CHAPTER TWO: A PLURALISTIC JUSTIFICATORY METHODOLOGY FOR HUMAN RIGHTS

This chapter has two aims: to focus attention more closely on the strangely neglected problem identified in Chapter One -- the justification of the international legal human rights system—and to establish the proper methodology for addressing it. Philosophical theories of human rights are proliferating, but they had little to say about the system of international legal human rights. There are two possible sources of this neglect. Philosophers may have failed to appreciate how central international human rights law is to the practice of human rights; or, they appreciate it, but hold a simplistic conception of what the law is and does, relegating it to the philosophically uninteresting task of merely providing legal form to antecedently existing moral rights whose grounding and content can be understood without thinking about legalization. On this simplistic conception, law is merely an instrument for realizing pre-existing moral rights that we can know simply by the power of individual moral reasoning, without relying on the collective, institutionally-structured practical reasoning that law supplies. If that is how one conceives of the relationship between the morality of human rights and the law, then it is not surprising that one’s theorizing about human rights would have little to say about the law, as has been the case with the majority of contemporary philosophers writing about human rights.

It appears that at least some theorists who take the so-called “moral” or “orthodox” approach to theorizing human rights have tended to assume what I referred to in Chapter One as the Mirroring View: that the standard or typical justification for an international legal human right must appeal to an antecedently existing, corresponding moral human right (while allowing for the possibility that some justified international legal human rights are specifications of more abstract moral human rights or valuable instruments for realizing moral human rights). The hypothesis that they hold the Mirroring View would explain their almost exclusive focus on the
question of how to justify assertions about the existence of moral human rights, to the neglect of other, at least equally daunting questions relevant to the justification of a practice anchored in a system of international legal human rights. Perhaps the Mirroring View has inclined them toward the trivializing view of the law characterized above, proceeding as if the main philosophical task will be completed if a sound theory of moral human rights is produced.

It is worth emphasizing, however, that even if the Mirroring View were true, things look quite different if one has a richer view of what the law is and does. Even if international legal human rights (to the extent that they are justified), often mirror pre-existing moral human rights, legal processes can provide greater determinateness, with the result that the effort to realize moral human rights in law actually changes our understanding of the content of the moral human rights. If that were the case, then Griffin would be mistaken in his apparent assumption that giving more determinateness to the idea of moral human rights is a task largely reserved for the philosopher.

I shall argue that there are two problems with a methodological approach that assumes the Mirroring View and focuses primarily or exclusively on the justification of statements about the existence of moral human rights. First, the Mirroring View is assumed, not argued for, and false to boot. Second, even if the Mirroring View were true, producing a theory of moral human rights would, for reasons I will specify shortly, only be one necessary condition for justifying international legal human rights; the bulk of the work of justification would still have to be done. Justifying assertions about the existence of certain moral rights is one thing; justifying an institutionalized system of international law designed to realize them is quite another.

Advocates of the so-called “political” approach to theorizing human rights, who say that we should attend to the actual practice of human rights and not assume that it must have
philosophical foundations that are, as it were, antecedent and external to it, have also neglected to provide either a justification for having an international legal system of individual human rights or anything approaching a satisfactory account of how to justify the inclusion of any particular right within it. If we assume that philosophical theories of human rights are supposed to shed light on the practice of human rights (or restrict our attention to those that purport to do so), then this failure to engage the justification of international legal human rights is a major shortcoming, given how central that human right law is to the Practice.

The main conclusions of this chapter can be previewed as follows. (1) It is a mistake to begin philosophical theorizing of human rights with the assumption that the purpose of human rights practice is to realize a set of pre-existing corresponding moral human rights; indeed, once we appreciate the instrumental character of legal rights, it is a mistake to assume that to justify an international legal human right one must appeal to any moral human right. Instead, it may be possible to provide an adequate grounding for international legal human rights in other kinds of moral considerations, for example, moral duties which are not the correlates of individual moral rights. (2) Given the main functions and key features of the international legal human rights system, the existence of pre-existing, corresponding moral human rights is neither necessary nor sufficient for justifying international legal human rights. (3) Some prominent international legal human rights, including the rights to freedom of expression, to health, to democratic government, and rights to due process under the law, cannot be justified by appeal to corresponding moral rights, because there are no moral rights that have the extensive scope of these legal rights. (By ‘scope’ here I mean the set of duties that correlate with the right; one might also call this the content). Nonetheless, there are cogent moral justifications for all of these international legal rights. (4) The argumentative distance between identifying the basic moral values or moral
rights on which a system of international legal human rights is most securely based and providing a sound justification for such a system is much greater than philosophical theorists have assumed. It is one thing to make the case for certain values or certain moral human rights, another to show that they should be realized through law, and yet another to establish that they should be realized through international law and, more specifically, through international law that constrains state sovereignty even in its exercise over domestic matters and has the other features that the existing system exhibits. By concentrating almost exclusively on the development of an account of moral human rights, philosophical theorists have not only proceeded with an unduly constrained conception of the moral considerations that ground international legal human rights; they have also failed to appreciate how complex and daunting the task of justification is.

I. Why Corresponding Moral Human Rights Aren’t Necessary

At least some of the most prominent international legal human rights, as well as their domestic law counterparts, can be justified without appealing to corresponding moral rights. Indeed, it appears that they can be adequately justified without appealing to moral human rights at all. Consider the legal right to health, whether in a domestic or regional or international legal system. This legal right admits of a powerful pluralistic justification that does not include an appeal to an antecedently existing moral right to healthcare. 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 a 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.² Taken together, these distinct lines of justification, none of which appeals to an antecedently existing moral right to health, make a strong case for having a legal right to health.

**Justifying legal rights without premises about moral rights**

Further, it is not at all clear that these arguments need to invoke premises asserting the existence of moral human rights of any kind. Instead, it appears that these arguments only require an appeal to some rather uncontroversial values and can achieve the desired conclusion by invoking mere duties to promote or protect them, without recourse to rights. Once we appreciate the instrumental character of legal rights, it becomes clear that there is nothing inconsistent about justifying a legal claim-right by showing that, if enacted and implemented, it would help realize important values or fulfill important moral duties, even though the duties are not correlatives of rights. In other words, it can be beneficial, and even morally mandatory, to create a legal right, where this means a legal duty that is owed to the legal right-holder, in order to fulfill a (mere) moral duty.

Similarly, legal rights that promote physical security—rights against assault, arbitrary killing, torture, etc.—can be justified by appeal to a number of moral considerations, without recourse to antecedently existing corresponding moral rights. Legal physical security rights serve several important values, including individual autonomy, peaceful and productive social cooperation, social utility, the protection of minority groups, and the protection of property rights (by shielding individuals from coercive expropriation of their property).

Once such a pluralistic justification for physical security rights is provided, it can serve as the basis for justifying other legal rights, such as the right to democratic governance and the various rights of legal due process, on the grounds that these latter rights are needed to make the legal physical security rights effective.³ At no stage does the argument require reference to
corresponding moral rights. Further, as with the right to health, one should not assume that these justifications for the legal right are sound only if they rely on premises about the existence of moral rights, as opposed to (mere) moral duties.

*Legal rights: instruments to serve a variety of purposes*

The fundamental and quite general point is that legal rights, whether domestic or international, do not presuppose corresponding moral rights. This should be no surprise, given that individual legal human rights are instruments that can serve a number of purposes, including moral ones of various types. The moral purposes for which individual legal rights are instrumentally valuable are not restricted to the realization of antecedently existing individual moral rights. Consequently, one should not assume that if a legal right is morally justified, there must be a corresponding moral right that it serves to realize. The fact that law is an instrument capable of serving quite diverse purposes, including the realization of a diversity of moral concerns, including the fulfillment of mere duties, should make one skeptical about the assumption that to justify international legal human rights one must show that they are grounded in corresponding moral human rights.

*Avoiding a confusion about enforcement and rights*

One might assume that a system of legal individual rights is justifiable only if there are corresponding moral human rights, if one made two further assumptions: First, that if something is to be a legal right, it must be justifiable to enforce it; and second, that only duties that are the correlates of moral rights may be justifiably enforced. For my purposes, it is not necessary to take a position on the first assumption; I will remain agnostic on whether there is such a tight connection between legality and enforceability. The second assumption, however, is clearly false. It can be justifiable to enforce legal rights even if there is no corresponding moral right.
Although some libertarian philosophers have uncritically assumed it, it is not the case that duties may justifiably be enforced only if they are correlates of moral rights. For example, in some cases, it is morally justifiable to enforce duties the fulfillment of which is necessary for securing morally important public goods, but its being justifiable does not depend on the implausible claim that each individual has an antecedently existing moral right to the public good. Justifying a legal right does require justifying the enforcement of the correlative legal duties, but the enforcement of legal duties does not require correlative moral rights. If the existence of a moral right is not necessary for the justified enforcement of duties, then one should not assume that if the duties that correspond to international legal human rights are to be justifiably enforceable, they must be grounded in moral human rights. Hence, even if one assumes that to justify an international legal human right one must show that it is justifiable to enforce the duty the right entails, it does not follow that an international legal right is justified only if it is necessary for realizing an antecedently existing moral human.

II. Why Moral Rights are Not Sufficient

Some moral rights are not plausible candidates for legalization

Thus far, I have shown that justifying claims about the existence of corresponding moral rights, or any rights at all, is not necessary for justifying legal rights, international or otherwise. It should be obvious that, generally speaking, the existence of a moral right is not a sufficient reason for establishing a corresponding legal right either. Sometimes the attempt to enforce a moral right would be require dangerously high levels of coercive capacity on the part of the state. In other cases, even if enforcement would not require excessive coercive capacity, the content of a particular moral right is such that enforcing it would be inappropriate. One might argue that
this is so with the rights generated by promises (as opposed to contracts) and the right to be treated with respect, among others.

In brief, as the literature on the relationship between law and morality has long acknowledged, not all moral rights are suitable candidates for legalization, whether domestic or international. On the face of it, it seems that the same sorts of considerations that can make it inadvisable to legalize some moral rights generally apply to some moral human rights. If this is so, then we shouldn’t expect that all moral human rights are appropriate for international legalization.

The right to be treated with respect is, on some views, a moral human right; but as I have just noted, it would not be a good idea to make it a legal right, assuming that being treated with respect includes ways of being treated, especially in personal relationships, that are not the proper business of law. Some might deny that the right to respect, understood in this way, is a moral human right, however, because they think that moral human rights are, by definition, rights that are suitable for international legalization. That is not a promising line of thought, given that the notion of moral human rights, as it was invoked by philosophers at least as early as the 17th and 18th Centuries made no reference to international legalization. Restricting the term ‘moral human rights’ to moral rights that may rightly be included in international law seems arbitrarily stipulative, given the long history of the notion of moral human rights that antedated even the proposal for an international legal human rights system. But even if we accept the stipulation, all that follows is the trivial assertion that all moral human rights in this special, stipulated sense, may rightly be made international legal rights. It does not follow that being a moral human right is sufficient for being included among international legal human rights,
because there is a quite respectable usage of the term ‘moral human right’, as I have noted, that
does not refer to international legalization.

Quite apart from the familiar considerations that sometimes speak against legalizing
moral rights, whether a particular moral human right ought to be given international legal
embodiment will depend upon the functions that the system of international legal human rights is
supposed to serve. Not all moral human rights may be relevant to those functions and including
legal counterparts of some of them might actually detract from the system’s ability to perform
them. In particular, there is no reason to assume that every moral human right is important
enough to play a role in a system of international law designed to limit sovereignty, given the
important values, including collective self-determination, that sovereignty protects and promotes.

*Some plausible legal rights cannot be grounded in corresponding moral rights*

I now want to articulate a less obvious reason why a strong correspondence between
international legal rights and moral rights should not be assumed. A sound theory of the moral
rights of individuals will not include counterparts of some important individual legal rights,
including the right to health, the right to democratic government, and rights of legal due process.
Therefore, even if philosophers could produce a comprehensive and sound moral theory of
human rights, this would be inadequate for justifying some of the most important international
legal human rights. The problem is that many international legal human rights have a much
broader scope or content—a more extensive set of correlative duties—than the moral human
rights that go by the same name.

Moral human rights are typically claim-rights in Hohfeld’s sense (though as Carl
Wellman has shown they may also have other Hohfeldian features as well). In the case of moral
claim-rights generally, including moral human rights, the correlative duties are morally owed to the right-holder, or as is sometimes said, they are directed duties.

What must be true if these duties are to be owed, morally speaking, to the right-holder? The only cogent answer, so far as I can tell, is that there must be something about the right-holder that is of sufficient moral importance to ground the duties and it is because this is so that the duties are owed to him or her. Or, to put the same point in different terms, in the case of a moral claim-right, the right-holder is morally entitled to the performance of the correlative duties and this can only be the case if there is something about the right-holder that makes him or her so entitled.

Joseph Raz appears to acknowledge this point about moral claim-rights when he says that A has a right only if there is some aspect of A’s interest that is sufficient to ground the correlative duties. This makes sense if Raz is referring to moral claim-rights, rights with directed correlative duties. For the correlative duties to be owed, morally speaking, to A or for A to be morally entitled to the performance of those duties, there must be something about A that is of sufficient moral importance to justify the claim, not only that someone has those duties, but that they owe them to A. Raz uses the notion of interests to capture this something.

To highlight this feature of moral claim-rights, let us say that the correlative duties, as directed duties, are *solely subject-grounded*. But let us remain agnostic as to whether that something is always an interest (leaving open the possibility that it might also be something else—perhaps the moral status of the right-holder or some capacity of the right-holder that confers moral status). The key point is that to justify the assertion that A has a moral claim-right R, it is not enough to show that someone has a duty or even that someone has a duty regarding A; one must show that that duty is owed, morally speaking, to A or that A is morally entitled to
the performance of that duty; and to show that one must identify something about A that is sufficient to ground the “directed duty.”

Notice that while Raz’s assertion is plausible if it refers to moral claim-rights, it is not if it refers to legal claim rights. To say that someone has a legal right to R is only to say that the corresponding duties are owed, legally speaking, to the right-holder, where this means only that the right-holder has legal standing to demand that the duty be fulfilled, is eligible for compensation or restitution, etc. There is no assumption that the right-holder is morally entitled to the performance of the duties, nor that the only way to justify having the correlative duties owed, legally speaking, to the right-holder is to identify some feature of the right-holder that is of sufficient moral importance to ground the legal duties.

Raz notes that with some genuine rights the moral importance of the right-holder’s interests is not sufficient to ground the correlative duties. He tries to accommodate this fact by abandoning his original assertion about what is necessary to justify duties and hence correlative rights. He says that the grounding of the correlative duties can rest on the importance of the interests of large numbers of people, not just those of the right-holder, so long as the former are served by the protection of the right-holder’s interests. In other words, he back-tracks on his original claim that there must be some aspect of the right-holder’s interest that is sufficient to ground the duties.

This move seems to me (as it has to many others) to be wholly ad hoc. Further, and more importantly for present purposes, it cannot explain why, morally speaking, the duties are owed to the right-holder. Why would the fact that the correlative duties happen to serve the interests of others via serving my interests show that the duties are owed, morally speaking, to me?
If Raz restricted his revised view to legal claim-rights, it would be more plausible. With respect to legal claim-rights, one need not show that, morally speaking, the correlative duties are owed to the right-holder. One need only provide a sound justification for having the duties owed, legally speaking to the right-holder, and such a justification can quite properly appeal to the interests of persons other than the right-holder.

In the case of a legal right, the corresponding duty can be (legally) owed to the right-holder simply by virtue of the fact that the law confers that (legal) standing on her. There can be sound instrumental reasons for giving individuals this sort of legal standing, even in cases in which there is nothing about the individual that is in itself of sufficient moral importance to justify the duties in question. For one thing, by conferring legal standing on individuals, it may be possible to achieve more effective compliance with the duties, at least when the right-holders have appropriate incentives for advancing claims on the basis of the right.  

Further, it is perfectly appropriate to justify making certain duties owed, legally speaking, to an individual, if that is needed to promote the interests of large numbers of other people. The failure to appreciate this fundamental difference between moral and legal rights has done much mischief in philosophical theorizing about human rights, as I shall show.

In the case of the rights to health, to democratic government, and to due process--no individual’s interests alone could justify the imposition of the corresponding duties that are reasonably associated with them as legal rights, whether domestic or international. In each case, the scope or content of the legal rights is very broad: The range of corresponding duties includes duties to ensure that various large-scale social arrangements are created and sustained. For example, in the case of rights of due process, the duties include the training and supervision of
the police, appropriate processes for selecting an able and independent judiciary, and the establishment and maintenance of courts.

The same is true with regard to the right to health, if we grant the now widely accepted and empirically well-supported assumption that the individual’s health depends significantly on various social-structural and environmental factors. If this assumption is valid, then, as Gopal Sreenivasan has argued, protecting and promoting an individual’s interest in health will require large-scale social investment for the provision of public goods such as “herd-immunity” to infectious diseases through vaccination programs and, given the negative effects on health that certain social inequalities appear to produce, most likely large-scale social reforms as well.

Further, such policies will involve restrictions on the liberty of many individuals. No individual’s interest in health is morally sufficient to justify the great costs that such large-scale policies entail and the significant restrictions on many individuals’ liberty that they would inevitably require. If there is a moral right to health, it is narrower in scope—it has a less extensive set of correlative duties—than a reasonable legal right to health.

Similarly for the right to democratic government: Fulfilling the corresponding duties requires not only large outlays of social resources but also extensive control over large numbers of individuals, where this involves significant restrictions on their liberty. The duties that correlate with the right to democratic government, as an international legal right, include more than just the duty not to interfere with a citizen’s attempts to vote or to run for office. The scope of the right also includes duties on the part of the state to arrange and conduct fair elections, where this includes expending resources to prevent coercion or fraud from distorting the electoral process, and ensuring that the logistics for voting are in place.
One could also develop the same point for the right to freedom of expression. The interest of the right-holder herself may not be sufficient to justify such a right, at least if we think of it as being fairly robust in the protection for expressive activities it provides. But assigning such a legal right to the individual may be justifiable, because doing so serves the interests of large numbers of people, including their interest in keeping government under control.

With regard to all of these rights, it only because the fulfillment of the correlative duties positively impacts the interests of a large number of people that ascription of such extensive, expensive, and liberty-limiting duties is reasonable. But if that is so, then the interests of the individual cannot justify the ascription of the right to him or her, because the right implies the corresponding directed duties. The point is that while the contribution to any particular individual’s interest that fulfillment of the duties that correlate with these rights makes would not warrant the costs and burdens that fulfilling the duties requires, the consequences of the fulfillment of the duties for the population as a whole may be sufficiently good to justify the costs and burdens and hence the imposition of the duties.

The results of the analysis can now be formulated as an argument.

1. Many important international legal human rights have corresponding duties the fulfillment of which requires large-scale social investment and limitations on the liberty of large numbers of people.

2. Such duties, and hence the corresponding rights, are justifiable only because their fulfillment would positively impact the interests (or autonomy, etc.) of large numbers of people.

3. 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. (In
contrast, in the case of legal rights, the fact that the correlative duties are owed, legally speaking, to the individual right-holder does not imply that they are grounded solely in the moral importance of some aspect of the right-holder).

4. (Therefore), there are no moral rights that correspond to (i.e., have the same content as) many important international legal human rights.

5. If there are no moral rights that correspond to many international legal human rights, then for many international legal human rights, it is not possible to justify them by appealing to corresponding moral human rights.

6. Yet many international legal human rights that cannot be justified by appealing to corresponding moral human rights are justifiable—they are suitable for inclusion in a system of international legal rights, given the functions such a system is supposed to perform and given the moral appropriateness of those functions.

7. (Therefore), in the case of many justifiable international legal human rights, showing that the legal right helps to realize a corresponding moral human right will not fully justify the legal right, not because there would be unacceptable consequences of legally realizing the moral right (as with the case of the right to be treated with respect), but because the moral right has a narrower scope than the legal right.

Argument 1.-7. relies on a fundamental difference between moral and legal claim-rights that, so far as I can tell, has gone unappreciated in the philosophical literature on rights. Because the point is unfamiliar, it may be useful to elaborate on it. The core idea is this: Because the duties that correspond to moral claim-rights are directed, that is, morally owed to the right holder, they must be solely subject-grounded. That is, to establish the existence of the directed duties and hence of the right it is necessary to make the case that there is something about the
right-holder that justifies the assertion that the duties are owed, morally speaking, to him or her. But neither the interests nor the autonomy, nor any other feature of any particular individual is of sufficient moral importance to justify the ascription of the extensive and expensive duties that are correlates of many legal rights, whether domestic or international. To put the point bluntly: No matter who you are, you are not important enough to justify set of duties that correlate with the panoply of legal rights that constitute the modern rights-respecting welfare state, much less important enough to justify a system of international human rights law that serves to support the welfare state’s system of rights. But the interests and autonomy of large numbers of people like you are important enough. That is why legal rights, whether at the domestic or international level, often do not mirror moral rights. Legal rights can be and are much more expansive in their content than moral rights and the fact that this is so requires a radical transformation of the way philosophers have tended to think about human rights.

III. Appealing to the Interests of Many, Without Embracing Consequentialism

It is crucial to emphasize that by acknowledging that the justification for legal human rights can appeal to the interests, not just of the right-holder, but also of large numbers of other people, I am not endorsing nor am I committed to a consequentialist justification for these legal rights. One can appeal to the interests of many people without holding that legal rights are simply instruments for maximizing aggregate utility. Recall that on my view the international legal human rights system expresses a commitment to affirming equal basic status for all; that is, affirming and protecting the equal basic status of all individuals is one of its chief functions. The commitment to equal basic status constrains the appeal to the interests of the many: Appeals to the maximization of aggregate interests that sacrifice the interest of some are ruled out. In other
words, on my view, the justification for any particular international legal human rights proceeds in the context of the commitment to status egalitarianism. In particular, the background assumption is that each right will be ascribed to all human individuals, with the same general content, that it will have the same weight for all to whom it is ascribed, and that each will have an equal right to remedies for its violation. Accordingly, the kind of justification I am exploring allows one to escape the narrow confines of a solely subject-centered grounding for international legal human rights without collapsing into consequentialism. In my judgment, this is an impressive virtue of it.

IV. Taking the Distinction Between Legal and Moral Rights Seriously

Thus far, I have shown (1) that plausible justifications for some of the more prominent international legal rights need not appeal to moral rights, whether corresponding or otherwise, and (2) that for some prominent international legal human rights, including the right to health, rights of due process, the right to freedom of expression, and the right to democratic government, arguing that the legal realizes a corresponding, pre-existing moral rights is not sufficient to justify the legal right, because the moral right has a much narrower scope than the legal right.

In Chapter One, I defined the Mirroring View as holding that to justify an international legal human right one typically must show that it mirrors an antecedently existing moral human right (while allowing for the possibility that in some cases the legal right is a specification of such a right (as the right to freedom of the press is a specification of the right to freedom of expression) or that it is instrumentally valuable for realizing a moral human right (as the legal right to democracy is said to be instrumental for realizing the moral human right to physical security). It is worth pointing out that my reflections on the difference between legal and moral rights shows that some international legal human rights cannot be seen as specifications of moral
human rights. Specification is a matter of the determinateness of the object of the right (for example, a right to freedom of the press is more determinate than a right to freedom of expression). The broader scope of international legal human rights is a matter of more extensive duties, understood as means for realizing the object of the right, not a matter of difference in the specification of the object of the right.

I now want to take the argument a big step farther. If it is true that a moral right exists only if the interests or some other aspect of the right-holder are sufficient to justify the corresponding duty of the right-holder, then (general) moral rights have a narrower scope—that is, have much leaner corresponding duties—than is usually assumed. The reason for this is simple: The duty-justifying grounds of moral rights are much narrower than those of legal rights; the former are limited to morally significant aspects of the individual right-holder, the latter are not. In other words, if moral rights are solely subject-grounded, but legal rights are not, then, other things being equal, legal rights have a broader scope—a wider range of justifiable duties—than moral rights.

*Moral rights versus legal rights: the distribution of the costs of fulfilling duties*

There is another reason why a system of international legal human rights should not mirror a list of moral human rights. Generally speaking, it is easier to justify a legal right than to justify the corresponding moral right, at least so far as legal rights are enforceable. To justify a moral right, one must show that the corresponding duties exist, that is, that someone has the duties in question or, on some theories of rights, one must at least show that it would be justifiable to impose the duties on someone. But whether an individual, A, has a moral duty, D, to do X, and whether it is justifiable to require A to do X (to impose the duty on him) can depend on whether A has reasonable assurance that others are going to fulfill that duty. Without this
assurance, it may be unfair to require A to do X. If D is merely a moral duty, then A may not have this assurance, in which case he will not have the duty and it will not be justifiable to impose the duty on him; consequently, there will be no duty and hence no right. But if D is a legal duty and enforceable as such, then A will have the needed assurance and hence it will be justifiable to require him to do x. What one has a duty to do, absent reciprocity on the part of others, can be less than what one has a duty to do, given reasonable assurance of their reciprocating. Because the law can provide reasonable assurance of reciprocity, legal duties, and hence legal rights, can be more robust than moral rights. That is another reason why the law can be a more effective mechanism for achieving moral ends if it does not restrict itself to giving legal form and enforcement to pre-existing moral rights.

If these conclusions are correct, then it is a mistake to assume that a theory of moral human rights will carry us very far toward the goal of providing a critical perspective on the modern human rights practice. That is a mistaken assumption, given that the system of international legal human rights is central to the Practice. For there is no good reason to assume that a system of international legal human rights must be grounded on a corresponding set of moral human rights and good reason to assume that some important international legal human rights cannot be justified in that fashion but are nonetheless justifiable. Nor is it obvious that a sound justification for legal human rights must show that they all help realize some moral human right or other. International legal human rights, like other legal rights, can be justified by appeal to considerations other than the need to realize moral rights, such as the need to fulfill mere duties.

So, we ought to reject the Mirroring View. A more reasonable methodology is to keep an open mind and proceed on the assumption that the justification of international legal human
rights may well be more pluralistic in nature. Whether or to what extent the justification of international legal human rights will rest on assertions about the existence of moral rights should

V. Constraints on a Pluralistic Justificatory Methodology

I have argued that recognition of the fact that legal rights can serve a number of moral purposes, as well as the fact that international human rights law contains more than lists of rights, suggests a pluralistic strategy for justifying international legal human rights—one that allows appealing to a broader range of moral considerations. At this point it is important to emphasize, however, that it is not enough to show that some sort of international legal individual rights could be justified without grounding them on pre-existing corresponding moral rights: The ultimate task, rather, is to justify international legal rights that can function in the way that international legal human rights actually function in the existing system and that have the key characteristics that rights in the existing system have. In other words, any justification for international legal human rights must satisfy certain constraints of “fit,” if it is to succeed as a justification for international legal human rights of the right sort—the sort that are relevant to a critical evaluation of the existing system. If a justification only worked for international legal rights that were quite different in their characteristics or functions they serve or roles they play than existing international legal human rights, it would failure to shed much light on the normative status of the existing system.

In the next chapter, I sketch pluralistic justifications for items from each of four major categories of international legal human rights. Here I want only to show that there is no good reason to adopt a justificatory methodology that assumes that appeals to moral human rights play an ineliminable role in sound justifications for international legal human rights similar to those
that now exist. To do this, we need a clear idea of the constraints that a justification would have to satisfy in order to justify legal rights of that sort.

**Chief functions of the existing international legal human rights system**

The most important constraints, in my judgment, are that international legal human rights 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). Some might object that international legal human rights can serve these functions only if they are grounded in some pre-existing moral right or rights. I now want to show that this is not the case.

As I observed in Chapter One, among the most important roles of rights in the existing international legal human rights system is to constrain the exercise of sovereignty in the domestic sphere—to articulate legal norms that specify how a state is to treat those under its jurisdiction. In addition, the violation of some basic international legal rights, at least if they occur on a large scale, can serve as an important premise in justifications for armed humanitarian military intervention. Finally, respect for some of the most basic international legal human rights is sometimes regarded as a necessary condition for proper recognition of a state’s legitimacy, in the case of new states created by secession from existing ones, and as a necessary condition for the legitimacy of governments in some cases.

If they are to play these sovereignty-limiting roles, existing international legal human rights must be justified in ways that make it plausible for them to do so. It is not enough to produce considerations that justify some sort of individual legal right or other; one must show that individual legal rights having the potency that is distinctive of international legal human
rights are justified. The fact that international legal human rights constrain sovereignty in these ways restricts what will count as a sound justification for having a system of international legal human rights that has this feature.

Assuming that there are weighty moral reasons for a presumption that sovereignty is to be respected, the justification for having a system of international legal rights that constrains sovereignty in these ways will have to be comparably robust. Arguments that might suffice to justify a legal right in a domestic system, where there is no attempt to constrain the sovereignty of other states, may not be adequate to justify a corresponding international legal human right.

In addition to grounding the sovereignty-constraining roles, a justification must also be consistent with a striking feature of the existing international legal human rights system noted earlier: the fact that, taken as a whole, this system of rights expresses a strong commitment to equality of basic status for all people. Fidelity to the status-egalitarianism of the system significantly also constrains the sorts of justifications that can be offered. For example, justifications that are limited to the claim that international legal rights serve to protect individuals from the harms that can undermine the opportunity for leading a minimally good life or provide resources need for such a life will not be adequate because they will not be sufficient to justify the strong rights against discrimination that are characteristic of the existing international legal human rights system. A system of rights could protect individuals against state inflicted harms and provide resources for a minimally good or decent life for everyone and yet be compatible with arbitrary discrimination along gender, racial, or ethnic lines, so long as this discrimination did not rise to the level of gross harm or undermine the prospects for a minimally good life. Similarly, as I have already shown, the status-egalitarian feature rules out a justificatory strategy that relies solely on utilitarian justifications that appeal to the aggregation
and maximization of benefits across individuals, to the extent that such a consequentialist procedure gives short shrift to a recognition of the “separateness” and independent worth of persons that status-egalitarianism implies and the constraints on utility-mazimization that they entail.

It is crucial to emphasize that fidelity to status-egalitarianism is a requirement for justification at the system level. It is not necessary that every right in the system be grounded in the commitment to recognizing and protecting equal basic status for all. Instead, every justification must be compatible with that commitment and the system as a whole must exhibit that commitment.

The second primary function, that of ensuring that all have the opportunity to lead a minimally good or decent human life, introduces an additional constraint on justification. A system of legal rights might protect all from discrimination, but not require even the most minimal well-being promoting measures. (Absence of discrimination means only that there are no arbitrary differences in the treatment of different people; it is compatible will not providing needed resources to anyone). So, a justification for the system of international legal rights must be adequate to capture this second function as well.

To make a prima facie case for the claim that justifications for international legal human rights can satisfy these constraints without appealing to antecedently existing moral human rights, I will fill out the justification, offered early, for one especially important international legal right, the right against arbitrary deprivation of life, one of the most important rights of physical security, and show that it can satisfy the key criteria for adequacy without appealing to an antecedently existing moral right to physical security. My aim is not to provide a conclusive justification for this international legal right at this point, but rather to outline one in sufficient
detail to show that it is consonant with this right serving as a constraint on sovereignty, with it contributing to the affirmation and protection of basic moral status, and with it helping to ensure that all have the opportunity to lead a decent or minimally good life. The arguments I give for this legal right will not appeal to any moral human right; they can be formulated strictly in terms of (mere) moral duties.

The justification for having an international legal right against arbitrary deprivation of life for all individuals, and one that is understood to provide a constraint on sovereignty, is, to put it mildly, over-determined. Physical security is generally a necessary condition for the enjoyment of a wide range of other legal rights, and the lack of physical security threatens all that is worthwhile in human life. Without physical security, the opportunities for autonomous living, for reaping the fruits of our labors, and for engaging in collective projects that make life meaningful, are all threatened. Even if individuals do not actually suffer violent death, being vulnerable to the arbitrary killing can greatly decrease the quality of human life. Given that one of the greatest threats to physical security has historically been an individual’s own state—often through abuses of the domestic legal system--there is strong case for an international legal right against arbitrary deprivation of life, and one that is understood to constrain exercises of sovereignty that threaten it. Moreover, the case for providing international legal protection for our interest in physical security is so compelling and broadly grounded that first inferring that this interest grounds a moral right to physical security and then arguing from that moral right to the conclusion that there ought to be a legal right seems to be an unhelpful detour. Nor is it at all obvious that to explain the aptness of a legal right to physical security one must appeal to some supposedly more basic moral right, such as a right to equal concern and respect or a right to justification. Instead, the language of basic values or of fundamental goods, cashed out in
terms of (mere) duties, seems wholly adequate. I suspect that the tendency to overlook this simple point is an indication that many of us at least have come to assume that moral rights are the only really serious or weighty items in the moral universe. The fact that legal rights are so distinctively valuable, along with carelessness about the distinction between moral and legal rights, encourages that delusion.

Justifying an international legal human right against arbitrary deprivation of life along these lines, without appealing to an antecedently existing moral right, also clearly satisfies the second key criterion of adequacy. One of the most important ways of affirming and protecting the equal basic moral status of individuals is to provide them with equal protection from threats to their physical security. A legal right against arbitrary deprivation of life, ascribed to all persons helps to achieve this end. Further, affirming and protecting equal moral status is of sufficient moral importance to justify endowing this legal right with the authority to constrain sovereignty. A justification for this legal right that appeals to the notion of equal moral status need not move from equal status to a moral right to physical security and then to a legal right. It can proceed more directly. A person who did not have the concept of a moral human right or who had it but believed that no such rights existed could produce a compelling justification for a legal right to physical security. Of course, one might formulate the commitment to equal basic status in rights-terms: One might assume that the robust commitment to equal basic status that the system of international legal rights embodies is best understood as an attempt to realize a moral right to equal basic status. But it is not clear that the notion of a right is doing any necessary work here. One could just as well say that the affirmation and protection of equal basic status for all is a fundamental moral value, one that grounds a very high-priority (mere) moral duty.
Finally, a legal right against arbitrary deprivation of life is also extremely valuable from the standpoint of helping ensure the opportunity to lead a minimally good or decent life. Generally speaking, physical security is necessary for such a life or, to put the point negatively, lack of physical security seriously diminishes one’s prospects for a minimally good or decent life or at least renders them unacceptably insecure. As with the status egalitarian function, it is not clear that formulating it in terms of a moral right to minimal well-being is necessary; framing it in terms of basic moral values and a (mere) moral duty to promote and protect them suffices.

*Is the Mirroring View part of the modern conception of human rights?*

At this point it might be objected that the preambular rhetoric of some international human rights documents, including the Universal Declaration of Human Rights and several of the most general conventions, strongly suggests that international legal rights are conceived as the embodiment in international law of antecedently existing, corresponding moral rights. In other words, the language of these documents at the very least suggests the Mirroring View. For example, the UDHR begins with the assertion that it is important to recognize the “equal and inalienable rights of all members of the human family.” The can only be natural or moral rights. So, if the goal is to justify a system of international legal rights that is like the one that exists, we should assume the Mirroring View.

 Suppose it is true that, according to an important strand in the discourse of human rights practice, international legal human rights are conceived as the counterparts of antecedently existing moral rights. It does not follow that this is the best way to conceive of the system from the standpoint of justifying it. On the best interpretation of the system, a more pluralistic mode of justification—one that does not assume the Mirroring View--may be appropriate.
I noted in Chapter One that from the very beginning the core documents of the system have included items that are neither individual rights norms, nor explications of duties corresponding to such norms, nor instructions for setting up institutions for monitoring compliance with such norms. So, if the founders intended the purpose of these documents to be limited to giving international legal form to antecedently existing moral rights, they failed. Be that as it may, my surmise is that even if the founders of the modern international legal human rights system conceived of it as an effort to give international legal effect to antecedently existing, corresponding moral rights and this only, the system has developed in ways that do not recognize that constraint. My arguments in this chapter suggest that such development may best be regarded as progressive, rather than degenerate.

**Simply by virtue of their humanity**

Another objection can be anticipated: One might reasonably require that any justification for the system of international legal human rights must make sense of the idea, which appears to be deeply embedded in the practice of international human rights, that international legal rights are ascribable to individuals simply by virtue of their humanity—and one might assume that this requirement can only be satisfied if international legal rights are grounded on corresponding moral rights of individuals. It is not the case, however, that the assumption that international legal human rights are grounded in corresponding moral rights is necessary for making sense of the idea that international legal human rights are ascribable to individuals simply by virtue of their humanity. The phrase ‘simply by virtue of their humanity’ can reasonably be interpreted as conveying two ideas, neither of which implies that justifiable international legal human rights are grounded in corresponding moral human rights.
The first is purely negative; it is the idea that one’s having these international legal rights does not depend on any characteristics that only some human beings have, such as being a member of a particular race, or being socially productive, or being male, or being a citizen of some state or other. The second is more positive; it is the idea that these rights are ascribable to human beings on their own account, an idea that is also conveyed by the frequent references to human dignity that are found in the Universal Declaration of Human Rights and the conventions that followed it. The idea that every human being has worth on her own account (rather than derivatively, by virtue of God’s will or their membership in a nation or their ability to make a net contribution to social cooperation, etc.) and that this worth requires some sort of recognition in international law, is compatible with a number of different kinds of moral justifications for having a system of international legal human rights, so long as justifications that appeal ultimately to the moral importance of the well-being and freedom of individuals are included. A justification for having an international legal right to health or to freedom of expression that appeals to the beneficial consequences of the implementation of these rights for human beings generally, where each individual is recognized to be of moral importance on his own account, and which does not depend on the assumption that the interest of any particular individual is sufficient to ground the corresponding duties fits that description. As such, it is compatible with the idea that individuals ought to have these legal rights by virtue of their humanity.

VI. Advantages of Taking Legalization Seriously

I now want to explain the advantages that accrue to the pluralistic methodological strategy. The essence of that strategy is to take the legality of human rights in the Practice seriously, where this means abandoning the dogma that justified international legal human rights typically mirror antecedently existing moral human rights or serve only to realize some moral
human right or other and embracing instead an open-minded approach to the question of whether the international legal system can be morally justified. Adopting a pluralistic approach to justification makes the existing system more coherent and defensible in several respects. It also enables us to avoid certain mistakes.

**A less dogmatic perspective on rights inflation**

First, if one adopts my approach, the supposed truism that there is human rights inflation looks to be less obviously true. Many philosophers believe that there is human rights inflation—that the standard lists found in some of the major human rights conventions include items that are not plausibly regarded as human rights. As I noted earlier, a perennial target of philosophical derision is the right to periodic holidays with pay. The point cannot be that these are not genuine international legal human rights, because their inclusion in these international legal documents (along with the legal practice that has developed around them) ensures that they are. Instead, the claim must be that there is no corresponding moral human right. But the fact that there is no corresponding moral human right would show that there is rights inflation only if the existence of such a moral right were a necessary condition for the justification of the legal right. As I have just argued, however, that assumption is not warranted: Legal rights can be justified even if there is no corresponding, antecedently existing moral right, and this is true of several prominent international legal human rights. So, contrary to what philosophers have assumed, simply invoking the intuition that there is no moral right to R is not sufficient to show that the existence of an international legal right to R is an instance of rights inflation.

Those who decry rights inflation might deny that they are assuming that a justified international legal human right presupposes a corresponding moral human right. But then the charge of inflation looks problematic. Is it so obvious, for example, that international law
shouldn’t include a right to periodic holidays with pay? International law regarding labor standards has evolved through a complex process in which a plurality of justifications have been adduced, and it would be highly implausible to claim that for every item in this body of law the justification depends on the existence of a corresponding moral right. Perhaps in the end the right to periodic holidays with pay will not prove to be a plausible candidate for being an international legal right, but whether or not it is can only be determined by argument informed by an accurate characterization of the proper purposes of international human rights law, not by appealing to raw intuitions about what is or is not a human right morally speaking. Moreover, the sort of argument needed for deciding this matter will be quite complex, appealing not only to moral values (not all of which are moral rights), but also to assumptions about the appropriateness of realizing moral values through the law and more specifically through international law that has the authority of existing international legal human rights law.\textsuperscript{15} Most importantly, it will require making and defending assumptions about what the proper functions of international legal human rights law are, without the constraining dogma that they are simply to realize corresponding, antecedently existing moral rights or realizing moral human rights. If one abandons these assumptions and adopts a methodology of pluralistic justification, there is a better prospect of justifying a larger portion of the human rights that are currently recognized in international law—and the so-called problem of human rights inflation may be less serious than would otherwise appear. At least for those of us who are largely—though hardly unreservedly—sympathetic to modern human rights practice and the law that undergirds it, this is an advantage.

Earlier in this chapter, I argued that there are no corresponding moral rights on the basis of which to ground some prominent international legal human rights, including the rights to due process, the rights to health, freedom of expression, and to democratic government. If this is the
case, then the shoe is on the other foot: Instead of complaining that the international legal human
decision system is bloated, we should conclude that a theory of moral human rights is too slender a
basis for developing a satisfactory justification for the system of international legal human rights.

*Disarming the parochialism objection*

Second, my justificatory strategy provides an effective response to the perennial
complaint that human rights are parochial, not universal, because there are some reasonable
morals that cannot accommodate the concept of individual moral rights. If the Mirroring
View were correct, this would be a serious problem for the international legal human rights
system; but as I have argued, the Mirroring View is false. Whether or not one’s morality
recognizes moral human rights, one can appreciate the benefits of having an international legal
rights system, to the extent that it serves other important purposes than the realization of
individual moral human rights. (In a Chapter Seven, I elaborate this point and take up other
forms of the challenge to the universalism of human rights, when I consider the Ethical Pluralism
Objection).

*Avoiding mistaken claims about incoherence*

Third, some features of the existing system of international human rights look anomalous
if we assume that the function of international legal human rights is to realize moral human
rights, but are quite unproblematic if we reject it and acknowledge that other kinds of
justifications for legal rights are possible. The first feature is the fact that some of the most
important international human rights documents include a right to political self-determination
that can only be sensibly understood as a group right, not an individual right. The second feature
is the Genocide Convention, which is not framed in terms of individual rights, is commonly
thought to be a crucial element of the system of legal international human rights. If the function
of the system is to realize moral human rights, standardly understood as moral rights of individuals, this is an anomaly, but not so, according to the pluralistic justification methodology.

VII. What a Philosophical Theory Should Do

Thus far, I have tried to clear the way for a reasonable approach to justifying international legal human rights by criticizing unwarranted assumptions about the relationship between moral human rights and legal human rights, and identified several significant advantages of taking a more open-minded methodological approach. My aim in this part of the chapter is not to develop a philosophical justification for having a system of international legal human rights, much less a justification for the particular system that now exists. Instead, it is to begin to set an agenda—to lay out the daunting range of questions that a philosophical theory of would have to answer in addressing the issue of justification. Doing this will make abundantly clear how mistaken it is to assume that the major philosophical work will have been done if a sound theory of moral human rights is produced. It will also set the itinerary for the next chapter.

The complexity of justification

First, it is necessary to provide an account of what sorts of international legal human rights there should be and to do so without the constraining assumption that these will be limited to those that have moral counterparts. This will require being very clear on exactly what the purpose or purposes of the international legal human rights system should be. Should a central purpose be to affirm and protect equal basic status for all individuals, as I have argued the existing system aims to do, or should it instead have the more modest aim of ensuring the opportunity for a minimally good or decent life by protecting all from the serious harms states can inflict and providing all with basic resources for living? If the system’s purposes include a
well-being component, is it best characterized as the provision of the opportunity for a minimally
good or decent human life or in some other way? Further, should the violation of the rights the
system contains or of some of them (and if so, which ones) play a significant role in the
justification for humanitarian military intervention or other interferences with what would
otherwise be regarded as the proper domain of state sovereignty? In the design of the system of
individual international legal rights, how much weight should be given to preserving peace
among states as opposed to other values?

Second, also of crucial importance is an explanation of why an international system of
rights ascribed to all individuals is needed. In other words, an account of why the specified
purposes could not or should not be achieved by the constitutional entrenchment of individual
rights in domestic legal systems, without recourse to international law and institutions. ¹⁶

Third, a justification of the international legal human rights system would also have to
engage the question of whether the distinctive features of international law as it now exists—
including the absence of some key features of well-developed domestic legal systems, such as
representative legislatures and a hierarchy of courts with compulsory jurisdiction that are thought
to be important for the rule of law—are an obstacle to the justification of a system of
international legal human rights or at least significantly constrain the sort of system that can be
justified.

Fourth, it is necessary to determine the extent, if any, to which the best justification for
the current system of international legal human rights should appeal to antecedently existing
moral rights and to what extent to other moral considerations, including an account of which
moral rights should and which should not have international legal counterparts. (Nothing I have
said so far suggests that there will be no role for the appeal to moral rights in the justification of a system of international legal rights).

Fifth, it makes no sense to try to justify a system of international legal human rights without first specifying the kind of authority that such a system would claim vis-a-vis domestic legal systems. Presumably, a system that claims an unqualified supremacy over domestic law, including the domestic constitutional law of reasonably democratic, rights respecting states, would be harder to justify, other things, being equal, than one that did not. Although few philosophers have participated in it and many seem unaware of its existence and importance for philosophical theorizing about human rights, there is a vigorous debate among international and constitutional lawyers about whether international human rights law is or should enjoy supremacy over domestic law, including domestic constitutional law. The issue of supremacy is complicated by the question of whether the international legal human rights system should recognize a hierarchy of rights, with more robust legal implications, including greater weight, for items at the top of the hierarchy, and by the question of what the division of labor should be between domestic institutions and international institutions regarding the authority to interpret international legal human rights norms.

Finally, to justify a system of international legal human rights requires not only providing sound moral arguments for various rights-norms, but also an account of the legitimacy of the institutions in which the norms are formulated, interpreted, and implemented. To put the point most forcefully, a system of international legal norms ascribing rights to all individuals might be strongly justified in principle, but it might turn out that, under current and foreseeable conditions, efforts to institutionalize the norms would be extremely problematic, due to the weakness of international institutions and/or their tendency to be disproportionately shaped and controlled by
a handful of the most powerful states and the global corporate interests that exert considerable influence over those states. In brief, a philosophical theory of the international legal human rights system must go far beyond providing an “in principle” moral justification for having such a system and must include both a theory of institutional legitimacy and an empirically-informed judgment about whether legitimate institutions are likely to be obtainable.

Even if the justification for international legal rights includes a more prominent role for moral human rights than my argument thus far suggest is likely to be the case, the preceding list of theoretical desiderata makes it clear that having a serviceable theory of moral human rights would only be one component of a comprehensive justification. That is a point worth emphasizing, given how much attention philosophers have paid to developing an account of moral human rights and how little they have had to say about most of the issues that would have to be addressed to construct a cogent justification for the system of international legal human rights.

VII. Moral or Political?

I can now draw the implications of my analysis so far for the debate between so-called moral and political theories of human rights. First, as I observed in Chapter One, this debate has been greatly impaired by a failure to distinguish between international legal human rights and moral human rights and by the unwarranted assumption that there is only one concept of human rights. Like most other philosophers (including myself until recently), both groups habitually use the ambiguous phrase “human rights” without making it clear when they are referring to moral human rights and when they are referring to international legal human rights. Arguing about whether ‘the’ concept of human rights includes reference to the existence of a system of states or whether human rights are essentially constraints on sovereignty wrongly assumes that
there is only one concept of human rights. More importantly, it overlooks the possibility that the dominant use of the term nowadays refers to international legal human rights or to rights that ought to be included in international human rights law (and hence implies the existence of a system of states), even if it is descended from a usage of the term ‘human rights’ that does not presuppose a system of states.

Second, and more important, my justificatory methodology is more sympathetic to political theories than to moral ones, but only in this limited sense: I believe that understanding and exploring possible justifications for existing international human rights practice, and for the system of international legal rights that is central to it, should be the focus of philosophical theorizing, if one’s concern is with the moral status of the practice of human rights, and I believe that one should not approach this topic by assuming that international legal human rights are simply the legal embodiment of moral rights.

Third, unlike political theorists such as Beitz, however, I seek to go beyond merely characterizing the practice within which the international legal human rights system plays such a central role to engage the task of justifying the system of international legal human rights.\textsuperscript{20} Further, again unlike Beitz, I explicitly affirm the centrality of international legal human rights to the practice and in so doing acknowledge a much more ambitious and complex agenda for philosophical theorizing.\textsuperscript{21} Finally, although I agree with Beitz that a philosophical theory should begin with an inquiry into the functions of the Practice rather than by developing a theory of moral human rights on the assumption that the purpose is to realize them, my conception of the functions is different from Beitz’s. His idea that the rights that are central to the Practice—by which he must mean international legal human rights—serve to “protect urgent interests” is not adequate. For one thing, it does not capture the status egalitarian component. A system of
international law, even one that ascribed a set of right to all individuals, could protect everyone’s “urgent interests” (to some significant extent) without including the status egalitarian features that we find in the existing international legal human rights system. For another, there is a large gap between saying that something is a morally important or urgent interest and showing that there ought to be an international legal human right to protect it. Finally, Beitz’s notion that the Practice protects “urgent interests” is deeply ambiguous, because it could be interpreted as the view that international legal human rights have to be grounded solely in the interests of the right-holder or as the view that a proper grounding can appeal to the interests of large numbers of people.

Fourth, unlike political theorists, I have now taken the first steps to articulating this more complex philosophical agenda. As I observed in Part I of this chapter, it requires addressing issues that proponents of the political conception of human rights have not yet even formulated. These include whether a system of international legal rights that restricts legal duties to states is optimal or even defensible, whether the legal duties that are correlatives of international legal human rights should be conceived as pertaining only to those over whom the state exercises jurisdiction, whether international legal human rights duties should be incorporated into domestic law automatically upon the ratification of treaties or in some other way and whether the method of incorporation should be uniform among states or not, what sort of ‘supremacy’ international legal human rights law should enjoy over domestic law, whether states should have default duties, rather than ‘responsibilities’, whether the existing division of labor between states, international institutions, and regional institutions regarding the interpretation of international legal human rights is appropriate, whether it would be justifiable to impose international legal human rights obligations on states that do not ratify the relevant treaties, and whether the
institutions that play a key role in formulating and implementing international legal human rights are legitimate. Chapter Five is devoted to the problem of institutional legitimacy, Chapter Six to the supremacy issue.

Finally, I agree with the advocates of the political approach in their criticism of the assumption that international human rights are simply the international legal embodiment of natural rights or of general moral rights of any kind. However, I do not assume that there is no room for appeals to natural rights or general moral rights in the justification of the system of international human rights. I reject moral theories of human rights if they assume that the only adequate justification for international legal human rights will ground them on moral human rights or hold that the task of the philosopher of human rights is largely accomplished by producing a theory of moral human rights.

**Conclusion**

Approaching the justification of international legal human rights without the constraining prejudice of the Mirroring View, or more generally, without making unexamined assumptions about the relationship between moral and legal human rights, and without dogmatic assumptions about the proper functions of the system is liberating. It enables one to consider the possibility that the international legal human rights system may serve other functions in addition to that of realizing moral rights. It also permits one to explore the possibility that the functions the system serves are not fixed, but are instead subject to revision and perhaps progressive development, as has been the case with domestic legal systems. Thus, even it is true that original function of the system was to achieve something less ambitious—perhaps the international legal embodiment of minimal moral standards for how states ought to treat those under their jurisdiction—it may
evolve to perform more ambitious functions, including perhaps a more extensive portion of the work of global justice.

Assuming that the function of international legal human rights is to realize moral rights is no more plausible, than assuming that this is all that domestic legal rights do. Abandoning that assumption liberates our understanding of the capabilities of law. The value of law is not restricted to its ability to track the features of a pre-existing landscape of moral rights.

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1 It might be thought that Charles Beitz has already made this point in *The Idea of Human Rights*. In my judgment, he has not. He does not clearly articulate the Mirroring View. And his arguments against what he calls “naturalistic” theories of human rights are directed mainly against strawmen and do not engage more plausible versions of the Mirroring View. To put the same point differently: Not all Mirroring View proponents are “naturalistic” theorists in his sense; they need not and do not all hold, if any of them hold, that moral human rights are timeless and pre-institutional. See Charles Beitz, *The Idea of Human Rights* (New York, New York: Oxford University Press, 2011).


4 Whether there is an international legal right to democratic governance is disputable. The ICCPR includes a right to periodic elections, but that falls short of what is generally meant by democracy. In Chapter Four I consider arguments for including a right to democratic government in the system of international legal human rights.


8 *Ibid.* Raz notes that some rights cannot satisfy this condition, that is, the moral importance of the right-holder’s interests is not sufficient to ground the correlative duties. He tries to accommodate by abandoning his original assertion about what is necessary to justify duties and hence correlative rights. He says that the grounding of the correlative duties can rest on the importance of the interests of large numbers of people, not just those of the right-holder, so long as the former are served by the protection of the right-holder’s interests. This move seems to me to be wholly ad hoc. Further, it cannot explain why, morally speaking, the duties are owed to the right-holder. If Raz restricted his revised view to legal claim-rights, it would be plausible. With respect to legal claim-rights, one need not show that morally speaking the correlative duties are owed to the right-holder. One need only provide a
sound justification for having the duties owed, legally speaking to the right-holder, and such a justification can quite properly appeal to the interests of persons other than the right-holder.

9 Ibid.


11 The same conclusions follow if one adopts, instead of Raz’s Interest Theory, the Will Theory of Rights. As I understand Carl Wellman’s Will Theory, unlike Raz’s interest Theory, it is not an attempt to identify the conditions for justifying assertions about the existence of rights, but rather a view about what rights are. Be that as it may, Wellman holds that if A has a claim-right to R, then A “controls” the correlative duties. Perhaps the idea is that the duties could be controlled by A only if they were owed to A (not somebody else). If that is so, then we need an account of why they are owed to A if we are to understand why A “controls” them. But as I have already suggested, it is hard to see how the duties could be owed, morally speaking, to A (and hence how A could “control” them) unless there were something about A that made this so. Once again, however, this only applies to moral rights. The law can grant A “control” over a set of legal duties (can legally empower A to invoke or waive the duties, etc.), for any number of reasons, including the fact that doing so promotes public interests of the right sort.


13 Ibid.

14 I thank Miriam Ronzoni for pressing me on this point.

15 One might think that an international legal right to periodic holidays with pay cannot be justified if one assumed that international legal human rights—all of them—provide grounds for intervention. But as Charles Beitz and others have pointed out, that is an indefensible assumption. It might be true that the violation of some international legal human rights supplies a prima facie reason for intervention, but there is nothing in the current understanding of international legal human rights that supports the assumption that the violation of any international legal human right, no matter what its relevant importance, provides even a prima facie reason for intervention, must less a permission to intervene. See Charles Beitz, The Idea of Human Rights.


19 If the Mirroring View were true, then theorists such as Tasioulas would be on stronger ground in claiming that the noninstitutional, purely moral concept of human rights is “focal” and that the institutional concept of international human rights is somehow derivative or of secondary importance, or the latter must be explained in terms of the former. But as we have argued, neither he nor anyone else has made the case for the Mirroring View.

20 The closest Beitz comes to engaging the task of justification is when he says that human rights are thought of, in the practice, as protecting “urgent interests” and when he says that the modern practice was a response to the perceived threat that states posed to those within their jurisdictions. The former suggestion is not filled out; no theory of urgent interests is provided. In addition, it is not clear that the idea of urgent interests (anymore than the idea of basic interests or that of a minimally good life) can capture the prominent status-egalitarian strain of
practice, as it is shaped by international legal human rights law. Similarly, the notion that the system is designed to protect individuals from harms emanating from their states not only fails to explain why the protection should take the form of international law nor, if it does, why it should be a matter of individual rights.

21 It is remarkable that Beitz’s characterization of the practice pays so little attention to the role of law in it, as Samantha Besson has noted. Samantha Besson, “Human Rights Qua Normative Practice: Sui Generis or Legal?”, Transnational Legal Theory 1 (2010) p. 130.