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Human Rights and Social Provision

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Human rights are typically presented in terms of entitlements, correlative duties, claims, "trumps," and remedies.[1] These framings, which draw principally on law and philosophy, emphasize legal and political processes centered on adversarial claims. This essay, by contrast, seeks to highlight a more functional, sociological, or political perspective that understands human rights in terms of systems of social allocation and provision. Rather than focus on citizens and states linked by relationships of entitlement and claims, I stress the obligations of states to assure that citizens are provided with the goods, services, opportunities, and protections needed to enjoy their rights.

After laying out a few simplifying assumptions, Part One outlines some of the basic elements of a social provision approach. Part Two then compares this approach to the "violations approach," which has received considerable attention over the past decade, and offers two illustrative applications.

Assumptions

To simplify and to focus the discussion, I will take human rights to be, literally, the rights that one has because one is a human being. In the contemporary world, human rights are held primarily as moral rights, as international legal rights,[2] and, in a growing number of countries, as national legal rights. I will take the *Universal Declaration of Human Rights* as providing an authoritative list that states and other international actors have accepted as more or less morally justifiable,[3] binding in international law, and a normative standard for evaluating domestic law and politics. I will also follow international human rights law in understanding implementation and enforcement as an essentially national matter of action by sovereign territorial states.[4] This last point is particularly important for the arguments I develop here.

"Everyone has a right to . . . ," in practice, means that *states* are required to guarantee the designated goods, services, opportunities, and protections to all *citizens*. The state need not directly provide the necessary goods, services, opportunities, and protections. It must, however, design and implement a system of social provision that effectively realizes the allocated rights. Although I will touch occasionally on questions of allocation,[5] my focus will be on the duties of states to design and to implement systems of social provision to realize internationally recognized human rights.

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Part One: A Social Provision Approach to Human Rights

Respect, Protect, and Provide

The duties correlative to rights come in many forms. Slightly modifying Henry Shue's classic analysis, we can identify duties (1) to *respect* the right (or not to deprive the right-holder of the enjoyment of one's right), (2) to *protect* against deprivation, and (3) to *provide* what is necessary to ensure that right-holders are able to enjoy their rights.[6]

These diverse duties can be variously allocated to different social actors.[7] In the contemporary world, the duties to protect and to provide are assigned almost exclusively to states. International human rights law creates a system of national implementation of international human rights. For example, my right to security of the person obliges only the state to protect me against attack and to provide the conditions that assure me reasonable prospects of physical security. In fact, private actors (as well as other states) are positively disallowed from taking many measures that the state is empowered or required to undertake. For example, private individuals may not demand identification from "suspicious" individuals, to order loiterers to move on, or to enter a house where a crime might be being planned or committed. Even where there is considerable analogy between private and police activity—e.g., neighborhood watch or "citizen's arrest"—the lack of official authority creates many important differences.

The allocation of duties to respect human rights is somewhat less clear. Such duties may be seen as universal. All actors of any type—individuals, states, businesses, nongovernmental organizations (NGOs), interest groups, and international organizations, to mention just some of the more prominent types—might be said to be under an obligation not to deprive individuals of their human rights. We rarely, however, actually say that. If an irate neighbor assaults me or shoots me dead, he commits an ordinary crime. If a police officer comes into a holding cell and assaults or shoots me that is an archetypical human rights violation. In a well-designed and effectively functioning national legal system, there is little occasion to talk about the duties to respect human rights of any actors other than the state. In so far as other actors do have such duties, they typically have been (re)conceptualized as national legal duties, especially duties under the criminal law, rather than a direct consequence of human rights.

Remedy vs. Social Provision

Thinking in terms of entitlement and claims draws our attention conceptually towards the duty to respect (not to deprive) and practically towards the duty to protect against deprivation. To the extent that duties to provide are contemplated, emphasis tends to be placed on adversarial processes that culminate in "legal remedy;" that is, a system of authoritative and effective adjudication.

Even the most superficial reflection, however, reveals that most of the work of protection, and virtually all the work of provision, takes place far from courts. To protect and provide human rights requires extensive and expensive systems of social, legal, administrative, and political rules and institutions (which themselves depend on the widespread diffusion of certain social values and attitudes). A social provision focus not only shifts our attention to the duty to provide but remains open as to the mechanism of provision.

I do not mean to belittle the role of courts and legal remedy.[8] Rights are indeed likely to be well guaranteed where right-holders can challenge deprivations of their rights through fair and impartial courts whose judgments are reliably implemented. But this is only the tip

of the iceberg. Even where law is arguably the single most important institution assuring the effective enjoyment of human rights, which is largely because "the law" is embedded in a complex system of social provision of rights, the submerged foundation on which legal mechanisms rest.

Examples: Economic and Social Rights

Consider "the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (*Universal Declaration*: Article 25[1]). Duties not to deprive rarely will be of much significance; active deprivation of social security is likely to occur only through violations of other rights (e.g., assault, theft). Even duties to protect from deprivation are of secondary significance. The right to social security is fundamentally about assuring that one has available—if necessary, is provided with—the financial and other resources needed to lead a minimally dignified life when confronted with unemployment, old age, etc.

How, though, is this to be accomplished? Different societies and states have had "social security systems" that have relied to varying degrees on family, society, state, and self-provisioning. Historically, the family has been the principal social security mechanism. "Society" sometimes has an obligation, for example, through religious organizations or through a redistributive social norm obliging the wealthy to assist those in need. Patron-client relations are another common "societal" mechanism. Over the past half century, the state in many countries has played a central role. But even in developed market economies, family provision is an essential element of the system of social guarantees. In many countries, self-provision, through savings and private insurance and investment schemes, is an important part of the picture. Employers, through "private" pension schemes, also sometimes play an important role.

The practical heart of the human right to social security is the obligation of the state to assure that *some* system of provision is in place that gives everyone a reasonable guarantee of social security. Whoever actually provides the necessary goods and services, the state is obliged to assure that citizens are provided with social security, and the state has a considerable "margin of appreciation" in allocating particular elements of the general duties to protect and to provide to different social actors.

Consider also the human right "to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care" (*Universal Declaration*: Article 25[1]). Here too, duties not to deprive and to protect from deprivation are of relatively minor importance, and an effective system of provision again is likely to require a variety of social institutions and actors.

For example, children typically get food through their families, who acquire it in various ways. Subsistence farmers may require little more than access to land and microcredit. In the "modern" world, most adults work for a wage that they use to purchase food. Some rely on church and other private charities. Many people, especially in developed market economies, rely on the state, either for income or directly for food aid. Public and private international agencies are in some places significant sources of provision, particularly in emergencies. The human right to food, however, places the duty to provide ultimately on the state, which must design, or at least manage, an effective system of provision.

The central role of social choice in a system of provision is well illustrated for Americans by the case of health care. Although the state is the principal provider in most developed market economies, in the United States most individuals under age 65 obtain health care

through the market, primarily through collective buying schemes ("insurance") funded jointly by employers and workers. The state, through the tax system, partially subsidizes this mechanism. It also directly funds the provision of health care for the elderly, the disabled, and the poor, especially poor children. The notorious failures of the American health care system, however, lie not in the decision to rely heavily on market mechanisms but in the refusal of the state to provide health care by other means to those who are priced out of the market.[9]

Examples: Civil and Political Rights

Social provision is no less important for civil and political rights. Some civil and political rights do focus centrally on duties to protect from deprivation. Consider the right to "security of person" (Article 3). Even here, though, we must recognize various mechanisms of social provision. In the contemporary world of states, duties to protect personal security are largely carried out by the police and courts. Nonstate societies, however, rely (by definition) on other social institutions, usually including a substantial element of "self-help," and, in all societies, families, neighbors, and friends play a supporting role and individual right-holders are expected to exercise a certain degree of prudence.

Consider the contemporary United States. Private security services and neighborhood watch organizations have become an important part of the system for those able to afford or to organize them. Urban gangs, in addition to their criminal activities and other social functions, often provide some elements of neighborhood security. And individuals have been forced to take a variety of personal measures—installing better locks and alarms, exercising more caution when walking in certain areas, choosing where one lives on the basis of neighborhood and building security—to "supplement" state efforts. Many large third world cities reveal a similar dynamic. Rio de Janeiro is an often-cited example.

I do not mean to suggest that these various self-help/self-provisioning mechanisms operate effectively, let alone efficiently. In thinking about the social provision of the right to the security of the person, however, we need to consider the full range, and various mixtures, of "private" and state provision, and the results produced by system of provision as a whole are the measure of whether a state is adequately discharging its human rights obligations.

Some civil and political rights involve primarily duties to provide, not to protect. Consider the right to a government chosen by "periodic and genuine elections" carried out with "universal and equal suffrage" (*Universal Declaration*: Article 21[3]). The principal duty correlative to this right is the obligation of the state to stage and to administer an election that is free, fair, and open (to all candidates and all voters). Other actors—e.g., poll watchers or international election monitors—may be incorporated into the process to strengthen its integrity. The state must vigilantly protect all citizens from being coercively discouraged or prevented from participating. For the most part, though, the state's basic obligation is to run—that is, to provide—a clean election.

Consider also Article 5 of the *Universal Declaration*: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." As a practical matter, guaranteeing this right requires extensive systems of training and monitoring of police and security services. Citizens have not merely a right not to be tortured (correlative to the duty not to deprive) but a right to be protected against deprivation, and a focus on the practicalities of assuring such protection shifts our focus to the duty to provide—in this case, through institutions and practices that protect detained suspects against abuse.

Providing protection is "the bottom line" for civil and political rights and economic and social rights alike. In most instances, this will require multiple social actors to discharge a

considerable variety of particular duties. The state need not be, and often is not, the only or even the principal provider. But the state has primary and ultimate responsibility for implementing an effective system of universal provision.

The right to nondiscrimination, which cuts across the standard civil and political versus economic and social divide, further illustrates the importance of focusing on provision. The United States again provides an interesting example. "Conservatives" and certain kinds of "liberals" tend to focus on the duty not to deprive and on protecting individuals against various discriminatory practices, primarily by the state, employers, and providers of housing and other "public services." This, however, ignores the duty to provide effective nondiscrimination. If protections against particular deprivations in practice guarantee effective nondiscrimination, so much the better. But the human right to nondiscrimination requires the state to provide a set of social, political, legal, and economic institutions and practices that guarantees all citizens a life unmarred by harmful invidious discrimination on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," (*Universal Declaration*: Article 2) no matter how insidious the mechanisms by which it is produced.

Part Two: Comparisons and Applications

Having outlined some elements of a social provision approach, the remainder of this paper offers three very different illustrative applications. I begin with a much-discussed topic in the theory of human rights, the distinction between so-called positive and negative rights. I then compare the social provision approach to the "violations approach" that has become increasingly popular in the discussion of economic and social rights. Finally, I address one of the more interesting emerging issues in the field of international human rights, namely, the human rights responsibilities of multinational corporations and international organizations.

"Positive" and "Negative" Rights

The preceding examples, besides challenging the utility of the conventional distinction between civil and political rights and economic, social, and cultural rights, have also implicitly challenged the much-discussed distinction between so-called negative rights, which require the duty-bearer only to abstain from certain prohibited acts, and so-called positive rights, which require the duty-bearer to do something on behalf of the right-holder.[10] An allocation-provision lens points to three important problems with such a conceptualization.

First, few rights, and no human rights, can be effectively enjoyed solely through the discharge of duties not to deprive—at least as long as we continue to live in a world not peopled exclusively by saints or other beings (e.g., Star Trek's Vulcans) who rarely if ever give in to egoistic temptation. All internationally recognized human rights impose duties to protect or to provide—usually both—and the effective enjoyment of these rights typically requires discharge of all three classes of duties.

Second, the mix between largely "negative" duties not to deprive, mildly "positive" duties to protect from deprivation, and strongly "positive" duties to provide often is a matter of institutional design rather than intrinsic to the right. Consider the right to housing. In a system where the state owns much of the housing stock or substantially subsidizes rents or mortgages for a significant proportion of the population, the element of active provision is central. But where most people acquire their housing through purchase or lease in a market, the system of provision may require little in the way of positive provision. The state is principally a provider of last resort and a protector of access to the market.

These arguments have been staples of the theoretical literature on human rights over the past three decades. The allocation-provision framework may provide new twists but here adds nothing fundamentally new. The third problem with the negative-positive distinction that I want to draw attention to, however, is something that I do not believe I have seen centrally addressed.

Whether duties to protect or to provide are central, and how they relate to each other and to duties not to deprive, depend heavily on existing allocations of rights, capabilities, and resources. For example, those who are parts of thick and robust families are much more likely to be able to enjoy their economic and social rights without recourse to the state than those who are not. Likewise, individuals who possess talents or skills highly valued in the market are relatively unlikely to need to rely on state provision for food, clothing, and housing.

Consider Article 17(2): "No one shall be arbitrarily deprived of his property." This may seem like a right that combines universal duties not to deprive with state duties to protect from deprivation, but such an account ignores the prior allocation of property rights, and the broader social systems in which they are embedded. Seeing the right not to be deprived of one's property as a fundamentally negative (or only mildly positive) right involves starting the account very late in the process of the social allocation of rights and the design of social systems of provision. For some political and analytical purposes, this may be useful, but for others it seems arbitrary and misleading. Why not consider the allocation of property rights—how something becomes "his property"—not just its protection?

More generally, systems of provision are deeply dependent not only on preexisting allocations of resources, broadly understood, but on complex social structures, values, and practices that shape opportunities and constraints. Consider, for example, Article 16 of the *Universal Declaration*:

> Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Any plausible and defensible implementation of this right depends centrally on factors such as levels of economic development, social understandings of the nature and meaning of the family, and dominant conceptions of gender roles. Are children seen in significant measure as an economic resource of the household, both immediately and for the provision of long-term social security? How are members of families related to each other and to the family unit? For example, are they primarily seen as embedded elements of the "natural and fundamental" family group, or as "individuals" who largely happen to be parts of families as well? And, to take an example the drafters of the *Universal Declaration* never considered, are same-sex unions, whether sanctified by marriage or not, "families"?

Violations and Social Provision Approaches

A "violations approach" to economic and social rights has become increasingly prominent over the past decade.[11] The underlying idea is that just as violations have been the focus of

much national and international advocacy on behalf of civil and political rights, advocates and policymakers should focus much, perhaps even most, of their attention to economic and social rights on violations.

Such an approach has a variety of virtues and attractions. The failure of states to discharge their duties with respect to economic and social rights does indeed involve violations of those rights. Emphasizing this may occasionally be valuable.[12] A violations approach also usefully emphasizes the fact that "progressive realization" of economic, social, and cultural rights, which is the technical legal obligation imposed by Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, does not indicate an absence of immediate legal obligations. Although allowing the obligation to be fulfilled incrementally, it requires considerable immediate action. A focus on violations also underscores the often-stated principle of the interdependence and indivisibility of all internationally recognized human rights. Practically, a violations approach brings economic and social rights directly within the reach of the familiar and important advocacy mechanisms of naming and shaming.

Here, however, I want to focus on the limits implied by prioritizing more precise specifications of the content of economic and social rights (in order to define violations) and by drawing our attention to the politics of claims and legal remedy. A violations approach is likely to lead to an emphasis on lowest common denominator measures, or, what are often called, minimum core obligations (Chapman and Russell 2002; [Maastricht Guidelines] 1998: Guideline 9; Dankwa, Flinterman, and Leckie 1998: 716). Although such obligations are of great importance, especially in poorer countries, they provide an inadequate account of the full range of obligations associated with economic and social rights. A focus on violations also obscures the fact that effective enjoyment of economic and social rights depends on complex systems of social provision.

Punishing failures to respect rights and devising mechanisms to protect against deprivation/violation certainly are vital endeavors. They are, however, but one rather modest part of an effective system of social provision. In fact, only in the context of robust and effective systems of provision are remedial measures associated with redressing or preventing violations (which are rooted principally in the duties to respect and to protect) likely to be of central practical importance. The effectiveness of legal remedies depends not only on an independent judiciary whose decisions are regularly given force but also on the fact that cases are rare and that decisions are readily translated into laws, policies, and practices that prevent the reappearance of the violations. And all of these depend vitally on the broader social and political environments within which the law is embedded.

This conclusion applies at least as strongly to civil and political rights as to economic and social rights. It even suggests that a violations approach risks channeling advocacy into broadly unproductive paths. Consider the focus in the 1970s and 1980s on political imprisonment, torture, disappearances, and arbitrary executions. Because these involved violations of relatively uncontroversial minimum core obligations they were particularly appealing targets for national, transnational, and international human rights advocacy. But they were largely symptoms of grossly ineffective systems for protecting and providing civil and political rights—and, in most cases, economic, social, and cultural rights as well. Thus progress, when it was not cosmetic or encapsulated, had to wait until broader and more fundamental political and legal changes—regime change—occurred.

Where violations are gross, persistent, and systematic, a focus on violations, sadly, may be the best strategy available to human rights advocates. But if it is presented as anything more than an unfortunate stop-gap measure, it risks fundamentally misdiagnosing the nature of the problem. Even more importantly, a violations approach is likely to misdiagnose the

remedy, which lies in systematic changes in the legal, political, social, and economic systems of provision. Without such changes, "legal remedy" is not a viable option. In fact, the availability of effective legal remedy is more an effect than a cause of good human rights performance. A violations-claims-remedy logic may be decisive in guaranteeing rights where a reasonably effective system of provision is in place. But without considerable progress in fulfilling duties to provide, a focus on violations, and thus on the duties to respect and to protect, is likely to be of very modest value.[13]

A focus on violations also fails to capture the full meaning and promise of human rights, both civil and political and economic, social, and cultural. The aim of human rights is to ensure reasonable prospects for a life of dignity for every person. The state must provide whatever goods, services, opportunities, and protections are necessary to realize the underlying vision of human dignity implicit in each and all internationally recognized human rights. This includes protecting people from violations and providing remedies for those whose rights have been violated. But, in many cases, much more extensive duties to provide are the heart of the matter.

We *could* think of violations across the whole range of duties. Logically, there is no reason why a violations approach could not acknowledge, or even prioritize, duties to provide. In practice, however, violations approaches have focused on duties to respect and to protect, and most legal systems address obligations to provide primarily through established legal duties to protect. Failures of the state to act to provide necessary goods, services, opportunities, and protections usually can be addressed by remedial legal claims only awkwardly if at all.

New Duty-Bearers

Another major new area of development has involved attempts to attribute responsibility for protection and provision to actors other than the state.[14] If, as I have argued elsewhere (Donnelly 2003: ch. 4), the *Universal Declaration* is largely a record of our social learning concerning the threats to human dignity posed by modern markets and modern states, then such efforts at extension make considerable sense. The mainstream of international human rights law envisions something very much like a liberal democratic welfare state, understood in this context as a set of institutions to tame modern markets and modern states through the mechanism of human rights implemented and enforced on the basis of citizenship. But as globalization has led to more and more of the economy being outside of the control of states, as more and more corporations develop capabilities that dwarf those of many states, and as people become increasingly frustrated with the unwillingness of even strong states to respond to certain egregious violations of human rights, calls for direct human rights accountability for multinational corporations (MNCs) and new powers and responsibilities for international organizations have increased in frequency and urgency. Here I want to suggest that a social provision approach provides considerable insight into both the strengths and limitations of such arguments.

Organized Violence by Nonstate Actors. I want to begin, however, by looking very briefly at the issue of violence by nonstate armed groups. This links the topics of duty-bearers and violations in a context of social provision. It will also help to set the stage for a discussion of human rights duties of MNCs and international organizations (IOs).

It is increasingly common to see violence perpetrated by insurgents of various sorts described as involving violations of human rights.

> A generation ago the international community barely paid attention to such violations [by nonstate armed groups]. Because only states protect rights, the assumption went, only states can violate human rights. As a result, even gross violations by rebel, warlord, guerrilla, terrorist, or insurgent groups were defined as merely "criminal" violence that fell within the domestic jurisdiction of sovereign states. But today the old assumptions no longer hold. From Colombia to the Philippines, the international community has increasingly broadened the definition of human rights violations to include both states and nonstate groups engaged in armed conflict. (Policzer 2006: 215)

It certainly is true, and important to note, that actors with no duty to protect human rights may violate (the duty to respect) human rights. Above I noted that although all social actors have duties to respect human rights, we actually use the language of respecting and violating human rights almost exclusively in reference to states. The case of large, successful nonstate armed groups is an appropriate exception to this rule. When the state no longer exercises an ideal-type monopoly on the (legitimate) use of force then it becomes appropriate to express failures to respect human rights as instances of violations of human rights. "Crimes" usually attributable only to the state are appropriately attributed to nonstate armed groups. Such groups, though, have no duties to protect or to provide.

Imagine, however, that one such group goes on to acquire control over a territory and begins exercising governmental functions. Consider, for example, the Revolutionary Armed Forces of Colombia (FARC) in certain areas of Colombia or the Shining Path during the height of its powers in Peru. Duties to protect or to provide then might appropriately be seen as devolving to that group. The reason, though, is not that it is an armed group but rather that it has in effect become a state by exercising governmental functions within a defined territory. Having taken over from the state, it acquires the state's duties to protect and to provide human rights.

If this analysis is correct, nonstate armed groups are quite different from MNCs and IOs. As armed groups, they have only a duty to respect, acquiring duties to protect and to provide to the extent that they effectively replace states as governing institutions. MNCs and IOs, by contrast, are plausibly seen as acquiring duties to protect or to provide in a system of social provision still centrally focused on states.

Multinational Corporations. What duties correlative to human rights might reasonably be attributed to MNCs?[15] Like all social actors, firms have duties to respect human rights. Businesses often directly or indirectly have an important impact on practices that influence the enjoyment of a wide range of human rights, in areas ranging from the health and safety of workers to the integrity of political and legal systems. Big businesses are likely to have an especially large impact. I can see no reason, though, why we should in a human rights context single out a class of businesses on the basis of the fact that they operate transnationally.

Most people working in poorly paid jobs with miserable working conditions are employed by local firms. And I am aware of no evidence that local firms, taken as a whole, are more "human rights friendly" than global firms. Environmental degradation, poor working conditions, or inadequate wages may plausibly be interpreted as violations of the duty to respect human rights. But such duties apply to all firms, local and foreign, and all other social actors as well. I can see no reason why, as a general principle, only large foreign firms should be held to such duties. In particular cases, of course, particular firms might reasonably be singled out. But this is a matter of designing a local system of provision, not a matter of general human rights duties of MNCs.

There are, however, powerful moral intuitions underlying talk about human rights duties of MNCs. Particularly important is the sense that it is unjust for large global firms to "take advantage" of their power to behave in ways that either fail to give a fair share of the proceeds to their workers or that impose excessive "externalities" on workers and local communities. This is indeed true in an unfortunately large number of particular instances.[16] Large corporations do often run their businesses in ways that leave their workers with lower wages or poorer working conditions than might otherwise be possible or that have a variety of negative effects on the broader community. I will argue that specifying new human rights duties for corporations simply is not an appropriate solution to this problem. The idea of a system of social provision of human rights, however, provides a framework for capturing this sense of injustice.

I am skeptical that there are any human rights, specified at the level of the *Universal Declaration*, to which we would want to say that all businesses in general or MNCs in particular (ought to) have duties to protect or to provide. Do we really believe that all firms/MNCs everywhere (should) have an affirmative duty to protect or to provide the internationally recognized human right to (fill in the blank)? I at least cannot think of a right where I would be comfortable answering "yes."

The injustices that lead to calls for human rights duties of MNCs reflect a failure of the state to exercise its regulative authority in a way that discharges its duties to protect and to provide. Rather than specify new general duty-bearers of obligations to protect or to provide any human rights we should insist and attempt to ensure that states discharge their existing obligations.

Critics of corporate behavior point to the considerable power of MNCs. But not all powerful actors have duties to protect or to provide human rights, even in those areas where they exercise a significant ability to alter the capacity of individuals to enjoy their rights. We could substantially improve the ability of many people to enjoy many rights if, for example, we directly imposed duties to provide on the wealthy. But few if any people believe that the wealthy do or should have duties to protect and to provide human rights. (They may have duties of charity, beneficence, or humanity to provide, in addition to their duty to respect, but these are very different matters.) Unless we can specify good grounds on which MNCs or all firms, but only firms, should have duties to protect or to provide human rights, these are not the appropriate remedies for the injustices in question. And I at least have seen no argument that even tries to make a case for general duties to protect or to provide held only by (national or transnational) business enterprises. The standard "arguments" instead simply jump from the capability to help or to harm to a duty to protect or to provide.

This does not mean that corporations should not be pressured to behave more fairly or humanely to their workers and the communities in which they operate. The grounds, however, are either general considerations of justice, fairness, morality, or humanity or requirements that have been or might be imposed locally. This later case is brought into clear focus by a social provision perspective.

Consider workplace health and safety. States are required to draft appropriate legislation and then see that it is effectively enforced. To the extent that corporations impede states from discharging these duties, they are guilty either of violations of local law or of facilitating the state's failure to discharge its human rights responsibilities. The human rights violations in question are either corporate failures to respect or state failures to protect or to provide. Both are important concerns. But they are qualitatively different and should not be confused. What we need are not new duty-bearers but new efforts to see that those who already have the duties actually discharge them.

Now let us expand the discussion beyond violations. States have a responsibility to design systems of social provision that guarantee effective enjoyment of all internationally recognized human rights. In many cases, this will involve incorporating firms as agents of protection or provision. Minimum wage legislation is a good example of a mechanism that relies on employers to discharge a duty to provide, in this case a duty correlative to the right to an adequate standard of living. Requiring firms to report workplace accidents is another common mechanism.

MNCs thus may indeed have certain duties to protect or to provide internationally recognized human rights. But these are not general duties directly correlative to human rights. They are not held by all firms everywhere simply because they are firms. Rather, they may be appropriately imposed locally by particular states discharging their human rights duties to protect or to provide.

Much corporate irresponsibility with respect to human rights rests on states not holding firms to legal or moral obligations not to deprive. Another large set of cases of concern arises from the failure of states to take proper advantage of corporations as agents by which they may discharge their obligations to protect and to provide. Corporations can and often should be ascribed derivative duties to protect or to provide human rights—but only in local systems of provision in which both the original and the ultimate duties lie with the state.

International Organizations. Consider now human rights duties of regional and international organizations. Genocide provides the clearest case. Talk of a responsibility to protect (International Commission on Intervention and State Sovereignty 2001) is overdrawn. Contemporary international law and practice establishes a right to humanitarian intervention against genocide, not a duty to intervene, let alone to protect. Nonetheless, in the past 15 years we have come to recognize some duties beyond respect borne by the international community in the case of genocide. Here too a social provision perspective provides some important insights.

States are embedded in a broader society of states.[17] International human rights law is an expression of that society of states, which has in effect allocated the duties to protect and to provide to its individual members. Sovereignty as it is ordinarily understood today requires extremely strong deference to the legal fiction of state provision of human rights. Genocide, however, has come to be accepted as conclusive evidence that state provision has failed. A government that perpetrates genocide on some segment of its population has in effect demonstrated its failure to protect and to provide human rights. This both effectively renounces its presumptive protection against intervention and activates a residual duty on the part of the international community.[18]

Few other human rights violations, however, fit this model. Slavery and apartheid come readily to mind. Those subject to colonial domination might plausibly claim that the society of states has direct duties to protect and to provide their human rights. Famine might also create a situation where direct duties to protect or to provide apply, although if the state in question attempts to prevent international assistance the case begins to look very much like genocide. Most internationally recognized human rights, however, cannot plausibly be fit into this framework.

There are, however, considerable possibilities for creating shared responsibilities between states and both regional and international organizations. Consider the system of regional enforcement based on the European Convention on Human Rights. The members of the Council of Europe have in effect chosen to pool part of their duties to protect and to transfer it to the European Court of Human Rights. They have collectively decided to create

a two-tiered system of social provision that remains fundamentally state-based but makes significant use of regional legal remedies.

Without entering into theoretical debates about the relationship between state consent and international legal obligation, genocide and the European regional human rights regime point respectively to (relatively) top-down and bottom-up approaches to creating duties of regional and international organizations to protect or to provide. Given the continuing strength of states, bottom-up approaches are more likely to produce positive results. Although marred by the obvious and severe shortcoming of leaving out states that choose not to participate, consensual treaty-based procedures do not require a fundamental change in the established state-based system of provision.

States are obliged to protect and to provide human rights for their citizens. They are free to do that by relying on supra-state mechanisms, just as they are free to rely on subnational actors such as businesses or private charities. For example, the European Union (EU) can be seen, from a human rights point of view, as a mechanism to protect economic and social rights by preventing certain forms of competition and to allow citizens of EU member states to exercise a wide range of human rights wherever they choose across the territory of the EU. The member states have decided that they can do a better job protecting and providing human rights for their citizens by incorporating regional mechanisms into their systems of social provision.

Once again, then, nonstate actors have duties to protect or to provide only to the extent that states incorporate them in a system of provision or have conclusively abdicated their responsibilities to protect and to provide.

Conclusion

The Social Provision of Human Rights

Human rights do not just happen. And they do not happen simply, or even primarily, as a result of legal procedures. No one denies this. Standard ways of talking about human rights, however, sometimes obscure these important facts. My goal here has been to suggest a perspective that draws attention away from mechanisms of claims and remedies—not because they are unimportant, but because they are only one relatively well-understood and frequently addressed piece of the picture.

Human rights have over the past two decades become a hegemonic national and international political project in much of the world. We now have a system of international human rights norms that are almost universally accepted as authoritative by states and other international actors. And for better or worse we have a system of national implementation of international human rights norms. Within that system of national implementation, I have suggested that we focus more attention on the duties of states to implement and to enforce a system of social provision.

We often think of states as violators of human rights. That they indeed are, but they are also, in the contemporary world, the essential provider of the goods, services, opportunities, and protections necessary for individuals to enjoy their internationally recognized human rights. We certainly want states to stop violating human rights. But we want much more. And even stopping violations is largely a matter of creating effective systems of protection and provision.

The purpose of this brief, suggestive essay has been to draw more attention to the vital duties to protect and especially to provide that are correlative to all internationally

recognized human rights. I have tried to suggest that we may be able to think more clearly and, thus, to act more effectively if we focus more of our attention on state-based systems of social provision of human rights.

Notes

1. See, for example, Dworkin (1977), Feinberg (1980: esp. ch. 7), Shue (1979, 1980), Donnelly (2003: esp. ch. 1–2), Nickel (2003, 2006: esp. ch. 2). I do not mean to in any way diminish the importance, even centrality, of such features of rights. My point here instead is to go beyond them, to focus on also important elements that have received less attention.
2. The six major international human rights treaties have been ratified by an average of 85% of the world's states. (http://www.ohchr.org/english/bodies/docs/status.pdf)
3. Elsewhere I have argued that there is a Rawlsian international overlapping consensus on internationally recognized human rights understood as a political conception of justice .(Donnelly 2003: 40–43, 51–53). Compare Bielefeldt (2000) and Peetush (2003).
4. See, for example, Donnelly (2003: 34–35, ch. 8, 10) and Forsythe (2006: ch. 3).
5. Most of the central allocative issues are dealt with here by assumption. As universal rights, all human rights must be allocated to all (citizens). And the thorny philosophical problem of what needs to be allocated has been bracketed here by an appeal to the particular list of human rights in the *Universal Declaration*.
6. See Shue (1980: 52–60; 1984). Instead of a duty to provide, Shue speaks of a duty to aid the deprived. "Deprived," however, seems to me less than ideal: those who are deprived of the enjoyment of particular rights need not be seen as generally deprived or suffering deprivation. The language of aid is also problematic. People/citizens are entitled not just to aid but to whatever is necessary to assure reasonable prospects that they actually enjoy their human rights; "aid" may not be enough to discharge this class of duties. Furthermore, to the extent that aid has connotations of charity or beneficence, this formulation is both misdirected and insufficiently demanding.

   In international legal discussions of economic, social, and cultural rights, it has become conventional to talk of duties to protect, to respect, and to fulfill. This formulation, which appears to have been coined by Asbjorn Eide (1987, 1995: 37–38), became standard with the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights ([Maastricht Guidelines] 1998: Guideline 6). Compare Dankwa, Flinterman, and Leckie (1998: 713–714). "Fulfill," however, may have connotations that suggest something weaker and more passive than provide or even aid. And in ordinary English, especially American English, it is relatively rare to speak of fulfilling rights, making it unclear exactly what is being suggested. (For example, a Google search turned up 35 times more hits for "protect* rights" than "fulfil* rights." Furthermore, the first 30 hits for "protect" covered a wide range of rights, whereas almost all on the first 30 for both "fulfil" and "fulfill" involved international human rights, suggesting an embedding of this relatively rare formulation within international human rights discussions. This is further suggested by the fact that "fulfil human rights" returned more than 27 times as many hits as "fulfil rights," whereas almost equal numbers were returned using the American spelling "fulfill." And underscoring the British provenance of this usage, which has been adopted in most international organizations, despite the fact that American English is much more widely represented on the web, the British "fulfil human rights" returned 30 times more hits than the American "fulfill human rights.")

   Note that "enforce" is not used in any of these formulations. The duties in question do require giving effective force to the enumerated rights. In legal circles, however, "enforcement" often is particularly tied to providing legal (judicial) remedies. Duties to protect/aid/fulfill typically extend far beyond such remedies.
7. Shue again provides the classic discussion, focusing on the question of institutional design in the new final chapter of the second edition of *Basic Rights* (1996).
8. For a variety of perspectives on the "legalization" of human rights, see (Meckled-Garcia and Cali 2005). The title of my essay in that volume, "The Virtues of Legalization" (Donnelly 2005),

should make it clear that I am no critic of a necessary and central role for law in realizing human rights. But law alone is never enough. And legal mechanisms have probably been given inordinate overrepresentation—or, perhaps more accurately, nonlegal mechanisms have not been given sufficient attention.

9. The imperfections and failures of American health care markets also mean that the system is grossly inefficient. Although Americans spend significantly more for health care, measured in both absolute terms and as a percentage of GDP, than any other developed market economy, (http://www.kff.org/insurance/snapshot/chcm010307oth.cfm) at least 15 percent of the population lacks adequate access to health care and the United States and has life expectancy and infant mortality rates worse than 40 other countries. (http://www.cnn.com/2007/HEALTH/08/13/life.expectancy.ap/)
10. Although this distinction still is regularly encountered—e.g., "negative rights correspond with what the United Nations recognizes as civil and political rights" (Gosselin 2006: 36; cf. Goodman 2005: 647)—neither the idea itself nor the alleged correlation with the two International Human Rights Covenants can bear theoretical scrutiny. See especially Shue (1979: 72–75; 1980: 41–45). Compare also Lichtenberg (1994), .Donnelly (2003: 30–31).
11. See especially Chapman (1996), Chapman and Russell (2002), Maastricht Guidelines (1998), Dankwa, Flinterman, and Leckie (1998). Compare also .Leckie (1998). The critical comments that follow are intended solely to illuminate the ways in which a social provision perspective points to other important dimensions that are ignored or obscured by this legalized, processual focus on the duties to respect and to protect.
12. Half a century ago, this may have been a contentious claim, at least to those who believed (falsely) that economic and social rights were not justiciable and held (stipulatively) that only justiciable rights could be violated. This previously mainstream although minority position, however, is now only rarely encountered. See, for example, Tomuschat (2003: 28–30, 37–39, 47, 92). On the role of debates over the justiciability of economic, social, and cultural rights in drafting the Covenants, see Whelan (2006: ch. 3) and, more briefly, Whelan and Donnelly (2007: §8–10). On state practice with respect to justiciability, see Coomans (2006).
13. It might appear that this is less true of economic and social rights. For example, minimum core obligations provide reasonable priorities for states seeking to make maximum progress with limited resources. This contribution, however, arises from the idea of a minimum core rather than from a focus on violations. And it must be emphasized that minimum core obligations represent only a small part of the demands of internationally recognized economic and social rights.
14. For excellent introductions to this general issue, see Kuper (2005) and Clapham (2006).
15. For a variety of perspectives on this question, see, for example, Frynas and Pegg (2003), Teubner (2006), De Feyter (2004), Forsythe (2006: ch. 8), Clapham (2006: esp. ch. 6), Wettstein (2007), and Benedek, De Feyter, and Marrella (2007: esp. Part III).
16. This is likely to be particularly true of global firms producing branded merchandise that yield substantial monopoly rents or that have shareholders or customers concerned about such issues. This, I think, in large measure explains the focus on MNCs: they are a target with both a relatively high incentive to respond to campaigns based on adverse publicity and a relatively high capacity to make improvements, especially in working conditions and wages, because they are less subject to competitive market pressures.
17. There is a very different literature that argues for cosmopolitan duties. Thomas Pogge's work on global poverty is a good example in the area of human rights (Pogge 2002, 2007). I do not have the space to deal with such arguments here, other than to note that they operate outside the state-centric system of protection and provision established by international human rights law that I have explicitly introduced as a parameter for my discussion.
18. There is a striking analogy with international refugee law. Those with a well-founded fear of persecution have in effect demonstrated that the established system of state-based human rights provision is not working for them. Therefore, they have at minimum a right not to be returned to "their own" country (*non-refoulement*) and a right to at least seek asylum (even if no particular state necessarily has an obligation to grant asylum).

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