But an account of how to go about justifying or criticizing the international human rights practice should not be confused with actually doing so. The task of responding to the examples of skeptical challenges to human rights listed in the introduction to this chapter still remains. Moreover, as Beitz, Raz, and especially Buchanan emphasize, and as orthodox theorists such as Tasioulas agree, the justification of both the international human rights practice as a whole and the individual norms that compose it partly depends on how it is, or could be, institutionalized. The relatively primitive nature of the international legal order, the extent to which it exhibits fidelity to the rule of law, and the legitimacy of the various actors who enact, apply, and enforce human rights norms all have

important implications for the moral justifiability of the international human rights practice. Nevertheless, when it comes to reflection on human rights, if philosophers enjoy any comparative advantage over theorists and practitioners steeped in other disciplines, it is with regard to formulating and answering basic theoretical questions of the sort explored in this chapter.