Chapter 2
Human Rights as Rights

Historic documents limiting governmental abuses were often formulated in the language of rights. Examples include the English Bill of Rights (1689, in Ishay 1997), the French Declaration of the Rights of Man and the Citizen (1789, in Ishay 1997), and the US Bill of Rights (1789, in Urofsky and Finkelman 2002). Because of these influential precedents, it is not surprising that the authors of the Universal Declaration chose the concept of rights to express international standards of government conduct. This chapter explains what it means to say that human rights are rights.

Before turning to that, however, a qualification is in order. The political project of creating international standards regulating how governments should treat their citizens and residents does not stand or fall with the concept of rights. That project can be pursued using other normative concepts. Indeed, human rights documents do not use the language of rights exclusively. They often issue prohibitions such as "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (European Convention, article 3). They sometimes issue requirements such as "Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him" (American Convention on Human Rights, article 7.4). And they occasionally declare general normative principles such as "All human beings are born free and equal in dignity and rights" (Universal Declaration, article 1). These alternative vocabularies offer both normative and philosophical flexibility. The importance of the concept of rights to the human rights movement can be recognized while avoiding a fetishism of rights.

Elements of Rights

One way to analyze a concept is to look at its elements or parts and the relations between them. For example, if we analyze "biological mother"

in this way the elements would include female, parent, and offspring. Because rights often involve complex relationships concerning who has the right and when it can be applied, it is helpful to have a detailed analysis of the parts of a fully specified right.

First, rights have rightholders, parties that possess and exercise the right. For example, I am the holder of the rights conferred by my retirement plan. And the human right to freedom of religion has all persons as its rightholders.

Second, a right is to some freedom, power, immunity, or benefit, which is its scope or object. "Fair trial" roughly identifies the object of the right to a fair trial. This right prescribes that a person charged with a crime must have available a full and genuine opportunity to have a fair trial. It does not require, however, that each accused person actually be given a trial. The accused can waive his or her right to a trial by pleading guilty or accepting a plea bargain. The scope of a right often contains exceptions excluding items that might otherwise be expected to be included. If, for example, the constitutional right to freedom of speech in the United States does not include protection for speeches made from the visitors' gallery during sessions of Congress, this exception could be specified in, or be a consequence of, a full statement of the right's scope.

Third, almost all human rights are or include claim-rights, and such rights identify a party or parties (the addressees or dutybearers) who must act to make available the freedom or benefit identified by the right's scope. (Besides claim-rights there are immunity-rights, power-rights, and privileges (see Hohfeld 1964 and Wenar 2005).) Rights are commonly classified as negative or positive, according to whether the right requires the addressees merely to refrain from doing something or instead to take some positive action they might not otherwise take. Many rights impose on their addressees both negative and positive duties.

Finally, the weight of a right specifies its rank or importance in relation to other norms. Weight pertains to whether a right can be overridden by other considerations in cases of conflict. A prima facie right is a nonabsolute right whose weight is not fully specified. Describing a right as prima facie does not imply that it is only an apparent right but rather asserts that it a genuine right that can sometimes be outweighed by other considerations.

Rights range from abstract to specific (or from general to precise) according to how fully their parts are specified. Indeterminacy can occur in any of the elements of a right. There may be lack of clarity about the identity of the rightholders and addressees. The scope of the right, what it offers its holder(s) and requires of its addressee(s), may be

imprecisely defined. And we may lack a clear view of the right's weight in competition with other considerations. One of the confusing things about rights is that they have differing degrees of abstractness. A right under a business contract is likely to be quite specific while constitutional and human rights are usually abstract (and therefore somewhat vague). Abstract rights are just as important as specific rights, so we should not repudiate them simply to achieve some philosophical ideal of precision.

Rights and Goals

Suppose that instead of formulating a bill of rights the human rights movement had formulated high priority goals in areas such as civil liberties, security of the person, due process, and social justice, and had recommended that these goals be pursued by all nations. This vocabulary would have lent itself to formulating a long list of things that it was desirable for governments to do and not do. The resulting "Universal Declaration of High Priority Goals" could have been even more expansive than the Universal Declaration.

A declaration of high priority goals might have had much the same effect, and many of the same problems, as the Universal Declaration. These goals might have served as international standards for governments and led to familiar sorts of disputes about the phrasing, relative priorities, and ambitiousness of the goals. Defenders of these high priority goals might have justified them by appeal to considerations of human welfare, dignity, and equality. Their critics might have charged that high priority goals for such things as civil liberties and due process are Western ideas with few roots in non-Western cultures.

This comparison of goals and rights should help us to recognize some of the distinctive features of rights. I have spoken of high priority goals in order to match an apparent feature of rights, namely, that they are typically very important or high priority considerations. In Ronald Dworkin's phrase, rights are "trumps" (Dworkin 1977). What Dworkin means to suggest with this metaphor is not that rights always prevail over all other considerations but rather that rights – or at least constitutional rights – are strong considerations that generally prevail in competition with other concerns such as national prosperity or administrative convenience. Dworkin proposes "not to call any political aim a right unless it has a certain threshold weight against collective goals; unless, for example, it

cannot be defeated by appeal to any of the routine goals of political administration" (Dworkin 1977). Part of the rhetorical appeal of the concept of a right is that having a right to something usually means having a strong claim that can outweigh competing claims.

The assertion that rights are powerful normative considerations does not imply that their weight is absolute or that exceptions cannot be built into their scope. And the weight of a particular right is relative to other considerations at work in a given context. Some rights involve matters that are not of earthshaking importance (for example, the repayment of a small loan). Such rights are powerful in comparison with other considerations normally at work (for example, in the context of a small loan, the debtor's convenience).

The vocabulary of goals, if it had been chosen for the Universal Declaration, would have yielded more flexible standards of government behavior. Even high priority goals can be pursued in various ways and can be deferred when prospects for progress seem dim or when other opportunities are present. Rights, however, are more definite than goals; they specify who is entitled to receive a certain mode of treatment (the rightholders) and who must act on specific occasions to make that treatment available (the addressees).

Rights are more suitable for enforcement than goals because they have identifiable holders, scopes, and addressees. But a theorist who wished to equate rights with some subset of goals might respond that rights are just those goals that are both high priority and definite in the sense of having specific beneficiaries and addressees.

It is not clear, however, that having these two characteristics will make a goal into a right. Suppose that a family chooses as a high priority goal making available to its only child the resources needed to fund a university education. It is clear that such a high priority goal is a lesser commitment than giving the young person a right to the resources needed to attend university. The mandatory character of a right is still missing. As long as providing the resources is merely a high priority goal, the parents would do no wrong if they decided to use their resources to pursue some other project such as providing for their retirement by taking advantage of a very attractive investment opportunity. But if they had given their child a moral right to the resources for a university education through an explicit promise, such a decision would be morally wrong. The mandatory character of a right provides a basis for complaint that a high priority goal may not.

Rights are distinctive not only in their high priority and definiteness but also in their mandatory character. It is these three features – high

priority, definiteness, and bindingness – that make the rights vocabulary attractive in formulating minimal standards of decent governmental conduct. This character would be lost if we were to deconstruct rights into mere goals or ideals.

To avoid exaggeration here, however, two qualifications need to be stated. First, rights are never perfect guarantees. To return to our example, a young person who has been given a right to university expenses may face not only deliberate noncompliance with that right but also the parents' inability to pay when the time arrives or even a conflicting, higher priority claim on those resources such as expensive medical treatments for a sibling.

The second qualification concerns the fact discussed above that rights vary greatly in degree of specificity, ranging from very specific, such as a right to reside in a particular apartment under a rental contract, to grand constitutional rights such as due process of law. Abstract rights are much less definite in their requirements than specific rights; indeed, very abstract rights may function in a way not too different from high priority goals. Rights do not always imply clearly who must do what, and hence actions to comply with and implement them are subject to considerable discretion. But when abstract rights can be made concrete in particular cases, they differ from priority goals by conferring on the guidance they provide a binding character that high priority goals lack and cannot confer.

Claiming One's Rights

Some theorists have emphasized the usefulness of rights in claiming things as one's due. By facilitating claiming things as one's due, rights provide especially firm support for dignity and self-respect. Joel Feinberg states this as follows:

> Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon . . . Having rights, of course, makes claiming possible, but it is claiming that gives rights their special moral significance . . . Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. (Feinberg 1973; see also Hart 1955; Gewirth 1981; and Pogge 2002)

Moral and legal guarantees of important freedoms, benefits, and powers do seem to support people's self-respect. And we can readily concede that the identification of rightholders to whom the addressees have duties (or other normative burdens) gives rights a more definite meaning than goals. It is less clear, however, that the activity of claiming is somehow central to the meaning of the rights vocabulary or the maintenance of self-respect.

One problem with this assertion is that the notion of claiming a right is very ambiguous: it can involve (1) insisting that one has a right to something (as when civil rights protesters claimed that they had a right to use segregated public libraries); (2) triggering an already recognized right (as when one invokes or triggers one's right to a fair trial in a criminal case by entering a not guilty plea and demanding a trial); (3) demanding compliance with a recognized right in the face of a threatened violation (as when a member of a minority group insists on nondiscrimination from a realtor who is giving him or her the runaround). The assertion that all rights can be claimed in the first and third senses is not very interesting because any norm can be asserted and compliance with it demanded. The second sense is the more interesting one, but not all rights require triggering to be engaged. A person's right not to be tortured can be engaged even if the person is too weak to invoke it.

Another problem concerns the claimant. Must it be the rightholder? Or can claiming by an interested party other than the rightholder serve as well? This difference is important since a self-effacing society might rely almost entirely on an interested party claiming.

These questions show how imprecise it is to say that the distinctive feature of rights is found in the activity of claiming one's due. A further problem with this thesis is that we can easily imagine the concept of a right functioning in cultures where actions such as demanding, claiming, and protesting are frowned on as discourteous. If we generalize from the close connection between rights and claiming in many Western societies, we risk giving an ethnocentric account of the functions of rights – one which overemphasizes social and legal procedures for bringing about the recognition of rights and which suggests that other cultures cannot have or adopt the concept of rights unless they are or become pushy and litigious.

Finally, it is not necessary to identify some particular speech act – claiming or anything else – as the single act which it is the special role of the rights vocabulary to perform. Most words can be utilized in a great many speech acts. Just as the word "good" can be used to perform many speech acts besides commending, the statement that someone has a right can be used to perform many speech acts besides claiming a right to something.

Besides claiming rights, we can recognize them, question them, take them into account, disregard them, respect them, and use them as a basis for decision. Since these other activities give the rights vocabulary a functional role, perhaps all we should say about the connection between rights and claiming is that claiming things as someone's due is one of the characteristic things done by rights talk.

Rights and Duties in Morality and Law

Rights are found in various normative systems, such as moralities; the regulations of organizations; and local, state, national, and international legal systems. It is common to classify rights by the kind of normative system in which they are rooted. A positive legal right is one that is recognized and implemented within some legal system. A moral right is one that exists within a morality.

Moral rights can be divided into those that exist in actual moralities and those that exist as constructs in critical or justified moralities. An accepted moral right is one that exists within the actual morality of some group or groups. For example, a group's moral code may give people a right not to have their clothes forcibly removed by other persons. Such a right may exist prior to the group's having a formal legal system, and it may be recognized and enforced by the formal legal system once such a system comes into being. Rights often exist both as accepted moral rights and as positive legal rights.

When a right is part of a group's actual morality, it is used as a standard of argument and as a guide to the evaluation of conduct and social policy. Those who refuse to comply may be scolded, shamed, ostracized, exiled, beaten, or even killed. For some rights such recognition and implementation at the moral and social level may be all that is possible or desirable. Legal or governmental implementation may be impossible (as with, say, a right to revolt against repressive governments), or it may be inappropriate because it would be too costly or because its enforcement would require unacceptable violations of other norms.

Many people believe that their moral rights include not only those accepted within their society but also some unrecognized rights they believe to be justifiable. This belief suggests that some rights exist as justified moral rights. A justified morality may be a philosophical reconstruction of morality, of the sort one finds in Kant and Mill, or it may simply be an actual morality that has had some deficient norms replaced with ones believed to be better.

Legal positivists and skeptics hold that we should take legal rights as our exclusive paradigms of rights and thus treat moral rights as degenerate or spurious. Closely connected issues here are whether it should be definitional that rights are constituted by the duties or other normative burdens of the addressees, and whether legal and moral rights are rights in the same sense of the word.

Three broad positions can be taken in response to these questions, corresponding to three stages in the evolution of a legal right. The first stage is the recognition that it is very important for people to have some good available to them – that people are somehow entitled to that good. The second stage involves identifying moral duties, disabilities, and liabilities of some parties that, if they are complied with, will result in the availability of that good. The third stage involves constructing parallel legal duties, disabilities, and liabilities and providing measures for their enforcement; at this stage a legal right emerges.

Each stage corresponds to a position on when it is appropriate to speak of a right. The first, which I call the entitlement theory, endorses a liberal use of the language of rights and holds that it is proper to speak of rights whenever one can justify on moral or legal grounds the proposition that people are entitled to enjoy specific goods – even if we cannot say who should bear the burden of making these goods available or how these entitlements should be implemented and enforced. A more restrictive view, which I call the entitlement-plus theory, holds that entitlements alone cannot constitute full-fledged rights and must be supplemented by the identification of addressees who have appropriate moral duties, disabilities, or liabilities. These burdens on the addressees are the "plus" added to the entitlement to yield a full-fledged right. The third and narrowest position, which I call the legally implemented entitlement theory, agrees with the previous theory in holding that genuine rights are more than mere entitlements, but it holds that this "something more" must include legal implementation. In this view, it is not proper to speak of rights at the earlier stages; the real thing does not emerge until one has effective legal implementation.

The entitlement theory

Broadly, this theory holds that a right is a very strong moral reason why people should have a certain freedom, power, protection, or benefit. H. J. McCloskey puts forward a theory of this kind; he believes that rights are best "explained positively as entitlements to do, have, enjoy, or have done, and not negatively as something against others . . ." (McCloskey

1976). McCloskey's view implies that a full-fledged right need not specify who bears the burden of making available what the right is to; a right is not to be equated with claims against other parties. Of course, rights do often give rise to duties, but McCloskey wishes to emphasize the logical priority of entitlements to the duties they generate. An entitlement might be a strong set of reasons, rooted in the nature of human beings, for ensuring that a certain good is available to people. Since McCloskey believes that entitlements – and thus rights – can exist even when it is not feasible to implement them, he finds no difficulty in saying that a right to medical care, for example, is a universal human right.

The entitlement theory has the advantage of accounting for the wide range of actual uses of the rights vocabulary. McCloskey emphasizes that people often speak of rights when it is unclear who must bear the burdens of these alleged rights. Thus McCloskey would have no objection on linguistic grounds to reformers who declared a new right even though they were unable to specify who would bear the burdens of this right, what exactly these burdens would be, or whether resources were available to meet such burdens. Such rhetorical uses of the rights vocabulary are very common, but a key issue here is whether we should endorse them.

A second advantage of the entitlement theory is that its notion of rights is readily exportable. Talk of entitlements is tied neither to possibly parochial activities such as claiming things as one's due or seeking remedies for wrongs nor to legal implementation. Thus the vocabulary of rights can easily be put to use in diverse cultures.

Viewing rights as mere entitlements, however, is likely to have inflationary results. A moral right will exist whenever there are strong moral reasons for ensuring the availability of a certain good. Hence there is danger that the list of entitlements will be nearly as long as the list of morally valuable goods. To extend the economic metaphor, this conception has no built-in assurance that the demand side of rights will not outrun the supply side.

The entitlement theory is insufficiently penetrating because it is unable to distinguish between rights and high priority goals. It dilutes the mandatory character of rights by cutting out essential reference to their addressees.

The entitlement-plus theory

These problems can be remedied, it seems, by adding essential reference to specific addressees and burdens to our conception of a full-fledged

right. This is what the entitlement-plus theory does. It holds that a right cannot be constituted by an entitlement alone, that moral or legal norms directing the behavior of the addressees are essential to the existence of moral or legal rights and must be added to an entitlement to constitute a right.

A version of the entitlement-plus theory of rights is put forward by Joel Feinberg, who makes a useful distinction between "claims-to" benefits and "claims-against" parties to supply those benefits (Feinberg 1973). A claim-to is what I call an entitlement, and a claim-against is the "plus" that can be added to an entitlement. Feinberg's position is that a full-fledged claim-right is a union of a valid claim-to and a valid claim-against. He allows, however, that rights in a weaker, "manifesto," sense can be constituted by a claim-to or entitlement alone. Feinberg's approach makes clear that justifying a right requires one to justify not only an entitlement (or claim-to) but also a claim-against, that is, the burdens that the right will impose on at least one other party.

The entitlement-plus theory fits well with the traditional view that claim-rights are simply duties seen from the perspective of one to whom a duty is owed. In this view the difference between A's right against B and B's duty to A is mainly the difference between the active and the passive voice. From B's perspective the normative relation is a duty and from A's perspective it is a right, but the relation is really the same.

The entitlement-plus theory need not require all full-fledged rights to have precisely specified scopes, weights, and addressees. The vocabulary of rights is used in abstract as well as in specific normative discourse, and one cannot expect abstract rights to be fully specified. The description of an abstract right often identifies only key ideas and leaves specific elements to be worked out at the implementation stage. But even when rights are stated abstractly, as they typically are in human rights documents, there must at least be some general idea of what normative burdens are imposed by the right and who the dutybearers are.

The entitlement-plus theory has important advantages over the entitlement theory. First, it is a more accurate and penetrating analysis in recognizing an essential feature of rights, the burdens they impose on their addressees, which the entitlement theory leaves out. Its penetration comes from its ability to distinguish rights from high priority goals and to explain how both moral and legal rights are rights. Because the entitlement-plus theory holds that even justified moral claim-rights must generate norms that place burdens on addressees, it sees similar normative structures in all kinds of claim-rights, which makes it easier to see that they are all rights in the same sense. Second, the entitlement-plus theory

is noninflationary in that it denies that mere entitlements are full-fledged rights.

Still, some will say that the entitlement-plus theory is insufficiently accurate and penetrating because it ignores practices of legal recognition and enforcement and thus fails to emphasize what is practically most important about rights and also fails to mark the very significant difference between legal rights and moral demands. I now turn to this charge, which is central to the third theory of rights.

The legally implemented entitlement theory

It is often claimed that a "right" is mainly a legal notion, that practices of legal enforcement are central to the existence of rights, and that nonlegal rights are phony rights. To the nineteenth-century philosopher Jeremy Bentham, the idea of rights not created by positive law was nonsense. Bentham might have been willing to allow that entitlements, in the sense defined above, can exist as conclusions to utilitarian arguments and can serve as grounds for wanting corresponding legal rights. But he held that such entitlements are not rights just as "hunger is not bread" (Waldron 1987).

Bentham held that talk of moral and natural rights is politically dangerous and ultimately unintelligible. An advocate of Bentham's view might point out that when, for example, the right to leave one's country is not legally recognized, respected, or enforced, we sometimes say that people in that country do not have the right to leave or that this right does not exist there. But this mode of speaking proves nothing. One may mean by these statements that the right to leave is not a legal or effectively implemented right in that country without at all wanting to deny that it exists as an accepted or justified moral right. Indeed, it is precisely to demand reform in cases like these that we may wish to appeal to independently existing moral or human rights.

Bentham viewed appeals to nonlegal rights as mere rhetorical ploys, and held that without a court of law to determine who has the right and what it means, talk of rights is merely "a sound to dispute about," allowing argument from undefended premises. But an appeal to rights is no bar to further argument. Underlying assumptions are always open to challenge. Bentham was eager to settle political questions by appeal to what would maximize utility, but there is no system of courts and judges to answer the question of whether a particular policy maximizes utility. Thus, if we accept Bentham's premise that a normative concept without an adjudication procedure merely gives us a sound to dispute

about, we must conclude that nothing more is given by the principle of utility that he favored. Subtract Bentham's exaggerated claims about the determinacy of his preferred standard, and it becomes clear that Bentham's attack on the vocabulary of his opponents undermines his own appeals to utility.

A third argument against nonlegal rights is that recognition and enforcement are such important features of our paradigm that unenforced rights cannot be said to be rights in the same sense as enforced rights. According to this view, only by saying that nonlegal rights are rights in a different or phony sense can we adequately reflect the importance of recognition and enforcement to what rights are all about. But important differences often exist within a single generic category. There are huge differences between small economy cars and giant long-distance trucks, but this does not require us to say that they are vehicles in a different sense of "vehicle."

Although noninflationary, the equation of all rights with enforced legal rights excludes talk of important moral rights and severely limits the exportability of the concept of rights. Another disadvantage is that restricting full-fledged rights to legal ones gives important argumentative advantages to defenders of existing social, political, and legal arrangements.

Overview

Rights are high priority mandatory norms that typically have rightholders, addressees, scopes, and weight. They focus on the rightholder and thereby emphasize the freedom or benefit to be obtained or enjoyed. Unlike goals, claim-rights impose moral or legal duties on the addressees. Rights can exist in actual and justified moralities and in national and international legal systems. Legal enforcement is generally important to making rights effective, but is not essential to the existence of rights.

Further Reading

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Chapter 3

Making Sense of Human Rights

A general explanation of the concept of a right, like the one in Chapter 2, does not tell us what human rights are. An account of the nature of rights explains the genus, but we still need an understanding of the particular species, human rights. The explanation of the genus is helpful, however, because it identifies relevant questions. It shows that we need answers to questions such as what areas of life are covered by human rights, who has human rights, which parties have duties under human rights, how weighty human rights are, and how human rights exist. If we had good answers to these questions, then we would have a general conception of human rights. Questions would remain about the justification, existence, and lists of human rights, but at least we would understand the general idea.

In Chapter 1, human rights were defined as being:

- mandatory norms with rightholders, addressees, and scopes;
- universal in the sense of protecting all people;
- high priority norms with strong justifications;
- not dependent for their existence on recognition by particular governments or on legal enactment at the national level;
- international standards of evaluation and criticism that are not restricted by national boundaries;
- political norms whose primary addressees are governments rather than interpersonal standards;
- numerous and specific norms dealing with matters such as security, due process, liberty, equal citizenship, and basic welfare;
- minimal standards that constrain rather than replace legislation and policy-making at the national level.

This chapter explains and qualifies these characterizations of human rights. Let's begin with the last.

Human Rights as Minimal Standards for Governments

When a widespread human problem is recognized the question arises of whether its remedy should be conceived as a human right. This is not just a political question; it includes the foundational question of whether the problem is serious enough to be a matter of human rights. To answer this question we need to appeal to fundamental values and norms. Discomfort due to hot weather is a widespread human problem, and a right to air conditioning might be proposed as its remedy. But this problem is not serious enough (discomfort does not generally get one into the realm of human rights), and its universal remedy is not feasible enough, to support a universal human right. We can think of the emergence of a human right as the coming together of the recognition of a problem; the belief that the problem is very severe; and optimism about the possibility of addressing it through social and political action at national and international levels. Judgments about the severity of a problem are hard to make because different people are impacted differently by problems and because of the vagueness of the boundary between problems that are severe enough to be matters of human rights and ones that are not. Still, we have strong reasons for limiting international human rights to minimal standards.

Human rights aim at avoiding the terrible rather than achieving the best. Their modality is "must do" rather than "would be good to do." Henry Shue suggests that human rights specify the "lower limits on tolerable human conduct" rather than "great aspirations and exalted ideals" (Shue 1996). As minimal standards they leave most legal and policy matters open to democratic decision-making at the national and local levels. Minimal standards can accommodate a great deal of cultural and institutional variation. Human rights block common threats to a decent or minimally good life for human beings. There are many such threats, however, and we need several dozen specific rights to address them.

As a political morality of the depths, human rights do not attempt to prescribe a general theory of distributive justice or give an account of optimal democratic institutions. Instead they prescribe equality in areas where inequality would be entirely unacceptable, and demand that countries allow political participation and have regular elections.

There are four strong reasons why international human rights should be minimal standards. First, it is by insisting that human rights address very severe problems that we ensure their high priority and universality. If human rights are created to deal with problems such as smoking and

the unavailability of holidays with pay, this may undermine the claim of human rights to have great importance.

Another reason is to leave ample room for democratic decision-making at the national level. It is appropriate for a country's citizens and legislators to have the power to shape laws, institutions, and practices to fit popular desires, the country's cultures and traditions, and physical and economic circumstances. Globalization is already producing excessive uniformity around the world. Human rights should not contribute to such uniformity except in a few important areas where only one way is the acceptable way.

The third reason why human rights should be minimal standards is that this helps make them acceptable to countries who prize their independence and self-determination. The requirements of widespread and ongoing participation by sovereign states in human rights institutions need to be taken seriously (see the discussion of national self-determination in Chapter 6). Limiting the scope of international human rights is such a requirement.

The final reason is that by limiting human rights to minimal standards we make them more likely to be feasible in the vast majority of the world's countries. Human rights will do little work if they are so expansive that many countries can see them only as distant ideals to be realized some time in the future.

Who Has Human Rights?

A simple answer to this question is "Humans!" – all human beings everywhere and at all times. That human rights apply to all people without distinction has been a major theme of the human rights movement. Nevertheless, reflection on the idea that the holders of human rights are simply all people reveals that this answer is too broad.

First, some rights are held only by adult citizens, not by all persons. The clause of the Civil and Political Covenant dealing with political participation begins not with "Everyone" but with "Every citizen" (article 25). Further, the rights of people who are very young, severely retarded, comatose, or senile are justifiably limited. Although these people have important rights such as life, due process, and freedom from torture, it would be implausible to argue that they have rights to vote, run for political office, or travel freely on their own. These latter rights presuppose a greater degree of rationality and agency than some human beings possess.

Furthermore, some human rights cannot be universal in the strong sense of applying to all humans at all times, because they assert that people are entitled to services tied to relatively recent social and political institutions. Specific human rights are only as timeless as the specific problems they address. Some human rights problems have been with us for millennia, such as violence related to getting or retaining political power. Others have emerged in the last few centuries with the arrival all over the globe of the modern state, with its associated legal, penal, bureaucratic, educational, and economic branches (on the spread of modern political institutions see Morris 1998; see also Donnelly 2003: 92, 117). Human rights deal with security, liberties, fair trials, political participation, equality, basic welfare, and perhaps even the natural environment.

Due process rights, for example, presuppose modern legal systems and the institutional safeguards they can offer. Social and economic rights presuppose modern relations of production and the institutions of the redistributive state. My point here is not merely that people living 10,000 years ago would not have thought to demand these rights but rather that the scope of these rights can be defined only by reference to institutions that did not then exist (on "embracing temporal relativity" see Tasioulas 2002b: 87). Human rights could be formulated in much broader terms to avoid this objection, but the result would be very abstract rights, subject to a variety of interpretations and hence less useful in political criticism and less suitable for legal implementation.

Assigning Responsibilities for Human Rights

Rights have identifiable addressees – people or agencies who have responsibilities related to the realization of the right. This connection between rights and the assignment of responsibilities is a basis for a frequently voiced question: who bears duties in regard to human rights? On hearing, for example, that people have rights to food and education, one may wonder whether individuals have duties to try to provide these things out of their own resources.

The primary addressees of human rights are the world's governments. Human rights are not ordinary moral norms applying mainly to interpersonal conduct. Rather they are political norms dealing mainly with how people should be treated by their governments and institutions. The political focus of human rights is very clear in the human rights treaties. The European Convention, for example, requires participating govern-

ments to "secure to everyone within their jurisdiction the rights and freedoms defined [in] this convention" (article 1). It also requires that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (article 13). This requirement presupposes that governments are often both addressees and violators. The struggle to gain respect for a human right must often attempt to get the government both to restrain its own agencies and officials and to use its legal powers to restrain others.

If Almeida is a citizen or permanent resident of Brazil, the government of Brazil has the heaviest duties to respect and uphold Almeida's human rights. Brazil has duties not just to refrain from violating Almeida's human rights; it also has duties to uphold them through actions such as implementing them legislatively, protecting them with police work, providing legal remedies in the courts, and providing services such as food assistance. But we should not conclude from this that all of Almeida's rights are against the government of Brazil, or that all of the human rights duties of the Brazilian government are duties to its citizens.

Some of Almeida's human rights are against people and governments in other countries who at least have duties not to kill or imprison him without trial. When Almeida is standing peacefully on the Brazilian side of the Brazil/Bolivia border, a Bolivian police officer standing nearby on the other side of the border has the same human rights duty not to shoot Almeida as he has not to shoot a peaceable Bolivian citizen as she walks along the Bolivian side of the border.

Further, people and governments in other countries, along with international organizations, may have back-up responsibilities for Almeida's human rights when the government of Brazil is unwilling or unable to respect or uphold them. The United Nations and the World Bank, for example, may have duties to monitor human rights conditions in Brazil and to promote compliance with human rights. International corporations operating there may also have responsibilities (Weissbrodt 2005).

Because of the failures of many states to respect and uphold the rights of their residents, it is tempting to assign these tasks to international organizations such as the United Nations or to hope that a world federation or government will soon emerge to assume them. International organizations, however, have limited authority and power to enforce rights around the world. And a world federation or government currently seems at best a distant possibility. At present no alternative exists to assigning sovereign states the main responsibility for upholding the rights of their residents. This is a hard saying since many governments are corrupt and

weak, and reform and development have proven hard to bring about through outside pressure and assistance.

Saying that the primary addressees of human rights are governments is not the end of the story, however. Individuals also have responsibilities generated by human rights. This view is suggested by the Universal Declaration. Its preamble suggests that human rights have implications for the conduct of individuals when it says that "every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures national and international to secure their universal and effective recognition and observance." Clearly, the authors of the Universal Declaration believed that both states and individuals have obligations in regard to human rights. A rationale for this view is that if the justifying reasons for human rights are substantial enough to override domestic law and justify risks of international conflict, those grounding reasons are also likely to generate obligations for individuals in matters subject to their control.

Further, people participate as individuals in human rights abuses such as racial discrimination, slavery, domestic violence, and political killings (Cook 1994). When article 4 of the Universal Declaration asserts, "No one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms," the main violators of this right are not governments. Slaveholders have generally been individuals, although governments have often supported and institutionalized slavery. The right to freedom from slavery obligates individuals and governments not to hold slaves and further requires governments to pass legislation making slavery illegal. When article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (United Nations 1979) commits ratifying countries to "take all appropriate measures to eliminate discrimination against women in the field of employment," it is clear that this requires governments to pass legislation prohibiting discrimination by private businesses, firms, and corporations.

One approach to explaining how and why citizens share in the duties generated by human rights views the citizens of a country as having ultimate responsibility for the human rights duties of their government. If their government has a duty to respect or implement the right to a fair trial, or a duty to aid poor countries, its citizens share in that duty. They are required as voters, political agents, and taxpayers to try to promote and support their government's compliance with its human rights duties. This principle of shared responsibility is particularly attractive in democratic societies where the citizens are the ultimate source of political authority. This view makes individuals back-up addressees for the duties of their

governments. Thomas Pogge has taken a related but slightly different approach to generating individual duties from human rights that have governments as their primary addressees (Pogge 2002: 67). Pogge emphasizes Universal Declaration article 28 which says that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." Pogge sees in this article a plausible norm, namely that both countries and individuals have duties not to be complicit in an international order that unfairly disadvantages poor countries and the people in them.

The complex view of the addressees of human rights sketched above can be illustrated using the right against torture (Nickel 1993a). Duties to refrain from engaging in torture can feasibly be borne and fulfilled by all persons and agencies, so this duty can be addressed to all. An adequate response to people's entitlement not to be tortured also requires finding individuals or institutions that can protect people against torture. The right to protection against torture can be universal without all of the corresponding duties being against everyone, or against some single worldwide agency. What is required is that there be for every rightholder at least one agency with duties to protect that person from torture. This agency will typically be the government of one's country of citizenship or residence. The duty not to torture falls on everyone; the duty to protect against torture falls primarily on governments.

There may also be secondary addressees who bear back-up or monitoring responsibilities connected with the right against torture. The people of a country are secondary addressees with respect to fundamental rights. They bear the responsibility of creating and maintaining a social and political order that respects and protects the right to freedom from torture. International institutions are also secondary addressees. They bear the responsibility of assisting, encouraging, and pressuring governments to refrain from torture and to provide effective protections against torture. If national or international institutions are unable to fulfill this responsibility there is the possibility of reforming them or creating new ones (Shue 1996: 166).

Scope, Weight, and Trade-Offs

Human rights are both mandatory and high priority. As mandatory norms, they are not mere goals. Meeting their demands is obligatory, not merely a good thing. As high priority norms, they generally prevail in competition with other considerations – including advancing utility,

prosperity, national security, and good relations with other countries. To have high priority they must be supported by strong moral and practical reasons.

It is not plausible, however, to suggest that all human rights are absolute, that they can never be suspended or sacrificed for other goods. As James Griffin says, "The best account of human rights will make them resistant to trade-offs, but not too resistant" (Griffin 2001: 314). At least some civil and political rights can be restricted by public and private property rights, by restraining orders related to domestic violence, and by legal punishments. Further, after a disaster such as a hurricane or earthquake, freedom of movement in the area is often appropriately suspended to keep out the curious, to permit free movement of emergency vehicles and equipment, and to prevent looting. The Civil and Political Covenant permits rights to be suspended during times "of public emergency which threatens the life of the nation" (article 4). Yet it excludes some rights from suspension including the right to life, the prohibition of torture, the prohibition of slavery, the prohibition of ex post facto criminal laws, and freedom of thought and religion.

Human rights and their exercise are generally subject to regulation by law. For example, rights to freedom of speech, religious practice, assembly, movement, and political participation require substantial qualification and regulation so that they harmonize with each other and with other important considerations. A system of human rights must adjust the scopes and weights of its rights so that they can coexist with each other and form a coherent system (Rawls 1971, 1993). The right to privacy, for example, must be adjusted to coexist with the right to a fair trial. And the right to security against crimes has to be accommodated to rights to due process of law.

The scope of a right is the benefit, freedom, power, or immunity that it confers upon its holders. For example, specifying the scope of the right to freedom of religion involves describing a set of freedoms in the area of religious belief and practice that the holders of the right enjoy. Weight concerns the ranking or priority of a right when it conflicts with other considerations. To be exceptionless is a matter of scope, and to be absolute is a matter of weight. Nevertheless, it is often difficult to know whether the failure of a right to outweigh competing considerations and to dictate the result that should be followed, all things considered, in a particular case is best described as an instance of its containing an implicit qualification (scope) or as an instance of its being overridden (weight).

Suppose that Kim wants to exercise her right of free speech by marching into the courtroom in which Lee is on trial and telling the jury some fact that is barred from them by the rules of evidence (for example, about

Lee's criminal record). Here Kim's right to speak would conflict with Lee's right to a fair trial. Suppose further that we agree that Kim should not be allowed to speak to the jury and that the relevant rights do not, all things considered, require that she be allowed to do this. There are two possible ways of describing the failure of Kim's right to freedom of speech to prevail here. One approach says that the right to free speech, properly understood, does not include within its boundaries a right to enter a courtroom and tell the jury things about the defendant they are precluded from knowing. Here the matter is treated as one of scope. The other description says that Kim's right of free speech applied in this situation would normally have required that she be allowed to speak, but it was outweighed in this unusual case by Lee's right to a fair trial, which is of higher priority. Here the matter is treated as one of weight.

In this instance it is probably best to see the matter as one of scope. One might hope that all conflicts between norms could be dealt with as they arose by redrawing boundaries and inserting exceptions. Boundaries would eventually be adjusted to minimize or eliminate conflicts, and the relative priority of different norms would be reflected in the expansion or retraction of their boundaries when they covered contiguous areas.

All the same, at least three barriers stand in the way of this program. One is that we cannot anticipate all conflicts between rights and with other norms, and we are often uncertain about what we should do in the cases we can imagine. A second barrier is that a right containing sufficient qualifications and exceptions to avoid all possible conflicts would probably be too complex to be generally understood. Third, relieving a conflict by building in an exception will sometimes incorrectly imply that the overridden right did not really apply and that we need feel no regret about our treatment of the person whose right was overridden. The most awful moral dilemmas are conflicts not at the edges of rights or duties but at their very centers. Adding exceptions to cover such cases may lead us to see what is happening as nontragic, rather than as calling for regret, apology, and – if possible – compensation. Retaining the vocabulary of weight and overriding may help us to remember that not all moral dilemmas can be anticipated or resolved in advance and that in hard cases even our best efforts may result in serious harm or unfairness (Ignatieff 2004).

When we describe human rights as prima facie rights because we cannot provide in advance adequate accounts of how to deal with conflicts between human rights and other important considerations, we render irrelevant the sorts of objections that could be made if we claimed that human rights are absolute or near absolute. Prima facie rights are far easier to defend, but their implications for practice are often unclear. If no substantial competing values are present, a prima facie right will tell us what

to do. But when substantial competing considerations are present, as they often are, prima facie rights are silent. The danger is that prima facie rights will provide no guidance in the cases where guidance is needed most.

Two responses can be made to this objection. First, there is no reason why the scopes of prima facie rights cannot be defined in considerable detail or principles for ranking them in relation to competing considerations worked out. Classifying a right as prima facie implies not that this sort of work cannot be done, but that we recognize that the work will always remain partially unfinished. Second, appeals to human rights should be seen as part of moral and political argument, not as the whole of it. The presence of claims about human rights does not mean that less specialized forms of moral and political argument cannot be invoked.

Are Human Rights Inalienable?

We say that human rights are universal to avoid leaving the oppressed noncitizen, minority group member, or social outcast without rights to stand on. We claim that human rights are inalienable so that oppressive governments cannot say their subjects have forfeited or voluntarily given up their rights. Further, the idea that human rights are inalienable fits nicely with the idea that governments are not the ultimate source of human rights. What governments do not give they also cannot take away.

Inalienability means that a right cannot be permanently forfeited or given up entirely. The inalienability of a right implies that the rightholder's attempts to repudiate that right permanently, or attempts by others to take that right away, will be without normative effect. If people and government agencies lack the moral power to eliminate permanently a right of their own or others, that disability makes the right inalienable. And since the right cannot be eliminated, those who act as if it had been eliminated will violate it.

One problem with the claim that human rights are inalienable is that some of the rights in the Universal Declaration are forfeitable in many legal systems upon conviction of serious crimes. Most systems of criminal punishment use incarceration as a penalty, and thereby suppose that criminals forfeit at least temporarily their right to liberty. In spite of such examples, advocates of human rights often worry that the idea of forfeiture, if admitted, could consume too many rights. Admitting the possibility of forfeiture seems to invite oppressors to say that unpopular groups have forfeited their rights to life, liberty, or decent treatment. Nevertheless, this possibility is not sufficient to show that all human rights are

immune to forfeiture. Most normative concepts are susceptible to rhetorical abuse.

The claim that human rights cannot voluntarily be repudiated wholesale is also problematic. Some eighteenth-century rights theorists asserted the inalienability of natural rights because they wanted to counter the Hobbesian claim that people had agreed to give up all their rights when they left the state of nature and entered civil society (Hobbes 1981). And perhaps we can agree that some minimal rights to security and liberty are inalienable and hence that individuals lack the power to permanently waive those rights.

I doubt, however, that we can plausibly say that every human right is immune to repudiation. People choose to give up many basic liberties when they voluntarily enter monasteries or military service, yet we would not forbid these actions. Likewise, people may accept permanent limits on what they can say and publish about certain topics in order to receive a security clearance for government intelligence work. As a general conclusion about the inalienability of specific human rights I suggest that they are hard to lose but that few are strictly inalienable (for a stronger view of inalienability see Donnelly 2003: 10).

The Existence of Human Rights

Human rights are often held to exist independently of acceptance or enactment as law. The attraction of this position is that it permits critics of repressive regimes to appeal to human rights whether or not those regimes accept human rights or recognize them in their legal systems. Yet the contention that human rights exist independently of acceptance or enactment has always provoked skepticism. If human rights were mere wishes or aspirations, we could say that they exist in people's minds. In order to be norms that are binding on all people, however, human rights must be far more than wishes or aspirations.

It is possible to sidestep skeptical doubts about the independent existence of human rights by pointing to their place in international law. For example, the right to leave a country is found in article 12 of the Civil and Political Covenant, a treaty that is now part of international law. Under this treaty a person who wishes to leave her country (and who is not fleeing debts or criminal prosecution) has in this right a strong justification, and her government has a corresponding obligation to allow her to go. As this example suggests, human rights can exist as legal rights within international law.