Business and Human Rights in the Post-Westphalian Era:
A Democracy-Based Assessment

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St. Gallen, October 24, 2016

The President:

Prof. Dr. Thomas Bieger

A la Marta i a la Mireia,

Preface

Kant encouraged us to battle our fears and indecisions and to have the courage to know and use our understanding. He exhorted us to Sapere Aude! This dissertation has tried to live up to this maxim. However, as soon as I started working on it, I realized it would not be easy. Before landing in St. Gallen, all my research experience was empirical. Yet, at the Institute for Business Ethics, I discovered the excitement of normative philosophical discussions. With almost no idea or background on philosophy, I decided to write a normative dissertation. Indeed, sticking to Kant's Sapere Aude dictum has been the hardest part of this project: building up a discourse, constructing a position, and finding and raising my own voice and perspective. Now, I look back and the road travelled over the last 5 years amazes me. I feel that I took the challenge and met the goal. I feel accomplished and gratified by the entire process that brought me here, with its countless ups and downs.

It has been a long journey, and I am thankful to each and every individual that made it possible. Although the space here is limited, I would like to name those who helped make the journey particularly enjoyable and exciting.

First and foremost, I like to express my deepest and most sincere gratitude to my supervisor, Prof. Dr. Florian Wettstein. He has been an inexhaustible source of support from day one. He inspired and encouraged me to Sapere Aude, to tackle big questions, and to persevere to find my "own voice". He opened the doors of the Business Ethics Institute at the University of St. Gallen and provided numerous opportunities to help nurture my research project. I hope some of his kindness, clarity of thought and vision are reflected in these pages, and that they keep accompanying me in the future.

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Thanks to a Doc.Mobility scholarship from the Swiss National Science Foundation, I had the privilege to spend an incredibly stimulating year at the Legal Studies and Business Ethics Department at the Wharton School. I cannot thank enough Prof. Alan Strudler for inviting me to join his Department at the University of Pennsylvania as a visiting PhD. I am thankful for the time Alan, as well as Prof. Amy Sepinwall and Prof. Thomas Donaldson, devoted to discuss my ideas and drafts. Thanks as well to the PhD crew: Vikram Bhargava, Carson Young, Jooho Lee, Suneal Bedi with whom I had an exciting time in and out of the office.

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Summary

Globalization is transforming political power relationships. As the regulatory power of the state declines, corporations, in conjunction with other non-state agents, engage in the provision of public goods and participate in the regulation of the vacuums left behind by waning states. Globalization forces us to re-think *how* and *who* should assume the responsibilities derived from human rights in a context where the state is not the exclusive actor anymore.

Today, the assumption that corporations do have human rights responsibilities is almost undisputed. Yet, *how should corporations discharge these responsibilities?* This is a question that has not received sufficient attention within the BHR field. As the debate expands, though, this question becomes highly topical to address. This is the central research question of this dissertation.

The lack of scholarly focus on the *how* question comes along with an enhanced risk that the BHR debate endorses a materialistic conception of human rights. That is, one in which rights-holders are presented as passive agents in the realization of their own rights, and the responsibilities of corporations are conceived from beginning to end with the provision of certain goods, capabilities or resources.

Consequently, the research question is addressed from a democracy perspective. The analysis will reveal that a hypothetical materialistic approach to the realization of human rights responsibilities would strengthen, rather than weaken, potential patterns of injustice and domination. Human rights are not exhausted by the provision of certain goods. They also have a political dimension that must be realized. Such dimension entails that we all have the right to demand and provide justification for all those institutions that bind us. Therefore, any just and complete realization of human rights inexorably

requires realizing this basic right. The philosopher Rainer Forst labels it as the "basic right to justification"

This dissertation defends the thesis that when corporations are identified as human rights duty bearers they should discharge their responsibilities guaranteeing, in the first place, the right to justification. This may require corporations to create institutions or mechanism that secure this right to the victims of abuses. These institutions, I claim, should be constructed around four premises: they should be victim-centered, contextualized, oriented towards solving the injustices that led to the human rights violations, and function along the parameters of deliberative democracy.

Zusammenfassung

Die Globalisierung verwandelt politische Machtverhältnisse. Die Regulationskraft der Nationalstaaten ist– tendenziell wieder abnehmend, das Gewicht Fakten erschaffender international agierender Firmen und Konzerne und der Stimmen anderer nichtstaatlicher Akteure hat zugenommen. Die Globalisierung zwingt uns, darüber nachzudenken, wie und durch wen die Menschenrechte garantiert werden können und sollen, nachdem Staaten nicht mehr alleine bestimmend sind

Dass Firmen Mitverantwortung tragen müssen, die Menschenrechte zu wahren, wird heute kaum noch bestritten – umstritten ist jedoch nach wie vor, wie und in welchem Ausmaß diese Verantwortung wahrzunehmen ist. Die Debatte betreffend Menschenrechte in der Wirtschaft (business and human rights debate, BHR) ist dazu bisher vergleichsweise wenig schlüssig gewesen – die Frage aber von zunehmender Bedeutung und darum Thema vorliegender Dissertation.

Die Ansicht der Menschenrechte als Handelsware ist weit verbreitet. Werden Menschenrechte verletzt oder verweigert, werden die Betroffenen meist als passive Opfer wahrgenommen, und die Verantwortlichkeit der Firmen als darauf beschränkt, gewisse Güter oder Mittel zur Verfügung zu stellen. Diese materialistische Betrachtung der Verantwortung für Menschenrechte verstärkt das Potential von Missbrauch und Übervorteilung. Die Menschenrechte haben auch eine politische, demokratische Dimension die gewährleistet sein muss. Diese umfasst das Recht auf Freiheiten, wie jene zur Rechtfertigung all jener Institutionen die uns verbinden, also laut dem Philosophen Rainer Forst das grundlegende Recht auf Rechtfertigung.

Jede gerechte und umfassende Garantie und Ausübung der Menschenrechte muss dieses Recht unbedingt beinhalten. Die These dieser Dissertation besagt

darum, dass die Identifikation von Firmen als Menschenrechtsverantwortliche primär bedeutet, dass sie das Recht auf Rechtfertigung garantieren müssen. Die Verfasserin ist der Ansicht, dass die Einrichtung von Institutionen die das Recht auf Rechtfertigung garantieren oder dessen Realisierung ermöglichen helfen, für Firmen der beste Weg ist, diese Verantwortung wahrzunehmen. Diese Einrichtungen sollten auf vier Voraussetzungen fußen: Ihr Fokus muss auf den Besitzern der Rechte liegen, und darauf, diesen zu ihren Rechten zu verhelfen. Sie müssen dem jeweiligen sozialen und politischen Kontext angepasst werden können, ohne dadurch korrumpiert zu werden, und müssen gemäß den Prinzipien demokratischer Beratung funktionieren.

List of Acronyms

BHR	Business and Human Rights
CDOGM	Company Driven Operational Grievance Mechanism
CHRM	Company-created Human Rights Abuse Remedy Mechanisms
CSR	Corporate Social Responsibility
FPIC	Free Prior and Informed Consent
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
ILO	International Labor Organization
MSI	Multi-stakeholder Initiatives
NGO	Non-Governmental Organization
OGM	Operational Grievance Mechanisms
PS7	IFC's Performance Standard 7
RMG	Ready-Made Garment industry
SRSG	Special Representative of the UN Secretary General

TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGP	United Nations Guiding Principles on Business and Human Rights
UNPRR	United Nations Protect, Respect and Remedy Framework

The basic question of justice is not what you *have* but how you are *treated*

(Forst, 2014, p. 6 emphasis added)

Part I

1 Introduction

On April 24, 2013, the Rana Plaza factory collapsed near Dhaka, Bangladesh, causing one of the world's worst labor accidents ever in the garment industry: 1,129 people lost their lives and more than 2,500 were injured. Sadly, in Bangladesh, this catastrophe was far from being an isolated event. Bangladesh's Ready-Made Garment (RMG) industry is characterized by a constant trickle of big and small anonymous deadly accidents. Prior and after the collapse of Rana Plaza, other similar tragedies occurred. In October 2013, 10 people died in the Aswad garment factory fire. In May 2013, a fire broke out killing 9 workers at the Tung Hai Sweater Factory. In January 2013, a fire at the factory Smart Export killed 7 workers. In November 2012, 120 garment workers were killed in the Tazreen factory fire in Dhaka. In December 2010, a fire killed 29 at the That's It Sportswear factory. Earlier in 2005, Spectrum, a garment factory 30 km northwest of Dhaka, collapsed resulting in the death of 64 people and 80 more were injured (CBC News, 2013; CCC, 2013).

In Bangladesh, a complex interplay of forces gives rise to a systematic violation of the human rights of RMG Bangladeshi workers. Poverty, cheap labor, tremendous market pressure, a weak government, deficient infrastructures; all these factors add up to a deadly cocktail.

The RMG industry is a fundamental pillar of the Bangladeshi economy; it is one of the main vectors of economic growth. More than 4 million Bangladeshi people are estimated to work directly in an industry that accounts for 80% of the national exports (ILO, 2016). GDP growth is said to be closely linked to a fall of 26% in the number of people living under the poverty line between 2000 and 2010 (World Bank, 2013).

Bangladesh is the world's capital of the RMG industry. More than 5,000 factories are estimated to serve an unbridled demand for apparel (Labowitz &

Baumann-Pauly, 2015, p. 4). Foreign retail garment corporations, mostly North American and European, are attracted by the low production costs and the huge turnover capacity of the Bangladeshi factories. Bangladeshi manufacturers seem to be willing and apparently capable to immediately react to the whimsical demands of customers across the world. The sourcing business model of the Bangladesh RMG industry offered the capacity and flexibility to keep up with these demands, although it has done so at a terrible cost. The dense network of formal and informal factories and workshops working under different layers of subcontracting hampered the surveillance of working conditions and dramatically shrank margins.

At the same time, the Bangladeshi government has not played a determined role in regulating and taking care of the challenges that have accompanied the boom of the RMG sector over the last decades. A tenuous regulation and poor monitoring and enforcement reinforced the hazardous functioning of the industry. Additionally, the government has not been able to provide strong and reliable infrastructure. It forced the RMG factories and workshops to often rely on deficient and dangerous alternative energy sources. Altogether, these factors triggered an ever-increasing series of accidents and fatalities.

In the aftermath of the tragedy, an inflamed national and international public opinion placed the biggest and most relevant transnational corporations in the garment industry in the eye of the storm. They were insistently required to take part in the redress of the situation. Conversations among a variety of actors led to place the focus onto two hot topics: the redress of the appalling conditions of the RMG factories in order to guarantee the basic work safety of its workers; and the provision of remedy and compensation for the 1,136 victims and the more than 2,500 injured workers of the Rana Plaza tragedy.

The discussions eventually crystalized into three different private initiatives. Two of them aiming to address the fire hazards and building deficiencies so

common in the Bangladeshi RMG industry: the Alliance for Bangladesh Worker Safety, and the Accord on Fire and Building Safety in Bangladesh. The third initiative was the Rana Plaza Donors Trust Fund; a fund created to provide compensation to the victims of the Rana Plaza tragedy "in spirit of solidarity and compassion" (Rana Plaza Arrangement, 2015d). Today, these three private schemes have become the state of the art in the provision of remedy and protection of human rights, not only for the RMG industry in Bangladesh but also for the entire industry worldwide.

The case of the Rana Plaza catastrophe and the development of the private initiatives that followed in an attempt to redress and guarantee human rights, raise a number of questions and concerns.

The aim of the initiatives is twofold. First, they aim to transform the parameters upon which a public activity, doing business in Bangladesh, is conducted. Second, they aim to guarantee that basic human rights are respected and enforced. These are eminently public endeavors and thus one would expect them to fall entirely on state shoulders. Yet, nobody questioned the rather secondary role played by the Bangladeshi state, or any other state, in the development of these new regulatory schemes.

It is a known fact that the Bangladeshi state, for a long time, was neither capable nor willing to address the daunting human rights situation facing the RMG industry. Under these circumstances, would it be just that corporations take the lead in unilaterally deciding what shape and content should human rights adopt in the context of the Bangladeshi RMG industry? On what ground should they do so?

The three initiatives developed in the aftermath of the tragedy not only counted on the input of large western multinationals of the garment sector to develop their policies and strategies to redress the human rights wrongs. They all incorporated, as well, a variety of NGOs and international organizations.

However, only one out of the three initiatives, the Accord scheme, partially integrated the voice and input of the victims, or those whose rights were impacted, in the governance mechanisms of the organization[1]. No victims association or direct representatives seem to have been involved in the design, implementation and monitoring of any of these initiatives.

Since the Bangladeshi state was not there to properly design and execute the policies that would defend and protect the realization of the victims' human rights, should victims have played a rather more salient role? Should they have been provided with further opportunities to raise their voice within these private governance schemes? What role should victims have played in the redress and compensation for their violated rights?

This research attempts to address these questions. And the answer to them is a resounding “yes”. Yes, victims of human rights should play an active role in the definition and realization of their rights when the state is not capable or willing to assume its human rights obligations. Yes, it is insufficient that corporations unilaterally, without engaging victims adequately, take the lead in the provision of remedy for human rights wrongs when the state is absent. Democracy, I will argue, provides the moral and political grounds upon which human rights victims should claim their participation in the realization of their rights.

1.1 Research Gap and Research Question

In 1948, when the Universal Declaration of Human Rights was enacted, it was clear that states were the only significant decision makers in the international political arena. The entire body of international human rights law that followed

[1] The Accord initiative is the only one formally incorporating local trade unions into its governance structures.

the declaration was developed by states, for states. They are conceived, at all times, the exclusive actors retaining the responsibility to protect, promote and enhance human rights (Cragg, Arnold, & Muchlinski, 2012; Ruggie, 2006, 2007).

Over the last decades, globalization, though, has introduced profound changes in the understanding of the international political arena and challenged the way it is governed. Traditionally, under what is known as the Westphalia governance model, states have been regarded as the center of political power within their sovereign territory. In an era where the political authority of the state remained uncontested, it made absolute sense to expect international human rights law to refer exclusively to the state. Globalization, though, puts into question some of the fundamental pillars of the Westphalia model. The state is losing its regulatory power (Scherer & Palazzo, 2011, p. 902). A number of non-state actors are becoming a rival source of authority and frequently compete, cooperate and interact with the state-centric system (Rosenau, 2002, pp. 72-73). Corporations start adopting roles that once belonged exclusively to the state. They become political actors. Corporations engage in the provision of public goods, the definition of regulatory vacuums left behind by waning states and the administration of citizenship rights (Matten & Crane, 2005; Scherer & Palazzo, 2011, p. 900; Scherer, Palazzo, & Matten, 2009, p. 328).

New forms of governance emerge that often supersede the boundaries of the nation-state, include non-state actors, and rely on non-hierarchical modes of steering based on voluntary and weakly enforced agreements (Risse, 2004, p. 291; Scherer et al., 2009, p. 332). In this context, the assumption that human rights ought to exclusively bind states loses its force. Due to globalization, and the accompanying changes on the relevancy of the state to govern the public sphere, restricting human rights to the state would leave many human beings stripped of their fundamental rights. In fact, “the root cause of the business and

human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation" (Ruggie, 2008 para. 3).

Globalization requires redefining the premises on which human rights are constructed. We need to find adequate tools to secure and extend the reach of human rights beyond the state. This dissertation aims to contribute to finding new ways to understand human rights in the context of Post-Westphalia.

Human beings, especially those whose rights are at stake, are the central tenet of human rights. The dignity and meaning that accompanies every human being is protected by human rights. To breach somebody's human rights is to treat her as a non-human. There is no valid alternative other than respecting human rights. In light of the globalization context, though, Ulrich Beck wonders "who will uphold human rights in a world that has left behind the national state?" (Beck, 2000, p. 15).

Should corporations assume any type of responsibility in terms of human rights? Business ethicist and, more specifically, business and human rights (BHR) scholars have discussed this question extensively over the last decade. Today, the assumption that corporations do have human rights responsibilities is almost undisputed. The scope and grounding of this responsibility, nevertheless, is an entirely different matter.

The state of the art in the field, as represented by the work of the United Nations (UN) former Special Representative of the Secretary General (SRSG), John Ruggie, holds that the only responsibility of corporations is to respect human rights – i.e. to do no harm (Ruggie, 2008 para. 24). The SRSG justifies this corporate responsibility on the grounds that it is social expectation that

corporations do not harm human rights (Ruggie, 2011, p. 4). A number of BHR scholars have directly opposed Ruggie's "do no harm" proviso (e.g. Cragg, 2012b; Deva & Bilchitz, 2013b; Karp, 2014; Wettstein, 2015). Generally, they advocate for a broader understanding of the corporate human rights responsibilities, and argue that corporations have a positive duty to contribute to the advancement and protection of human rights in contrast to the rather passive approach "to respect" defended by Ruggie (2008, 2011). The arguments of these authors typically dismantle Ruggie's "societal expectation" (2008 para. 9) justifications of human rights responsibilities and present more ethically robust constructs based, for example, on the capabilities and the power hoarded by corporations or on the public role they may play.

The issue of whether corporations should bear human rights responsibilities and what the scope should be is a question about *who* should act for human rights. This is a question that has already kept BHR scholars busy for a long time. Globalization, and the governance transformations that come along with it, nevertheless, force us to expand the area of enquiry of the BHR field to include, next to the question of *who,* the question of *how* should corporations deploy these human rights responsibilities.

Within the field of corporate social responsibility (CSR), the account named "political CSR" is the best equipped to discuss the responsibilities of corporations in the governance context of Post-Westphalia. Political CSR scholars, inspired by deliberative democracy, suggest that corporations should gain legitimacy by engaging into discourse processes with all those affected. The insight and deliberative approach of Political CSR scholars helped mold the corporate social responsibilities of corporations to the challenges of globalization. However, as it will be discussed later, its normative foundations reveal relevant difficulties when one attempts to match the deliberative democracy foundations of Political CSR with the definitional characteristics of human rights.

Under the umbrella of a Westphalia governance framework, the state hoarded legitimacy and power to set the instruments that would actualize and protect human rights within its territorial domains. The state would enact laws, establish institutions, define policies and set priorities, with the objective of securing the basic rights of its citizens. Victims of human rights abuses would find in the state the tools necessary to raise their voice and defend their interests. The remedies and instruments deployed by the state would, in any case, remain under the scrutiny of citizens who, particularly in democratic countries, sanction government's work. In other words, the state retained the legitimacy to decide on how should human rights be realized; and it did so, ideally, leveraging on the legitimacy conferred by democracy.

The end of the exclusivity of the state in matters of human rights governance, and the heightened political role of corporations leads us to the question of how could the realization of human rights preserve democratic legitimacy. If corporations and other non-state actors become involved in the definition and actualization of human rights in a particular context without any democratic control, does it matter at all?

My dissertation will hold that indeed, it does matter. Human rights are not only legal or moral instruments. The concept of human rights extends beyond a collection of essential goods or capabilities. Human rights enable human beings to exercise their self-determination and to raise their voice against oppression and injustice. Human rights grant individuals the opportunity to participate in the definition of those policies, standards and instruments that define the life in common. Thus, human rights have an intrinsic political dimension. Furthermore, any actor working on securing or advancing human rights is engaging in political activity. With actions, there is contribution to the definition of what should be the life in common. Thus, to secure justice through the entire process, a democracy approach is required.

In matters of the public sphere, democracy is the only tool that can realize justice. Therefore, democracy will be the lens through which this research will look into the question of how corporate human rights responsibilities should be discharged. Democracy, nevertheless, the same way as with human rights, has its origins with the state. The context of globalization, though, will require us to find alternative accounts of democracy to the traditional liberal approach to allow us to think beyond the state. Deliberative democracy, I will argue, will provide the grounding to respond the *how* question from a democratic perspective.

Addressing the question of *how* corporations should tackle their human rights responsibilities is not an easy project. It inevitably requires us to go back to reassess the foundations of the human rights concept. For example, take the following question: should corporations unilaterally engage in the provision of human rights? The answer completely depends on what we mean by human rights. For whatever reason, the discussion of the normative justification of human rights has not been among the top priorities of the BHR field. As a result, the BHR field has uncritically tended to adopt an objectified or commoditized conception of human rights. Human rights are often regarded as goods, capabilities or resources that ought to be granted no matter what and to which all human beings are entitled. Through the lens of this conception of human rights, the question of *how* they should be realized is relegated to the background. Priority number one for the BHR field is to provide these objects alongside with determining *who* should provide them. In a nutshell, the question of how corporations should discharge their human rights responsibilities has received insufficient attention by the BHR scholarship.

Interestingly, it is in the work of the SRSG were we can find the most specific and detailed guidance on how corporations should address their responsibility to provide remedy for their human rights wrongs. John Ruggie centers all of his recommendations to the provision of operational grievance mechanisms

(OGMs). Unfortunately, it will be argued that, from a democracy perspective, the guidance offered by the SRSG in terms of non-judicial non-state-based remedy provisions does not go far enough. Victims not only have the right to present grievances, but the right to participate in the definition, monitoring and governance of those instruments, institutions or mechanisms that shall realize the human rights remedies that concern them.

To find an adequate answer to the question of *how* we need to first address the political dimension of human rights. We need to identify the forms of oppression and domination that lead to the violation of human rights. Because realizing human rights is a political endeavor, the question of *how* human rights should be discharged can only be answered and managed justly under democratic parameters.

In the governance context of Post-Westphalia, though, we need to find an account of human rights that is detached from the state and, at the same time, emphasizes their political dimension. At this point, the work of the German philosopher Rainer Forst on the right to justification comes in handy. Forst argues that all human rights emerge out of one single basic right: the right to justification. The right to justification encompasses the idea that, as human beings, we all have the capability and the right to demand and provide justification for all those institutions that bind us.

Corporations, when they are identified as bearers of human rights responsibilities, if they aim to fulfill them justly, should make sure that the right to justification of victims is respected. This implies that corporations create the institutions, initiatives, or spaces that allow for the provision and exchange of justifications that ground the potential options to realize the rights of the victims.

As a whole, this dissertation defends the thesis that the realization of human rights entails the provision, in the first instance, of the basic right to

justification. This, in the case of corporations, requires the creation of institutions or initiatives that grant the right to justification to the victims of human rights abuses. Fixing the relations of injustice that lead to a human rights violation inexorably involves securing this right for victims; denying or neglecting it, instead, will only preserve or reinforce domination patterns against them.

1.2 Structure of the Research

The dissertation is structured into 5 parts. Part I works as an introduction and contextualizes the area of enquiry of this research. Parts II and III set the theoretical grounds on which my arguments will build upon. Parts IV and V take a more applied ethics perspective by putting the focus on the implications of my thesis for the management field, and more specifically, for the BHR debate.

Part I is comprised of this introductory chapter and chapter 2. The aim of part I is twofold. First, chapter 1 presents the reader with the main arguments of the dissertation. Second, chapter 2 provides a sketch of the international governance context in which the arguments put forward in this dissertation are expected to work. In it, I detail the profound transformations that globalization impinges on the way international and national political governance is understood. The state is increasingly dispossessed of its exclusive role in governance affairs and the void left is being occupied by non-state actors (e.g. corporations) who are starting to adopt political roles and functions. These transformations will accompany us through the entire book. The way human rights and democracy are understood, as well as the conclusions reached in this dissertation, aim at responding fittingly at the context depicted in chapter 2.

Part II of this dissertation encompasses chapters 3 and 4. Part II is devoted to explore the concept of democracy. Democracy will be the lens through which

we will respond the research question of how corporations should discharge their human rights responsibilities. In part II, the goal is to present democracy as a valid and legitimate approach through which one can assess the BHR debate. I start, in chapter 3, by assessing the main accounts of transnational democracy. The specificities of the BHR debate, though, will require us to go one step further and explore, in Chapter 4, the normative foundations of democracy. Only in this way can one understand the guiding thread that connects democracy, human rights, and justice.

Part III puts its focus on the concept of human rights. Globalization imposes important challenges to the traditional, state-centric, notion of human rights. Thus, we need to find a perspective on the human rights concept that allows us to overcome these challenges. This is an endeavor, though, that will require us to dig deep into the justifications that underpin the human rights concept. Chapter 5, therefore, starts by presenting the reader with the main definitional features that characterize human rights. Chapter 6, then, will assess different normative theories of human rights. The goal is to find the guidance required to understand and update the concept of human rights according to the emerging governance context of Post-Westphalia. Eventually, the work of the German philosopher Rainer Forst on the "basic right to justification" is presented as a promising avenue worth exploring.

Chapters 7 and 8 configure part IV. The focus is placed here on extracting insight from the management literature on business ethics. Chapter 7 explores the corporate social responsibility debate (CSR) and discusses its strengths and weaknesses in addressing human rights questions. Chapter 8 narrows the scope to the BHR debate. In it, we discuss the main theoretical approaches to the human rights responsibilities of corporations. Chapter 8 illustrates how the entire BHR debate has been centered almost exclusively on the discussion of why corporations should bear human rights responsibilities. As we will see,

when asked about *how* this should be done, the guidance that can be extracted out of the existing BHR literature is very limited.

Finally, Part V presents in detail the contribution of this dissertation. It does so in two parts. First, chapter 9 discusses why, from a democracy perspective and embracing Rainer Forst's conception of human rights, corporations have a duty to set up institutions to discharge their human rights responsibilities. The reason is, I will argue, that this is the only way in which the basic right to justification that underlies all human rights can be guaranteed. Chapter 10 provides a picture of how this duty should take form in practice. Specifically, it focuses on operational grievance mechanisms (OGMs); a form of non-judicial non-state-based instruments promoted by the UNGPs through which rights-holders can obtain remedies. The chapter discusses four parameters that any OGM should follow to be considered a just instrument for the provision of remedy according to the right to justification, namely: putting victims at its center, contextualizing its forms and contents, being oriented towards the redress and transformation of the variables that led to the impact, and being guided by deliberative democratic principles. Finally, chapter 11 concludes and puts the focus on the future, as well as in the potential avenues to further explore the arguments exposed in this dissertation.

2 The Context: Transitioning from West- to Post-Westphalia

A quarter century ago, the Rana Plaza catastrophe would not have happened. Most of the technological and economic conditions that led to the boom of the Bangladeshi Ready Made Garment (RMG) industry simply did not exist. It would be unthinkable to try to explain the emergence and functioning of this sector without referring to the crucial role that information and communication technologies have had in fueling this industry. Technology opened the door for retailers to serve their customers' needs for fashion in an unprecedented speed.

Similarly, technology can also be spotted as a determining factor in the global public reaction of anger that followed the collapse of Rana Plaza. The activism of civil organizations pressuring governments and corporations to take action and their close monitoring and report of what was happening in the field would not have been possible a few years ago. Without such constant public pressure, most probably, no form of remedy would have ever been implemented. Globalization is behind the dynamics that led to the collapse of the Rana Plaza as well as the response and remedy mechanisms that followed.

Globalization, though, is not only a technological transformation. It is a complex and multifaceted phenomenon impacting almost all dimensions of societal human life. A variety of events and transformations are connected to the globalization process. Factors like communication, knowledge, transportation or the mobility of capital have accelerated, grown their magnitude, spread their reach and deepened their impact across the world like never seen before in history. Globalization has directly impacted political, social, economic and even environmental decisions such as the decrease of trade barriers, deregulation and privatization of public activities, migrations, global warming, global pandemics, transnational terrorism, etc. It generates

"transcontinental or interregional flows and networks of activity, interaction, and the exercise of power" (Held, McGrew, Goldblatt, & Perraton, 1999, p. 16).

This chapter tries to shed light on how globalization has transformed the way we understand governance, democracy and the protection and advancement of human rights. States and corporations are increasingly confronted with situations where key foundational premises of liberal democratic thought are contested. Eventually, the chapter concludes emphasizing the need to re-think and adapt the concepts of democracy and human rights, as well as the tools that shall realize them, to the challenges of the Post-Westphalian governance context.

2.1 Globalization and its Political Impact

Anthony Giddens defines globalization as "the intensification of worldwide social relations which distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa" (Giddens, 1990, p. 64). The dimensions of distance and time virtually shrink and we are witnessing a "shift or transformation in the scale of human social organization that links distant communities and expands the reach of power relations across the world's major regions and continents" (Held & McGrew, 2003b, p. 4).

The scale and reach of the phenomenon of globalization is so vast that, as Held et al warns us, it is "in danger of becoming the cliché of our times" if it has not already (Held et al., 1999, p. 1). Globalization is a "big idea which encompasses everything from global financial markets to the internet but which delivers little substantive insight into the contemporary human conditions" (ibid.). Globalization is not a single event that can be easily measured and tested empirically. Rather than a singular concept, globalization should be understood as a narrative connecting very different events and trends.

It attempts to explain a series of common ongoing transformations many societies are experimenting more or less simultaneously, but not necessary at the same degree of intensity, across the planet.

The debate on globalization has assumed gigantic proportions and ignited an equal amount of critics, deniers and supporters[2]. However, besides the different views and interpretations of the globalization phenomenon, both critics and endorsers often find common ground in recognizing that, over the last decades, there has been an increase in the economic, political and cultural interconnectedness within and among regions. Such developments, they agree, "challenge old hierarchies and generate new inequalities of wealth, power, privilege and knowledge"; therefore, new approaches in terms of politics, economics and culture are required (Held & McGrew, 2003b, pp. 38-39).

Globalization, though, should not be confused with globalism. The term globalization encompasses and aims at describing the transformations societies are commonly experimenting across the globe. Globalism, instead, is a fully-fledged political project, and it is one grounded on neoliberal premises. What makes globalism striking is that it is usually presented as a non-political panacea; one in which unfettered markets, at a world scale, supposedly produce welfare that shall "trickle down" and, eventually, create a "rising tide to lift up all boats". For Beck (2000, p. 122), neoliberalism presents itself as a revolution without politics: "its ideology is that people do not act but fulfill world market laws – laws which regrettably, force them to whittle the (social) state and democracy down to a minimum".

Globalism is the neoliberal normative project for globalization, in which a world market supplants politics. It "proceeds monocausally and

[2] David Held and Anthony McGrew collect a broad representation of authorized views on the topic of globalization in their edited book "The Global Transformations Reader" (Held & McGrew, 2003a)

economistically, reducing the multidimensionality of globalization to a single, economic dimension that is itself conceived in a linear fashion"(Beck, 2000, p. 9). Beck, though, is of the opinion that "the age of globality does not bring the end of politics but a new beginning (Beck, 2000, p. 129).

In fact, globalization forces us to reassess the premises upon which political power is grounded. Aspects like the roles, functions and institutions traditionally associated to political power, and for long taken for granted, are now under the spotlight. Not surprisingly, their reassessment has become one of the most controversial discussions within the globalization debate.

Globalization profoundly challenges some of the most deep-rooted notions of politics, particularly, those that configure the way in which governance is carried out at a national and international level. Beck (1992, 1999) coined the term "risk society" to define the notion that the destinies of countries and societies across the globe become more interwoven. Political or economic decisions taken by public or private actors far away may have consequences in our own community and we may not enjoy the power to curve or regulate the behavior of these agents (Scherer & Palazzo, 2008, p. 418).

The governance framework upon which national and international political power has traditionally been grounded is known as the Westphalia system (e.g. Beck, 2000; Cutler, 2001; Falk, 2002). Over the last two decades, though, a number of scholars identified in globalization a force eroding the Westphalia system's main principles, roles and functions. For example, some argue we are transitioning into a "Post-Westphalian" era (e.g. Cutler, 2001; Falk, 2002; Kobrin, 2009). Similarly, Jürgen Habermas speaks about the transformations occurring at a global level leading to what he labels as the post-national constellation (Habermas, 2001). Ulrich Beck, in turn, defends that we are entering a "second modernity" in which the contours of society no longer coincide with those of the national state (Beck, 2000, p. 21).

2.2 The Foundations of the Westphalia System

The Thirty Years War ended in 1648 with the signature of The Peace Treaties of Westphalia. In international relations and political sciences the Treaty and the emergence of absolutism as a form of political governance is said to mark the foundation of the modern state. Some of the core principles characterizing the current international political state system started developing almost four centuries ago with the Treaty; principles such as territorial sovereignty, formal equality of states, non-intervention in the internal affairs of other recognized states, or the state consent as the foundation stone of international legal agreement (Held & McGrew, 2003b, p. 9).

Absolutism overcame the multiplicity of locus of power that characterized the medieval times. The Church and a variety of local and regional rulers disputed power in "overlapping and interlaced feudal hierarchies" (Kobrin, 2001, p. 184). Absolutism gave way to a secular system of power where one single ruler enjoyed solid and final authority over a bounded territory (Held, 1999, p. 86). The absolutist regime also played a crucial role in the harvesting of national identities. It nurtured the cultural, social and economic homogenization within the state while, at the same time, it fostered the differences with other states. Politics became territorialized. Exact geographical boundaries delimit the contours of modern state power, characterized by a uniform system of rule and a monopolistic control of violence (Held, 1999, p. 86; 2003b, p. 9; Kobrin, 2001, p. 184).

Absolutism introduced a series of innovations that directly shaped the future modern state – e.g. the creation of new mechanisms of law-making and enforcement, the centralization of administrative power, the advancement of fiscal management, the introduction of standing armies or the formalization of relations among states through the development of diplomacy and diplomatic institutions (Held, 1999, p. 86). Eventually, absolutism paved the way for a

new understanding of national and international politics: the Westphalia regime (Held, 1999).

The concept of territorial sovereignty became one of the definitional pillars of the Westphalia regime. In plain words, the concept of sovereignty could be defined as the right states have to rule freely within their bounded territory while mutually recognizing each other as equals in the right to do so. Whether states are able to effectively govern themselves within their borders, that is a completely different matter.

Along with the territorial sovereignty condition, the Westphalia regime allocates the law making and enforcing of activities within the national territory exclusively to the state. As a result, this required the development of an international body of law to regulate the relationships between states. The priority of international law is clear: the minimization of impediments to state freedom—i.e. the non-intervention or interference of third party states in domestic affairs. International legal obligations are therefore based on state consent and its rules oriented towards establishing indispensable minimal conditions required for co-existence (Held, 1999, p. 87).

On the whole, the Westphalian regime relies mainly on the steering capacity of the state authorities founded on the principles of sovereignty: "the monopoly on the use of force on their territory and more or less homogeneous national cultures that lead to a stabilization of social roles and expectations within coherent communities" (Scherer & Palazzo, 2011, p. 902). In comparison with previous forms of government, the modern state enjoyed a correspondence or symmetry between the ruler and the ruled at three levels: sovereignty, territory and legitimacy (Held & McGrew, 2003b, p. 8).

2.3 Democracy and the Modern State

Modern liberal thought exerted a tremendous influence in the confection of the modern state, which eventually crystalized into liberal or representative forms of democracy (Held & McGrew, 2003b, p. 10; Potter, 1997).

Thomas Hobbes defended the idea that because the "life of man [is] solitary, poor, nasty, brutish and short" (Hobbes, 2008 [1651], p. 171), a centralized and unified center of power is required. A Leviathan would instill "terror […] to form the wills of them all to peace at home and mutual aid against their enemies abroad" (Hobbes, 2008 [1651], p. 132). This is Hobbes' gloomy vision of humans being lead into a paradox (Keohane, 2002, p. 66). Since people are presented as self-interested and rational-calculators, the Leviathan state must necessarily become one of an unlimited power for the ruler and thus a predatory, oppressive state. Liberals, Keohane argues, attempted to resolve Hobbes dilemma through the adoption of a constitutional government (ibid.).

Constitutionalism provided institutions incorporating systems of checks and balances on the power of rulers and, therefore, avoided the arbitrariness of the Hobbesian "predatory state". Eventually, Hobbes' conception of the state was transformed and linked to Locke and Montesquieu's idea that the final and absolute authority is found in the political community (Keohane, 2002, p. 69). Therefore, legitimacy in the modern state is grounded on the loyalty or consent of its citizens to an impersonal structure of political power that responds to the principles of representation or accountability (Held & McGrew, 2003b, pp. 8-9).

The emergence of modern democracy is inextricably associated with the Westphalia regime and the consolidation of nationalities. The national political community is considered autonomous in the control of its own destiny. Its core characteristic is that citizens "identify sufficiently with each other such that

they might think and act together with a view of what [is] best for all of them, that is, with a view of the common good" (Held, 1999, p. 90). The territorially bounded national community becomes the democratic community (demos) reinforcing the symmetry and correspondence between citizen-voters and national decision-makers.

According to Held (1999, p. 90), the national community becomes the cornerstone of modern democratic thought. It provides a space where freedom, political equality and solidarity can flourish within the boundaries of the state. It is through the procedures of a parliamentary democracy that rules are enacted to control and define both the form and the limits of action of state power. Therefore, both the rule of law and the free will of the people bound the public authority of the state (Palazzo & Scherer, 2006, p. 75). Only those state actions that are backed up by public democratic law can be considered legitimate.

The approach to domestic politics contrasts with another key feature of the Westphalia regime: the divergence between the principles ordering the domestic politics and those ordering the international sphere. Contrastingly, while the Westphalia regime facilitates democracy to become the ideal form of political rule within a state, relationships among states are not guided by democratic principles. In the international relations of the Westphalia regime, the "pursuit of reasons of state" prevails and those rights attributed to national citizens are denied to foreign individuals (Held, 1999, p. 91; 2003a, p. 164).

The development of national liberal democracies had spillover effects beyond the boundaries of the nation-state. Particularly the Second World War's tragedy and the international political events that followed completely transformed the concept of sovereignty and the meaning of legitimate political authority at the international level. State sovereignty was no longer based on unrestricted domestic power and plain freedom from interference by other

third states. Instead, liberal international sovereignty became connected to principles and instruments such as self-determination, democracy and human rights (Held, 2003a, p. 164). These parameters set the limits of the acceptable diversity of constitutions of states and in turn, determined the legitimacy of the state (Held, 2003a, p. 172).

Under the umbrella of Westphalia, the state, as depositary of the free will of the people, plays a key role as provider and guarantor of rights at three basic levels: civil, political and welfare (Scherer, Palazzo, & Baumann, 2006, p. 505). From a civil rights perspective, the state provides the framework that ensures the right to property or the right to enter into private contracts that are crucial, for example, for the well functioning of a market economy. The state also provides political rights to citizens when it guarantees their right to participate in the political arrangement of the community and denies or restricts it to non-citizens. Lastly, the state has traditionally taken the lead in the provision of rights connected to the welfare of individuals such as health, education and a basic security net against poverty.

2.4 Westphalia Revisited

The Westphalia framework has also been described as a myth (Cutler, 2001). A myth where the state is featured as the exclusive actor bearing public authority within the nation-state. To be considered legitimate, political and legal decisions must emerge from the state. The Westphalia governance framework's single focus on the state also applied beyond national boundaries. A clear example can be found in the body of treaties and conventions that conform international law. In it, states are the exclusive addressees and the only actors possessing international legal personality as well as the capacity to bear duties and rights (Cutler, 2001, p. 135).

Globalization, though, challenges the Westphalia myth and its monocentric approach to political power. The assumption that the locus of effective political power is found exclusively in the territorially sovereign nation-state is no longer valid (Beck, 2000, p. 35; Held & McGrew, 2003b, p. 39). We are witnessing the deterritorialization (Scholte, 2003, p. 90) or de-nationalization of politics (Beck, 2000, p. 14). We can no longer refer or study societies, politics, economy or culture exclusively using territorial categories – i.e. the state.

The capacity of the state to autonomously define its own domestic and international policy goals wanes (Held & McGrew, 2003b, p. 14). In other words, the state is losing its regulatory power (Scherer & Palazzo, 2011, p. 902). Power is increasingly distributed among a variety of transnational and national actors such us: non-governmental organizations, international organizations, diverse society groups, and of course transnational corporations. Political power becomes multi-centric.

A number of actors and collectivities have become a rival source of authority, and frequently compete, cooperate and interact with the state-centric system (Rosenau, 2002, pp. 72-73). The activities of these agents are not exclusively circumscribed within a specific territory. Often, they are capable of exerting significant political influence also inside and outside the traditional institutions of nation-state politics, not only through lobbying but also via the provision of public goods or the assumption of political roles or, more menacing, the risk of divestment (Scherer & Palazzo, 2008, p. 416).

It is no exaggeration to affirm that the nation-state is in decline due to globalization forces, particularly when assessed against the parameters of the classic Westphalia framework. In fact, Ulrich Beck refers to globalization as "the processes through which sovereign national states are crisscrossed and

undermined by transnational actors with varying prospects of power, orientations, identities and networks" (Beck, 2000, p. 11).

Similarly, Susan Strange (1996, pp. 13-14) denounces a "growing asymmetry among allegedly sovereign states in the authority they exercise in society and economy". She resolves that the state is in retreat. In the context of a global economy, it can no longer be taken for granted that the state is capable of uniformly controlling the social and economic relations that occur within its boundaries. Many of the forces and processes that individual nation-states confront are now beyond their reach and control (Held & McGrew, 2003b, p. 39). Globalization, Strange argues, has weakened and diffused authority away from national governments and has left a "yawning hole of non-authority [and] ungovernance" (Strange, 1996, pp. 13-14).

However, to argue for the complete demise of the state as Strange does is a far cry. It is excessive to conclude that the nation-state has become redundant or anachronistic (Gilpin, 2003, p. 349). The nation state is, still today, indisputably a central actor in the political and economic spheres (nationally and internationally); though, in many occasions, it may no longer be the *only* central actor anymore (Rosenau, 2002, p. 73).

Beck affirms that we are living in a world society. A society in which there is no world state or government. In such non-state world society, Beck argues, the territorial guarantees of the state and the rules of publicly legitimated politics lose their binding character in front of an amalgam of actors and institutions. He uses the term "Statelessness" to define the set of "competitive relationship exist[ing] between national states and national societies and a restless imprecision of the ties, players and arenas of world society, on the other hand" (Beck, 2000, p. 102). New forms of governance are linked to institutional arrangements that supersede the nation-state and are characterized by features like the inclusion of non-state actors (including civil society and

private actors) or the reliance on non-hierarchical modes of steering based on voluntary and weakly enforced agreements (Risse, 2004, p. 291; Scherer et al., 2009, p. 332).

Some scholars have put forward the notion of "governance without government" (e.g. Risse, 2004; Rosenau, 2002; Rosenau & Czempiel, 1992). According to Rosenau both concepts of governance and government share in common "rule systems and steering mechanisms through which authority is exercised in order to enable systems to preserve their coherence and move towards desired goals" (Rosenau, 2002, p. 72). Rosenau places the difference on the fact that government is usually conceived as structures. Governance, instead, is connected to "social functions or processes that can be performed or implemented in a variety of ways at different times and places (or even at the same time) by a wide variety of organizations" (ibid.). The key difference is that governance relies only on non-hierarchical modes of steering to cope with an absent (world) government capable of exercising a legitimate monopoly in the use of force as well as to enforce the rule of law (Risse, 2004, pp. 292-293). From Rosenau's perspective "[t]o govern, whether as structure or function, is thus to exercise authority. To have authority is to be recognized as having the right to govern" (Rosenau, 2002, p. 72).

Not surprisingly, the transnational corporation has become one of the largest and most active non-state actors participating in governance schemes and thus assuming a fully-fledged political role.

2.5 A New Political Actor: the Corporation

Operating and doing business in the Post-Westphalia context is a complex endeavor. As markets widen geographically, new opportunities for growth arise for corporations, and so does competition as free trade market policies allow for the entrance of foreign competitors. Pressure on cost cutting

increases as well as the ability to move capital globally; corporations engage in the search for new locations where to operate more "efficiently". Corporations "shop around" for those spots offering the most attractive conditions and through economic lenses consider the different legal, labor, social and environmental conditions and regulations they would operate in. Some scholars warn that such corporate behavior leads countries to compete into an alleged "race to the bottom" in which, precisely, labor and environmental standards may not come out well[3].

The key aspect of the novel role of the transnational corporation, though, is not to be found in its size, number of employees or revenues, but in the fact that in the "course of globalization, they are placed in a position to play off national states against one another" (Beck, 2000, p. 65).

The Westphalia system, and particularly its accompanying liberal model of democracy, conceives private actors such as corporations as apolitical agents. Therefore, they have no role whatsoever in the public sphere and do not have to respond to immediate legitimacy demands (Palazzo & Scherer, 2006, p. 75; Scherer & Palazzo, 2008, p. 420). In this context, the relationship between democracy and the capitalist economy is presented as a symbiotic interdependence (Scharpf, 1999, p. 29). On the one hand, corporations and the market economy in general depend on the state to protect and enforce property rights and contractual obligations. On the other hand, the economy generates resources for the state to provide public goods for citizens and secure the legal structures required by capitalism.

[3] The concept of the "race to the bottom" is a contested empirical claim. In their edited book entitled "The Global Transformations Reader", David Held and Anthony McGrew offer different perspectives regarding it (e.g. Garret, 2003; Gilpin, 2003; Held & McGrew, 2003a).

This reflects the moral liberal division of labor typically assumed by the Westphalia system. One in which businesses are exclusively devoted to generating profits and governments to the provision of the legal framework and the care of citizen's welfare. As part of the private sphere, neither transnational corporations nor individuals are regarded as authoritative legally or politically. Both are 'invisible' as agents of political and legal change (Cutler, 2001, p. 133). Governments are considered the legitimate wielders of public and political activity, markets the legitimate arbiters of private and economic activity (Cutler, 2001, p. 138). Globalization, however, jeopardizes this symbiotic relationship. While the state sovereignty is territorially bounded, the capitalist economy is inexorably inclined towards a global interaction (Scharpf, 1999, p. 29).

In an effort to fill the regulatory vacuum left behind by the declining nation-state, corporations start taking responsibilities that before belonged exclusively to the state (Scherer & Palazzo, 2011, p. 899). Corporations are becoming increasingly involved in the definition of global business regulation as well as in the production of public goods (Scherer & Palazzo, 2011, p. 900; Scherer et al., 2009, p. 328). Corporations are more and more participating in the administration of citizenship (Matten & Crane, 2005, p. 171).

The concept of citizenship is a key pillar of the liberal democratic system, a concept that liberals have built exclusively around the state. The notion of citizenship extends beyond the membership status granted by a state. It is a bundle of social, civil and political individual rights conventionally granted and protected by state governments (Matten & Crane, 2005, pp. 169-170; Matten, Crane, & Chapple, 2003, p. 109). In the Post-Westphalia context, the disempowered nation-state is not the unique guarantor of rights anymore. Some of the responsibility for protecting rights of citizens has been moved away from governments and been placed on corporations (Matten & Crane, 2005).

Matten and Crane explore the concept of "corporate citizenship" to define "the role adopted by the corporation in administering citizenship rights for individuals" (2005, p. 173). They have repeatedly insisted, though, that theirs is a descriptive approach, not a normative one (Crane & Matten, 2005; Matten & Crane, 2005, p. 173; Matten et al., 2003, p. 112) – i.e. they are not constructing an argument to justify that corporations ought to adopt such roles. They indicate that corporations are already doing so and discuss the conditions in which these events are taking place. Neither do they assume that corporations are citizens nor that they enjoy citizenship status, but that they are active in citizenship and show citizenship behaviors (Matten & Crane, 2005, p. 175).

They describe three situations in which the administration of citizenship may change hands between states and corporations (Matten & Crane, 2005, p. 172):

1. Where government ceases to administer citizenship rights, corporations have the opportunity, or are encouraged, to step in a government's shoes. On occasions, corporations are already playing a role close to the provision of citizenship rights, and this role becomes more pronounced as a government retreats.
2. Where government has not as of yet administered citizenship rights. A situation that is easily encountered in developing countries. Large corporations become the "default option" in the administration of citizenship rights.
3. Where the administration of citizenship rights may be beyond the reach of the nation-state government. This is connected to issues that transcend the boundaries of states and their capacities for regulation (e.g. tax evasion, global health threats, pollution and climate change, transnational markets regulation, etc.). In these situations, corporations may (or may not) opt for taking a role in the reform or creation of transnational institutions that can administer these rights.

Thus, corporations adopt three different roles when they incur in the administration of citizenship rights (Matten & Crane, 2005, p. 174). From a social rights perspective, corporations take a providing role as a supplier of social services. The corporation may also adopt an enabling role where it capacitates or constrains citizen's civil rights. Finally, through the exercise of a channeling role the corporation may serve as a conduit for the realization of political rights. Inevitably, corporations have become fully-fledged political actors (Kobrin, 2009, p. 350; Scherer & Palazzo, 2007; Scherer et al., 2006).

2.6 The Limitations of the Westphalia Framework to Assess the Human Rights Responsibilities of Corporations

Globalization directly confronts the Westphalia governance framework with its own limitations. Its state-centric assumptions on power and authority place corporations out of the political domain and, consequently, insulate them from political and social controls. The more exacerbated the conditions of globalization become, the more the Westphalia's framework limitations become apparent.

The Westphalia framework is legally structured around the body of international law, which takes for its principles the equality of states, their sovereign immunity and their right to non-intervention by other states (Falk, 2002, p. 313). In the international arena these principles often override the protection of individual rights (Kobrin, 2009, p. 350).

Within this framework corporations are seen as objects whose legal rights and duties are "derivative of, and enforceable only by, states who as 'subjects' conferred those rights and duties upon them" (Cutler, 2001, p. 135). What is more, given the assumptions on power and authority that ground Westphalia, it is difficult to conceive corporations as subjects of international law; only states

are considered adequate to hold this status (Cutler, 2001, pp. 134-135; Kobrin, 2009, p. 353). In fact, the construction of the international human rights regime is an outcome of the Westphalia framework. Human rights were developed by the states and aimed at states. The international human rights regime requires states to put in place constitutions, laws, policies and other public institutions to provide and realize human rights within their territory. Put differently, human rights[4] were essentially conceived as state-centric constructs.

This directly impacts the type of human rights responsibilities that can be allocated to corporations under international law. It is beyond dispute, nevertheless, that all states bear international legal obligations to protect and respect human rights and to ensure that all entities "within their territory or control" do comply with them (Deva, 2004, p. 49). Corporations, besides their emerging role as political actors and providers, conduits and enablers of citizenship rights (Matten & Crane, 2005), are left out of the scope of international human rights. Hence, they do not bear any direct duties or obligations in terms of international human rights law.

Treaties and conventions are signed by states and thus impose obligations on them exclusively, not on non-state actors. The common argument underlying the lack of direct human rights obligations of corporations is that states are the ones responsible for controlling the activities of non-state actors that may lead to human rights violations (Muchlinski, 2001, p. 35). There are no specific international law regulations holding corporations responsible for human rights violations. Amid such convoluted landscape Ulrich Beck wonders “Who will uphold human rights in a world that has left behind the national state?” (Beck, 2000, p. 15).

[4] Chapters 5 and 6 will extensively address the nature of human rights as well as and how the transition from a Westphalia to a Post-Westphalia governance context impacts their shape and content.

The work of John Ruggie as Special Representative of the UN Secretary General can be understood as a decided step towards addressing Beck's question. However, any answer to this question involving agents other than the state may entail "a risk that the continuing responsibility of states, as the prime movers behind violations of human rights, will be downplayed" (Muchlinski, 2001, p. 44).

The Westphalia governance framework provided a platform upon which democratic governments were able to thrive. The values of justice and equality inherent to democracy provided the lever for an advancement of human rights as never seen before in human history. Globalization, however, threatens some of the foundational parameters in which both democracy and human rights operate. Such profound transformations not only allow to consider new forms of governance but, as Pierre (2000, p. 215) notes, it might require them. Thus, we should be open to reconfigure and rethink democracy and human rights to find better ways in which they can preserve their relevancy and validity at the core of the political and governance structures of the emerging Post-Westphalia context. Parts II and III of this study undertake this task, and they will address the concepts of democracy and human rights respectively in the context of the responsibilities corporations hold in terms of human rights.

Part II

3 Transnational Democracy Accounts: an Assessment

The transformations that globalization impinges on the Westphalia governance framework forces us to rethink the concepts of human rights and democracy as well as the institutions that configure them.

Part II of this dissertation focuses on the notion of democracy. Democracy is far from being a monolithic concept. Since its inception in ancient Greece, its meaning has been under incessant transformation. Still, its core values remain indissolubly attached to the original concept: non-violence in public life, popular control over decision-makers and decision-making, and political equality among citizens (Archibugi et al., 2010, p. 85). Globalization is forcing democracy yet again towards another transformation.

Westphalia allocated states the duty to provide and grant their citizens human rights. Citizens, in turn, legitimated states' actions, laws and policies through democratic mechanisms. Currently, many states see their capacities to effectively discharge their human rights duties weaken. At the same time, a variety of non-state actors, including corporations, are becoming more and more engaged in political roles connected to the elaboration of regulation and the provision of public goods. In the mist of such profound transformations, an important question emerges: how can democracy be kept valid and central in society?

The answer to this question largely depends on what is meant by democracy beyond the traditional boundaries of the state. With this in mind, this chapter will explore different conceptions of transnational democracy with the intention to identify one capable of functioning beyond the limits predefined by the Westphalia framework. It is crucial that the account in question

recognizes democracy as a concept detached from the state, so it can incorporate non-state actors first hand.

The debate on transnational democracy has for long investigated how to integrate democracy in areas or dimensions that transcend the nation state. In fact, it is a debate geared to realize the cosmopolitan justice ideal that "all individuals as moral beings are capable of exercising equal control over their shared destinies" (Kuyper, 2016). Therefore, it is the right place to tackle the concept of democracy for research revolving around the cosmopolitan concept of human rights.

Eventually, the chapter will conclude that deliberative democracy provides the most robust foundations upon which to construct guidance for corporations to legitimately discharge their human rights obligations. However, to comprehensively target the research question of how corporations ought to discharge their human rights responsibilities will require us to take an additional step. The discussion on the different models of transnational democracy is informative but still too rigid to adapt it to the specificities of the BHR debate. Instead, a deep dive into the normative foundations of democracy will allow us to grasp the thread that connects democracy with the concepts of human rights and justice to eventually unearth its potential guidance for the BHR debate. This will be the goal of chapter 4.

3.1 Mapping Transnational Democracy

The terms "global democracy", or "transnational democracy", encompass a series of debates that precisely attempt to rethink the way democratic political power should be understood in the Post-Westphalia era (e.g. Archibugi, Koenig-Archibugi, & Marchetti, 2012; Held & McGrew, 2003a; Koenig-Archibugi, 2011, p. 522). The discussion on democracy in the globalization context targets aspects like who should be the leading actors or institutions, the

scope of the institutions involved, the mechanisms of representation and accountability, the definition of law and norms for governance as well as their enforcement and surveillance. The term "global democracy" may already incline us to think that all these variables should be conceived globally. This is a position that is closer to a cosmopolitan understanding of democracy and does not reflect the entire spectrum of alternatives discussing democracy in the Post-Westphalian context. The formula "transnational democracy", instead, serves as a more neutral label upon which to discuss all the mentioned variables and explore their meaning for corporations assuming human rights responsibilities.

Mcgrew (2002, p. 269) maps four distinctive normative theories of transnational democracy, namely: liberal internationalism, radical pluralist democracy, cosmopolitan democracy and deliberative democracy[5]. Yet, not all of these accounts may prove useful or adequate to reflect upon and react at the emerging political role of the corporation and its engagement in human rights responsibilities.

3.1.1 Radical Democracy

The radical democracy account regards capitalism and property rights as systems of domination and alienation that need to be overcome (Kuyper, 2016). Radical democracy is based on a "bottom up" approach to democratize world politics. It has its roots on environmental, feminist and pacifist social activist movements. The "real" democracy is found in a "juxtaposition of a multiplicity of self-governing and self-organizing collectivities constituted on diverse special scales – from the local to the global" (McGrew, 2003, pp. 501-502). The radical democracy account, with its Marxist and civic-republican approach, provides an alternative to the liberal political premises of global governance. It rejects and challenges head-on the authority of states,

[5] For an alternative taxonomy of the debate see Kuyper (2016).

international organizations or transnational corporations (TNCs). It accuses these liberal objects to represent a global governance structure that privileges "the interests of a wealthy and powerful cosmocracy whilst excluding the needs and interests of much of humanity" (ibid.).

The radical approach does a great job at denouncing the tremendous political and economic power imbalances that characterize modern capitalism (e.g. Hardt & Negri, 2000). Yet, its recommendations on how to move forward and the terms of institutional design that should follow remain underspecified (Kuyper, 2016). Additionally, this research is critical with certain forms of capitalism but does not support ruling them out altogether. Thus, the radical democracy approach does not provide a consistent platform upon which to construct meaningful responses to the research question posed by this research without entering into profound contradictions.

3.1.2 Liberal Internationalism

The liberal internationalist order is firmly based on the rule of law, unfettered global markets and its preference for a strong state sovereignty. In practical terms, this means embracing the "realpolitik" – an approach where "national interests" take preference and state decisions in the international arena are narrowed to a rational cost-benefit calculation. In the liberal internationalist account, political and economic international relations are eventually set by the most powerful states. States are assumed to act strategically in establishing international institutions and governance mechanisms with the intention to secure and defend their power and interests.

Transnational democracy, through the lens of a liberal internationalist account, does not challenge the structure of the liberal understanding of global politics. It simply attempts to make international institutions more legitimate by introducing procedural changes that make them more representative, transparent and accountable (McGrew, 2003, pp. 500-501). In this scheme,

transnational civil society organizations convey the citizens' demands as well as press for international institutions' accountability as decision makers. Thus, international institutions become "arenas within which the interest of both states and the agencies of civil society are articulated. Furthermore, they function as key political structures through which consensus is negotiated and collectives decisions are legitimated" (McGrew, 2003, pp. 500-501).

McGrew accuses the liberal internationalist account of being a too restrictive and technocratic view of transnational democracy. It fails to acknowledge the existing inequalities of power at a global level between states, international institutions and transnational organizations. It is remarkable, though, that the internationalist account already incorporates non-state actors into the picture of global politics. Their role, however, remains limited if not marginal.

Although it opens the door for transnational civil society organizations to interact with state-based international organizations, the liberal internationalist account remains essentially state-centric. In line with liberal thought, no role is assigned to the private sector, which is conceived as detached and isolated from politics. Corporations must not meddle into international politics and therefore must relegate their goals and operations to the sphere of the global free market. By placing the state at the center, the liberal internationalist account of transnational democracy prioritizes the preservation of the principles that underpin the Westphalia governance framework. Consequently, this account has difficulties accommodating the archetypical emergence of non-state powers in the Post-Westphalia landscape. .

3.1.3 Cosmopolitan Democracy

Globalization, as discussed in chapter 2, erodes the political autonomy of the state and curtails important premises of the liberal state-based democracy. Additionally, more and more, the stakeholder communities connected to specific transnational issues do not necessarily coincide with the communities

circumscribed within the geographic boundaries of states (Archibugi, 2004, p. 439). One cannot take for granted anymore that the locus of effective political power is the national government. Instead, "effective power is shared and bartered by diverse forces and agencies at national, regional, and international levels" (Held, 1997, p. 260).

States, as democratically elected institutions, increasingly see their autonomy constrained by sources of unelected and unrepresentative economic power (Held, 1997, p. 257). Such unelected and unrepresentative powers need to be brought back under democratic scrutiny. Otherwise, the capacity of citizens to decide and control over the form and content of their own political communities might result undermined.

Given the transformations that globalization impinges on the location of political power, it does not seem plausible that the spread of democracy at a global level be based exclusively on the deployment of democracy within each state as liberal internationalists would advise. Instead, cosmopolitan democracy offers an avenue to broaden the institutional framework and support a more democratic regulation of states and societies (Held, 1995, p. 232).

David Held, together with Anthony McGrew, Daniele Archibugi and Mathias Koenig-Archibugi are among the most notable scholars within the cosmopolitan account of transnational democracy. Held's book "Democracy and the Global Order" (1995) is probably one of the foundational pieces of this account. In it, Held elaborates most of the defining features of the cosmopolitan democracy account.

The cosmopolitan model of democracy conceives the global order as a body of multiple and overlapping networks of power that involve different dimensions of human life: culture, welfare, environment, economics etc. Individuals, therefore, have political membership in each and every political community

that significantly affects them. This implies that an individual enjoys multiple citizenships. One is not only citizen in her local community but also on all those regional and global communities in which she participates.

The cosmopolitan model of democracy also envisions the creation of effective legislative and executive transnational entities at regional and global levels. These organizations would have administrative capacity and independent political resources and act as a complement or support to the local or state institutions (Held, 2006, p. 305). They would be bounded by and operate within the umbrella of what Held denominates a "basic democratic law". Regional parliaments would be created and electoral processes would be put in place across nation-states. For Held "the establishment of an independent assembly of democratic peoples directly elected by them and accountable to them is an unavoidable institutional requirement" (Held, 1995, p. 273; 2004, pp. 383-385).

Held anticipates that, within the cosmopolitan democratic framework the nation-state would "in due course, 'wither away'" (1995, p. 233). He immediately clarifies that he does not mean that states would become redundant. The new transnational institutions envisioned by cosmopolitan democracy would "coexist with the system of states but […] would override states in clearly defined spheres of activity where those activities have demonstrable transnational and international consequences" (Held, 2006, p. 305). Sovereignty is, thus, "stripped away from the idea of fixed borders and territories"; it is not exclusively circumscribed to the nation-state, but to a pliable and dynamic set of local, national, regional and global institutions (Held, 1995, p. 234).

Cosmopolitan democracy responds to the fact that with globalization an increasing amount of issues escapes the control of the nation state. The proposals put forth by Held and other cosmopolitan scholars have two aims:

the redefinition of democratic accountability and the enhancement of the regulatory and functional agencies at regional and global levels. To achieve these goals Held suggests that the new politics should incorporate the following premises (2006, pp. 304-308):

- A strict separation of political and economic interests,
- The creation of new global governance structures addressing the issues of poverty and welfare and, at the same time, offsetting the power of market-oriented agencies like the World Trade Organization or the International Monetary Fund.
- A shift or a growing proportion of nation-states' coercive capabilities to regional and global institutions
- The creation of a new International Human Rights Court
- The creation of a diversity of self-regulating associations and groups in civil-society
- And public framework investment priorities set through general deliberation and government decisions but extensive market regulation of goods and labor.

Proponents of the cosmopolitan democracy base their propositions on a moral framework that aims at being universally accepted. Generally speaking, cosmopolitanism "rejects as unjust all those practices, rules and institutions anchored in principles not all could adopt" (Held & McGrew, 2003a, p. 484). Cosmopolitanism advocates for "those basic values that set down standards or boundaries that no agent, whether a representative of a government, state or civil association, should be able to cross" (ibid.). These principles aim for universal application and, therefore, require putting in place governance and regulatory institutions at a global level to foster and protect them.

Next to liberal democracy principles, the idea of human rights plays a central role in both moral and political cosmopolitanism. The cosmopolitan account is

often synthesized into one principle, the principle of autonomy, describing the raison d'être of the democratic project:

"Persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others" (Held, 1995, p. 147).

The principle of autonomy provides the ground for seven clusters of rights considered by Held as critical for citizens to exercise their self-determination. According to Held these principles secure the "protection and nurturing of each person's equal interest in the determination of the institutions that govern his or her life" (Held, 2003b, pp. 514-521). These are principles that summarize and sustain the entire cosmopolitan political project:

- The first principle highlights the equal worth, dignity and moral significance of each human being, a status that requires equal political treatment to all individuals.
- Secondly, active agency emphasizes the idea that individuals should have the opportunity not only to accept the political community to which they belong to, but also to take part in its shaping, and they should be able to do so without interferences.
- Thirdly, the principle of personal responsibility and accountability accepts that differences in the choices and outcomes of political, cultural and economic projects may be legitimate except for those options that may constrain the autonomy of others. Individuals, Held asserts, should be aware and accountable in those occasions in which their activities may impair the autonomy of other individuals, with special attention to those more vulnerable in determining their own lives.

- Consent is the fourth principle. If equal individual worth is taken seriously, it requires that any political project respects and takes into account each person's equal interests. Self-determination, in order to take effect, requires processes where individuals can participate freely and equally, and their consent (or lack of it) can be incorporated in a collective government.
- Principle five acts in accordance with principle four in that it states that reaching a consensus is only possible if mechanisms for a reflexive deliberation are put in place. These mechanisms, in Held's terms, include deliberations that effectively include all parts concerned and that include a voting decision-making mechanism at the decisive stage of the process. Special attention is put on those collectives typically at a disadvantage or marginalized, to ensure the inclusivity of the deliberation processes.
- Principle six advocates for the decentralization of political power to maximize the opportunity of citizens to take part in all those decisions that affect them. However, many of these decisions, as discussed before, are increasingly having an impact on individuals across nations and territories. In these occasions, the creation of institutions at a local, national, regional or global level that bring together the affected communities and individuals, and therefore the centralization of decisions, becomes a requirement.
- Finally, principle seven highlights the need to avoid harm and to ameliorate urgent needs. This has top priority and requires attention at least until all human beings "enjoy the moral status of universal recognition and have the means to participate in their respective political communities and in the overlapping communities of fate that shape their needs and welfare".

Political cosmopolitanism seeks to extend democracy beyond the nation-state borders. Transnational democracy is not meant to override nation-state based democracy; these are two levels of democracy that do not exclude each other but mutually reinforce rather than conflict in establishing the standards of political rule (McGrew, 2003, p. 503). Political order is understood as an association of a variety of democratic associations ranging from local city government to a global parliament. Held likes to emphasize that the aim is not to establish a world government, but rather "a global and divided authority system" (Held, 1995, p. 234). This system is characterized by a multiplicity of overlapping power centers all of them bounded by an internationally and democratically established body of law. Each of the different bodies of power may self-govern at its own level; however, the regional, national and local 'sovereignties' are subordinate to an "overarching legal framework" (ibid.).

McGrew presents cosmopolitan democracy as a radical agenda for the transformation of how international liberalism understands governance at an international level. Cosmopolitan democrats are skeptic of the primacy of the state-centric liberal-international view and of procedural notions of democracy (McGrew, 2003, p. 503). However, the cosmopolitan approach is not as radical as its proponents may like us to believe, particularly when compared to international-liberalism. One should recall that international liberalism reacts to the challenges posed by globalization by reinforcing the state sovereignty as well as by creating institutions at an international level to defend states' interests. Cosmopolitan democrats are not that far from this liberal scheme.

Instead of states joining forces in international institutions, cosmopolitans advocate for a sort of a global framework in which all nation-states and regional institutions would be subject to. Cosmopolitans, in contrast to liberal-internationalists, move the concept of the state to a global level. That is, instead of putting the focus on the role and power of the nation state, they construct institutions at a global level that overcome the limitations of the state.

Thus, although the cosmopolitan project cannot be qualified as "state-centric", it is "in large measure an extension of liberal democracy" (Dryzek, 1999, p. 32).

Cosmopolitans and liberal internationalists are equally concerned with the weaning force of the nation state resulting out of the globalization process. Both accept the same diagnostic and both propose to reinforce the idea of public government, albeit at different levels. Liberal internationalists want to strengthen nation-states at the national level. Cosmopolitans, instead, want to create a framework that, ultimately, reproduces the nation state at an overarching global dimension. Both accounts are determined to rearrange the authority and power of public actors. Yet both accounts seem to overlook the fact that globalization, as discussed earlier in chapter 2, challenges the exclusivity of public institutions on matters of public (transnational) governance.

Liberal "realists" put cosmopolitans in the line of fire by accusing them of daydreaming with their global governance propositions. Realists see international relations as exclusively being driven by force and interests. Cosmopolitan efforts to tame international politics through institutions and public participation are accused of being a pure utopia (Archibugi, 2004, p. 453)[6].

Cosmopolitanism shares many of the central pillars of liberal thought, among them, the centrality of the individual as the main source of concern. Thus, for communitarians, cosmopolitanism neglects the role and importance of the

[6] Check Mathias Koening-Archibugi paper at the European Journal of International Relations (2011) for a refutation to many of these "realist" criticisms with special emphasis on the feasibility of the global democracy proposals.

communities in shaping and constructing interests and values. Not surprisingly, Michael Sandel considers the ethic that informs cosmopolitan democracy to be "flawed both as a moral ideal and as a public philosophy for self-government in our time" (Sandel, 1996, p. 342 as quoted in McGrew, 2003, p. 503). Democracy, communitarians argue, can only succeed where there exists a community sharing similar values and beliefs; this is a condition that, they claim, is far from a reality at a global level (Brown, 1995). Others, like William Kymlicka, do not deny the need to address global responsibility but maintain that such responsibility is better addressed through existing state institutions (e.g. Archibugi, 2004, p. 460; Kymlicka, 1999).

Through the communitarian lens, the transnational democracy project of cosmopolitans is, consequently, doomed to failure. It is accused of taking western values of democracy as universally valid; an idea that, Hutchings warns us, is susceptible of being accused of imperialism (Hutchings, 1999). Habermas argues that human rights cannot serve, as cosmopolitans intend, as a substitute for what he calls the "civic solidarity" that can be found in the nation-state and other collective identities. While he sees no obstacles to expanding national civic solidarity and welfare state policies to the scale of a postnational federation, "[…] the political culture of a world society lacks the common ethical-political dimension that would be necessary for a corresponding global community" (Habermas, 2001, p. 108)

Thompson offers a critical perspective as well and argues that the cosmopolitan political project of democracy would only entail a confrontation between democracy and the protection of individual rights. Rights, he claims, could be pursued through international authorities but this would come along with the challenge of authority of locally or nationally democratically elected bodies or policies (Thompson, 1999).

Koenig-Archibugi, a cosmopolitan oriented scholar, accepts that "certain level of political centralization – a polity – can be seen as necessary for the democratization of political life, because democratic rights of participation (input) as well as compliance with democratic decisions (output) need to be secured" (2011, pp. 526-527). Cosmopolitanism, therefore, requires a sort of state-like institutional infrastructure.

Still, besides all the criticisms, cosmopolitanism represents a determined attempt to overcome the principle of "no state, no democracy" – i.e. that democracy is only feasible where there is a state. This is an aspect that differentiates this account from others, including liberals and communitarians. As the concept of cosmopolitan citizenship is not connected with state sovereignty "no normative obstacles impede the expansion of the traditional notion of polis to the entire cosmos" (Archibugi et al., 2010, p. 108). Although, it is not the most robust account to tackle the issues that are the concern of this thesis – i.e. the political role of corporations in the fulfillment of human rights obligations – cosmopolitanism deserves to be praised for taking a step in the right direction.

3.1.4 Deliberative Democracy

In face of the political challenges posed by globalization, cosmopolitan democrats and liberal-internationalist scholars agree that new forms of international governance require more state-like government. For cosmopolitans, more government implies the creation of an overarching democratic framework by which any other regional, national or local structures should be bound. For liberal internationalists, instead, more government involves states joining forces at an international level in the creation of international organizations that would, together with transnational civil society actors, tackle the issues at hand. Organizations and institutions like the World Trade Organization, the United Nations Security Council, treaties or

international courts are perfect examples of the meaning of government at the international level today.

A series of scholars, sympathetic with a deliberative democracy account of transnational democracy, explore the idea of "governance without government" (e.g. Dryzek, 1999; Fung, 2003; Rosenau & Czempiel, 1992; O. R. Young, 1994). In contrast to cosmopolitans and liberals, this notion does not necessarily imply the creation of structures or organizations usually associated with the concept of government (Dryzek, 1999, p. 33). Instead, proponents of this approach are more concerned with elucidating "the possibilities for democratizing the governance that does exist in the international system rather than the government that might" (Dryzek, 2000, p. 120). The notion of governance does require institutions, and it relies on them particularly in the absence of traditional binding decision structures (ibid.). Hence, governance is defined as institutions or rules, formal or informal, "capable of resolving conflict, facilitating cooperation, or, more generally, alleviating collective action problems in a world of interdependent actors" (O. R. Young, 1994, pp. 14-15) cited by Dryzek (1999, p. 33). The idea of "governance without government" is constructed on the foundations of a discursive democratic understanding of politics at an international level.

The distinctive idea of deliberative democracy applied to the arena of international politics is that "binding rules and practices should be determined through open and fair processes of public reason in which parties – be they citizens, political officials, or groups – offer arguments and evidence to persuade others" (Fung, 2003, p. 52). Its premises put the affected parties in a better position to understand and criticize the actions of the governing body and additionally greater efficiency is promoted as deliberation increases the amount of relevant information in circulation (Smith & Brassett, 2008, pp. 73-74). As a result, governance is improved at three levels (Fung, 2003, p. 52).

First, individuals become more knowledgeable through learning and exchanging views with other counterparts. Secondly, standards and rules can gain in refinement and efficacy by incorporating insight from a more diverse set of participants. Thirdly and lastly, deliberation processes boost the legitimacy and the credibility of the resulting norms as they are subject to the scrutiny of the open public debate, review and determination.

At this point, though, it is important to clarify what is meant by the word discourse. A discourse, Dryzek argues, is a process through which participants share their views on concepts, ideas and categories with the intention to signal or transform each other's assumptions, dispositions, intentions or judgments. Discourses "construct meaning, distinguish agents from those who can only be acted upon, establish relations between actors and others, delimit what counts as legitimate knowledge, and define common sense" (Dryzek, 2006, p. 104).

Proponents of deliberative democracy take the concept of discourse as the corner stone of their approach. Those who study international politics through the lens of discursive democracy scan the international context for the sources of discourse in the current and future governance initiatives. Their goal is to set the mechanisms so that, at an international level, the political discourse and the operations of the governance schemes remain under a deliberative democratic control (Dryzek, 2000, p. 138).

Deliberation is a process of communication. Through it, its participants contrast "whether their assumptions about the world and about cause-effect relationships in the world are correct" or "whether norms of appropriate behavior can be justified and which norms apply under given circumstances" (Risse, 2004, p. 294). The goal of the discourse process is to reach a "reasoned consensus" (Risse, 2004, p. 295). Not all discourses can be labeled as democratic. The conditions required for a democratic discourse to take place at an international level are certainly demanding. It requires securing spaces and

relationships of non-domination where hierarchies and power relations are set aside, enabling participation and public deliberation, responsive governance, as well as securing the right of all those affected to have a voice in the discourse process (Dryzek, 1994; Pettit, 1997; Risse, 2004, p. 295).

Deliberative democracy, in contrast to more traditional accounts of democracy, does not source legitimacy out of voting or representation processes, rather out of deliberation. In fact, deliberation is presented as an alternative to increase legitimacy where there is no voting or representation mechanisms available (Risse, 2004, p. 310). Only those outcomes emerging out of a democratic discourse – i.e. a process complying with the conditions outlined above – can be considered legitimate. Communication becomes the central feature of democracy. But not any kind of communication, only one that induces to reflecting upon preferences in a non-coercive fashion (Dryzek, 2000, p. 2).

A singular feature of the communicative approach to democracy at the international level is that deliberation is not circumscribed, hampered or restricted by predefined borders, and, therefore, policies, decisions, or outcomes of any kind are possible across a variety of domains. This represents a radical contrast with the liberal approach. Liberals rely on the aggregation of preferences in predefined self-governing communities, the "demos", anchored in territorial (state) boundaries. In international politics, and particularly in a Post-Westphalia context, these boundaries become hard to specify and preference-aggregation difficult to conceptualize (Dryzek, 2000, p. 116).

In contrast, the transnational discursive democracy approach presumes the demos to be defined in functional or systemic terms, not necessarily influenced by cultural, political or other territorially-based dimensions; hence, deliberation across boundaries becomes straightforward (Dryzek, 2000, p. 116; McGrew, 2003, p. 505). On the whole, it puts forward the idea that "the intimate link between democracy and the state can be severed" (Dryzek, 1999,

p. 44). Additionally, given its functional approach, transnational discursive democracy is not only capable of transcending territorial boundaries but it also enables the participation of other actors beyond the state and the transnational civil society organizations in rule-setting and rule-implementation initiatives (Risse, 2004, p. 310).

Transnational discourse democracy finds in the idea of network the appropriate conduit to realize its principles in the international arena. Democratic networks of governance are envisioned as relatively flat structures, lacking domination or subordination in relationships. The relationships established in the network significantly contrast with those usually found in a market environment (Dryzek, 2010, p. 121). Rather than the competitive relationships that characterize the market, networks stand out by their emphasis on collaboration, persuasion and self-regulation. Governance networks are often constructed upon informal structures, focused on specific issues, with no centralized authority but still capable of producing outcomes (Dryzek, 2010, p. 120). Arguing and persuading become the key characteristics of the nonhierarchical steering that prevails in networks of governance (Risse, 2004, p. 310).

Dryzek sustains that transnational discursive democracy is more plausible than the cosmopolitan alternative (Dryzek, 2006, p. 116). The cosmopolitan project, he argues, requires two steps. First, the establishment of a strong and overarching global institutional system. Second, its democratization. Transnational discursive democracy, instead, only requires one step: "the democratization of existing discourse-related sources of order" (ibid.).

The network or discursive approach to international politics directly contravenes the liberal premises allocating the power for decision making exclusively centralized to states. Governance networks do not hold elections. Nor do they have an electorate, government or opposition. Hence, networks, from a liberal perspective are problematic (Dryzek, 2010, p. 123). Through

constitutions, states are required to protect and grant liberties and rights to citizens. Network schemes, Dryzek points out, are reluctant or difficult to dovetail with constitutional instruments (ibid.). The reason is that rights against a government are difficult to be instantiated within networks that lack a formal operating government. Therefore, the liberal understanding of freedom as negative liberty with the corresponding rights against arbitrary power does a poor job where there is no clear governmental authority. For Dryzek (ibid.) republican ideas of freedom based on the notion of "non-domination" do a better job (c.f. Pettit, 1997).

Critics are skeptical of the value that the deliberative approach may bring and complain of the weakly stipulated procedural and institutional requirements, as well as its silence about how to deal with acrimonious conflicts (McGrew, 2003, p. 505). The discursive approach to international politics is considered more as a mechanism for resolving and legitimizing public decisions rather than a discrete model of democracy for decision making (ibid.). The principle of stakeholding - i.e. that all those affected by the decisions of a body should have the right to take part in the decision-making - is one of the most problematic assumptions. Critics are typically concerned with the identification of stakeholders, who do they represent and to whom they are accountable to (Risse, 2004, p. 311).

Communitarians, like William Kymlicka, firmly argue that democracy has to be rooted in a shared history, language or political culture. According to him "the only forum within which genuine democracy occurs is within national boundaries" (Kymlicka, 1999, p. 124). The state, from a communitarian perspective, represents a moral community beyond which no true demos can exist (McGrew, 2003, p. 506). Democratic political deliberation and legitimacy can only take place among participants sharing a sense of commonality or identity that provides them a base for understanding and trust among each other (Kymlicka, 1999, p. 119).

3.2 Deliberative Democracy: E pluribus Unum

Previous sections assessed the value of the diverse accounts of transnational democracy according to their capacity to adapt democracy to the conditions of Post-Westphalia while holding the emerging non-state actors (e.g. corporations) under its scope. Corporations assume an increasing political role and, at the same time, start finding themselves more and more enmeshed in situations where human rights are at risk. Not all of the accounts presented are equally equipped to provide effective guidance in these complex situations.

Cosmopolitanism and liberal internationalism have opposite understandings of the link connecting democracy with the state. For the former, democracy is to be realized at a global level and thus state-like institutions should follow at this level. For the later, democracy must remain circumscribed within the boundaries of each state. Both accounts, though, have in common their dependency on the assumption that the link between state and democracy is indispensable; the state is the natural vehicle for democracy (Goodhart, 2005, p. 25). The disagreement among these accounts is less on what democracy is than the conditions necessary for its realization (ibid.).

Globalization, as discussed in chapter 2, puts into question the assumption that political power is concentrated on the figure of the state and places doubts on the efficacy of the liberal internationalist project. At the same time, the construction of the state at a global level, as cosmopolitans advocate, is not free of the risks of tyranny (Kant, 2010 [1795]; Lu, 2015). The problem is not that the issues brought up by globalization and the institutions proposed by liberal internationalists and cosmopolitans do not match up. The problem is that they cannot in principle converge. The reason is that they assume democratic legitimacy depends on the contingent empirical proposition that the state is the site or container of politics (Goodhart, 2005, pp. 86-87).

The Post-Westphalia governance context makes clear that "the test of whether democracy is evolving in a globalized space is not whether the institutions of representation and responsibility conform with those to be found in territorial polities" (Rosenau, 1998, p. 49). To meet the challenges of globalization it requires new forms of democratic self-steering of societies (Habermas, 2001, p. 88). New problems require new tools. Tools that should be consistent with the structures and characteristics of the emerging Post-Westphalia world order: e.g. the fragmentation of authority; the increasing ambiguity of borders and jurisdiction; and the blurring of the line between the public and private spheres (Kobrin, 2009, p. 350).

Deliberative democracy is the only account able to transcend the umbilical cord between the state and democracy. It opens the doors to incorporate non-state actors as part of the equation of democracy and not to consider them as exogenous elements of the political realm. Thus, deliberative democracy offers the degree of flexibility and versatility to adapt and respond to the demanding conditions of Post-Westphalia. More specifically to the core of this research: deliberative democracy allows for a more participatory method through which basic rights can be advanced (Fung, 2003, p. 68). Through deliberative democracy mechanisms, corporations, at times considered political actors, can take part in the realization of human rights (ibid.). This is a feature that neither liberals nor cosmopolitans can conceive within their parameters of democratic reasoning. For them, human rights as well as democracy are irremediably and exclusively connected to the state.

What does it imply for corporations to jump into the bandwagon of deliberative democracy in human rights terms? Does this mean that they can be considered legitimate enough to provide human rights as a democratic state would? Does deliberative democracy imply that human rights should be defined through discourse? Does not this approach carry along an associated relativist understanding of human rights? How can democracy help

corporations realize their human rights responsibilities? Answering these questions requires a refined understanding of democracy's normative foundations. In fact, it requires us to go beyond assessing specific models of transnational democracy and check whether they fit our purposes or not. Instead, we should focus on the values of democratization (e.g. political equality, autonomy, liberty, etc.). We should carefully examine the fundamental principles of democracy and strive for them under specific conditions (Kuyper, 2016), in our case the context of the BHR debate.

This will be the object of the upcoming chapter 4. Understanding and specifying democracy's core principles will help us elaborate the guidance corporations need to assume their political roles when discharging their human rights responsibilities. The goal is that all corporate actions in the public sphere remain loyal to the core meaning of the concepts of democracy and human rights.

4 Democracy, Human Rights and Justice

The previous chapter hinged on the need to find appropriate democratic schemes to respond to the challenges to which globalization confronts public governance. Among the accounts of transnational democracy explored, deliberative democracy was presented as the best equipped to deal with the Post-Westphalia context.

Still, additional fundamental questions need to be addressed to understand how democracy, and more specifically a deliberative approach, can provide meaningful guidance to the business and human rights discussion. What makes democracy so important? Under what grounds can it be justified? What is its relationship with human rights?

Democracy, it will be argued, is the best form to organize political power and, at the same time, secure justice in the public domain. It is the best antidote against political forms of domination and oppression. It shares with human rights the fact that both concepts are grounded on the equal status of humanity that is shared by all human beings. The chapter argues that to avoid potential patterns of domination, any institution willing to provide human rights must adopt a democratic approach in their realization.

4.1 Defining Democracy

Making sense of democracy is not an easy job. With a history dating back a couple of millennium, the concept of democracy is far from being unequivocal and straightforward. In fact, democracy is an ever evolving, complex, even malleable, term. The portrait of an individual casting a vote in a ballot box is one of the most defining representations of the idea of democracy. Thus, it is safe to start approaching democracy here, with its most celebrated (or

commonly agreed) definitional picture. However, to truly understand democracy, we will have to transcend its picturesque traits and enquire about its justification by diving deep into the intricate web of values that underlies it.

We often associate democracy with a decision-making mechanism where individuals are called to vote typically on aspects related to the governance of associations or institutions to which they belong. Its most paramount feature is the recognition that all those involved in the decision-making are treated as equally qualified to participate (Dahl, 1998, p. 37 emphasis added). The term democracy has its roots in the Greek word *demokratia*. It is the conjunction of two terms: *demos* and *kratos*, meaning "people" and "power" respectively (Ober, 2008, p. 70). In other words, democracy means, literally, *the rule of the people*. But, what characterizes ruling by the people?

Dahl (1998, p. 37) synthesizes the most conspicuous features of any democratic process down to five key elements. First, all members of the association must have equal opportunities to share their views and to get informed on other's views; all have to be provided with effective participation. Second, all members enjoy voting equality; all have equal opportunity to vote and every vote is worth the same. Eventually, the issue up for discussion in a democratic process should be settled on the basis that the view that receives the greatest numbers of votes should prevail (Waldron, 2012, p. 190); this is also known as the Majority Principle. Third, all members should be granted equal access to opportunities to learn about the different policies at stake and their likely consequences. Control of the agenda is the fourth of Dahl's characteristics; the decisions on how and what has to be discussed pertains exclusively to the members of the association. Finally, all adults affected by the issues under consideration ought to be included and enjoy the rights that enable the four previous criteria to take effect (Dahl, 1998, p. 37; Waldron, 2012, p. 190).

Much has been written in social science about the characteristics of democratic societies and the technicalities related to the electoral systems implemented to adopt a decision or to choose the citizens' representatives and leaders. However, I do not aim at describing or explaining how these sets of mechanisms work in place. The focus here is not descriptive, but normative. I aim to assess when and why democracy is morally desirable as well as the ethics that should guide the design of democratic institutions. The goal is to establish the foundations upon which to construct, in subsequent chapters, the guidance that corporations need to discharge their human rights responsibilities justly and legitimately.

Democracy is a concept that goes well beyond the common descriptive hallmarks (e.g. voting) outlined by Dahl a few lines above. Democracy is a construct that transcends a predefined set of processes and institutions. As Beetham (1999, p. 4) points out, the institutions that realize democracy ought to be seen as secondary or derivative. They are instruments actualizing the principles and values of democracy; therefore, they should take different forms according to different contexts. Thus, the concept of democracy used in what is left of this dissertation will not be limited or circumscribed to the specific traditional western liberal structures and institutions of democracy. Instead, what becomes crucial are the values and principles behind this concept.

The following sections of this chapter will turn their attention to explore democracy in its normative essence. Only then will we be able to unearth the full potential of democracy for guiding life in the public realm independently of who shall be leading it, whether public or private actors. Thus, in subsequent chapters, we will set the ground for re-constructing the meaning of democracy when confronted with the transformations that globalization inflicts on the politics and governance of human rights.

4.2 Justifying Democracy

The concept of democracy is the synthesis of two core ideals: *popular sovereignty* and *political equality* (Christiano, 1996, pp. 3-4). The former calls on all competent adult citizens to take part in the process of deciding over the laws and policies that will govern their lives in common. The later implies that all citizens are considered equally, each is assigned one equal vote in the decision making process where decisions are taken by a majority of votes, all of them enjoy equal control over the process and the right and duty to participate in open and fair discussion. A society complying with these two minimal principles formally adopts democracy (ibid.).

There is a variety of arguments about why democracy should be adopted to govern and guide matters of public life. A first and almost immediate reaction is to enquire about the benefits of embracing democracy. We may opt for a democratic approach if it produces outcomes that we can consider desirable. Democracy is said to produce desirable outcomes that are better than any other non-democratic alternative at three different levels: epistemic, strategic, and at further developing human nature (Christiano, 2008; J. S. Mill, 2008 [1861], Ch 3).

Epistemically, democracy forces decision makers to take into account citizens - i.e. to protect their own fundamental interests (Christiano, 2008; Dahl, 1998, p. 52). It is only when common people are empowered to engage in public decision making themselves or in the election and accountability of those chosen to make decisions that citizen's interests are taken seriously (Waldron, 2012, p. 192). As highlighted by John Stuart Mill:

"[…] rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed to stand up for them" (J. S. Mill, 2008 [1861], p. 65).

Hence, democracy helps to prevent tyrannical and despotic regimes that so often in history have, and still are scourging humanity. Strategically, democracy generates a series of outcomes we should regard as beneficial for all. For instance, "no substantial famine has ever occurred in any independent country with a democratic form of government and a relatively free press" (Sen, 1999, p. 152). Additionally, democratic regimes have proved to contribute to peace making by not waging war against each other (ibid.). However, it is no less true that democratic countries have participated in the establishment of oppressive regimes like colonialism, some have supported dictatorships, and others fought violently non-democratic regimes with devastating human effects (Dahl, 1989, p. 57). Evidence, nevertheless, also proves that democracies do not fight each other; they make intense use of the art of negotiation and diplomacy to prevent conflict, and perceive people from other countries as less threatening and more trustworthy (ibid.). Democracy is also connected to prosperity since it allows markets to operate in, usually, not highly regulated environments where privately owned firms, capital and workers enjoy relative free movement. Market economies are strong sources of affluence and, although market economies do not necessary rely on democracy for its development, it is true that all democratic countries have market economy systems (Dahl, 1998, p. 58).

John Stuart Mill added a third type of benefit to be enjoyed from democracy. He argued that participants' moral character is improved as a result of taking part in democratic processes. Mill famously declared:

"The first element of good government […] is to promote the virtue and intelligence of peoples themselves. The first question in respect to any political institutions is how far they tend to foster in the members of the community the various desirable qualities, moral and intellectual" (J. S. Mill, 2008 [1861], p. 39)

However, Stuart Mill's democratic benefit on people's character is still a hypothesis to be subjected to empirical validation. Yet, it is difficult not to agree with the idea that adult citizens should be able to take decisions responsively considering different arguments and freely enter in deliberations with others. Dahl, in line with Mill, points out that democracy is the only system offering a safe environment where these qualities can flourish (Dahl, 1998, p. 56).

Hitherto, democracy has been exclusively justified on the basis of the epistemic, strategic and virtuous consequences that it generates. Such approach, I believe, is incomplete. Centering the discussion of democracy's justification exclusively on its outcomes jeopardizes democracy itself. The discussion immediately turns into a taskforce aimed at identifying the path that may lead to better outcomes.

Plato and Aristotle, with their critique of democracy, are early examples of an outcome-oriented approach to politics[7]. They both considered that democracy was doomed because it led to deleterious decisions and outcomes. In books VI-VIII of the Republic, Plato (2012 [380 BC]), through Socrates' voice, argues that ordinary people are not well equipped to govern society; they lack the virtue, the knowledge as well as the skills and expertise necessary to take wise decisions. Instead, Plato proposes the rule of philosophers (the class of 'guardians'), who constitute a superior class distinguished by their training, virtue and education that makes them uniquely qualified to assume the responsibilities for governing society. Put differently, Plato advocated for a government led by technocrats.

[7] We should note that the concept of "democracy" in ancient Greece was not the concept of democracy we live today in the XXI century (Ober, 2008). Still, the foundational values are similar and thus, Aristotle and Plato's critical arguments are relevant several centuries later.

Aristotle was less critical than Plato regarding democracy. Although he qualified democracy as a deviant constitution, he still considered it the best of a bad lot (Aristotle, 1981 [350 B.C.E.]; F. Miller, 2012). His argument resembles Plato. It is based on the premise that some people are more virtuous than others and, hence, it would be unjust to confer equal political power to all citizens (Christiano, 2003, p. 7). According to Aristotle, the end of the city-state is to promote a life of noble actions (the good life). Only those with virtue, property and freedom – the *aristoi*, the best persons - should be assigned political rights (F. Miller, 2012). Plato and Aristotle's arguments found echo among the modern consequentialist democrats of our time. Not surprisingly, modern and contemporary consequentialists have been accused of holding authoritarian, elitist and undemocratic positions (Schaffer, 2010, p. 7); particularly when they propose to weight voting according to normative capacities (J. S. Mill, 2008 [1861]), to disenfranchise the elderly (van Parijs, 1998) or to abolish local democracy (Arneson, 1993). Eventually, these accounts, with their outcome-oriented view, inevitably lead to a denaturalized conception of democracy or to its total rejection. In other words, the underlying assumption is that only a few enlightened and virtuous individuals are qualified to decide on the matters of the public; the rest of fellow citizens are assumed badly equipped to decide by themselves.

Democracy has also been traditionally justified on utilitarian grounds. It is presented as the best servant to the utilitarian mantra of maximizing utility for the biggest possible share of citizens. Bentham singles out democracy for being:

"The only species of government, which has or can have for its object and effect the greatest happiness for the greatest number" (Bentham, 1843, p. 47).

Consider as well the following excerpt from Alexis de Tocqueville in "Democracy in America":

"Democratic laws generally tend to promote the welfare of the greatest possible number; for they emanate from the majority of the citizens, who are subject to error, but who cannot have an interest opposed to their own advantage. […] The advantage of democracy does not consist, therefore, as has sometimes been asserted, in favoring the prosperity of all, but simply in contributing to the well-being of the greatest possible number" (de Tocqueville, 2003 [1835], p. 244).

Utilitarians directly connect democracy's distinctive majority decision mechanism with the expression of the "will of the majority". That is, democracy is taken as the best representation of the application of the utilitarian greatest happiness principle (J. Mill, 1992; Waldron, 2012). However, the "will of the majority" or those outcomes that may maximize the greatest happiness for the greatest number may come at the expense of legitimate interests of other individuals. John Stuart Mill, a classical utilitarian himself, already warned us about the perils associated with a potential "tyranny of the majority" (J. S. Mill, 2012 [1859], p. 33). For example, national, religious or racial minorities in a society may see their interests systematically threatened as the rulings of the majority ignore them. Being a "persistent minority" can lead to being treated publicly as an inferior (Christiano, 2008) which suggest that special institutions should be put in place to deactivate the persistence of the minority.

Utilitarians face similar challenges to those faced by consequentialist democrats. No room is left to accommodate intrinsic values like fairness, liberty, or the inherent importance of equal distribution of political power (Christiano, 2008). Utilitarian accounts have an exclusive focus on maximizing utility understood as pleasure, desire or satisfaction. Consequentialists justify democracy on the quality of the outcomes it produces.

Aristotle and Plato's arguments cannot be refuted with utilitarian arguments, because instrumental accounts deny the egalitarian character of democracy. Democracy becomes contingent on the calculation of utilities generated or the worth of the outcomes obtained. The moment other non-democratic alternatives generate higher amounts of social utility, or other "desirable" consequences, democracy becomes automatically discarded. Therefore, the justification for democracy cannot be left to instrumentalist arguments alone. Otherwise, democracy would incur the risk of eventually betraying itself by deceiving the core arguments of popular sovereignty and political equality that characterize it. Hence, we need to find other bases upon which to justify democracy.

4.2.1 Liberty, Equality and Democracy

Liberty is a potential candidate to ground the concept of democracy. Aristotle already considered liberty a definitional value of democracy:

"A basic principle of the democratic constitution is liberty. People constantly make this statement, implying that only in this constitution do men share in liberty; for every democracy, they say, has liberty for its aim" (Aristotle, 1981 [350 B.C.E.] VI 1317a40-b17).

Dahl links democracy to liberty in a very unique way. It contributes for individuals to self-determine their own paths in life:

"[Democracy] expands to maximum feasible limits the opportunity for persons to live under laws of their own choosing. […] To govern oneself, to obey laws that one has chosen for oneself, to be self-determining, is a desirable end." (Dahl, 1989, p. 89).

In many theories of democracy, liberty and the idea of human development are often presented as interrelated projects. According to Dahl, democracy offers the ground upon which human beings can find the liberty space to cultivate

their full potential capacities at the same time that they do so bearing in mind the limits of feasibility and fairness to others (Dahl, 1989, p. 89). Democracy is presented as the only project that allows self-determination to emerge from the individual up to the community. From a liberty perspective, democracy is a political mechanism that maximizes the opportunities for self-determination; for citizens to be free to pick-up their own paths in life. Dahl (1989, p. 89) illustrates this argument with a remarkable quote from book I, chapter VI of Rousseau's Social Contract where democracy is set out to

"[…] find a form of association that defends and protects the person and goods of each associate with all the common force, and by means of which each one, uniting with all, nevertheless obeys only himself and remains as free as before" (Rousseau, 1968 [1762], p. 60).

The relevancy of the liberty argument for the idea of democracy is indisputable. Still, liberty does not provide the robustness needed to act as the foundational pillar of democracy. Thomas Christiano (1996, pp. 19-43) points out two problems that challenge the proponents of liberty based arguments of democracy when they try to establish the connection between democracy and self-determination: the trade-off and the incompatibility problem. First, according to the trade-off problem, liberty based arguments do not address why a person is freer when she takes part in a democratic process than when she just cares about other private non-political issues. It is unclear why the political liberty that democracy requires is essential to liberty overall. I could live under a ferocious dictatorship and still enjoy my liberty as long as my private life path did not interfere with the will of the ruler.

Secondly, the liberty argument faces an incompatibility problem. It fails to show why democracy is not simply discordant with self-government. When a democratic majority takes a decision to interfere or limit my own plans, my

liberty is truncated. Therefore, under a "liberty-based" logic democracy would not be justified.

To overcome the limitations of the liberty argument of democracy, Christiano, proposes to ground democracy into a principle of equality; more specifically, a principle of equal freedom (1996, p. 18). Democracy must reflect the fact that some cannot be freer than others; we must all be equally free. Consequently, each of us should have an equal right to participate in the determination of the rules by which we want ourselves to abide.

4.2.2 Democracy as Equality and Autonomy

Equality, in contrast to liberty, provides a safer ground where to establish a concept of democracy that is effectively connected to freedom and self-determination. From there we can derive all the power and significance of the democracy concept. In fact, any attempt to justify or discuss the nature of democracy must consider its impact on equality. The question that follows, then, is equality of what?

A first approximation could be to promote the equality of well-being for all members of a society. This account, though, requires that each individual in the community lives a life of the same total level of well-being as everyone else (Christiano, 1996, p. 58). It is easy to foresee that profound disagreements among members of a society can arise in the discussion of what exactly implies to enjoy "equality of well-being". What might comprise a desirable well-being standard for citizen A might not comprise it for citizen B. The principle of equal well-being is not concerned with the method by which decisions are made; it does not say anything about who has the right to rule (Christiano, 1996, p. 56).

Alternatively, we could consider equality as the equal advancement of citizen's interests. Still, we would face similar challenges as with equality of well-being. Interests of citizens are diverse because of a multitude of factors like culture,

socio-economic background, gender or the idea of the good life, just to name a few. Again, one could expect substantial disagreement and controversy in how to advance each person's interests equally. According to Christiano (2008), only a conception of equality that genuinely advances equally the interests of members of a society, but that does so in a way that all conscientious and informed people can agree, may succeed. Equality, in the realm of democracy, has to be understood as political equality[8]. Hence, political equality suggests an equal consideration of interests as well as an opportunity to participate in the determination of the common legal, economic and political institutions under which one lives (Christiano, 1996, p. 47; 2008).

Political equality is the only account of equality that can take our common and unique condition of human beings seriously. As human beings, unlike other animals, we are not guided by instinct. We are capable of willful action (Ulrich, 2008, p. 13). We can reflect on our plans and pick up the course of action that best suits our reasons. We are autonomous moral creatures because we all enjoy the capacity to use reason and self-determine our actions. Such capacity is a definitional trait of our personhood, our undeniable status as human beings.

Kant's practical reason – i.e. our common ability to justify our actions – unconditionally presupposes human beings as free creatures. Freedom implies that there are no external impediments to act according to our will, but it also requires a law in guiding our decisions (Christman, 2015). According to Kant, an individual can follow law out of two reasons: out of heteronomy or out of autonomy (Kant, 2012 [1785], p. 41 4:433). To act out of heteronomy is to act inclined by desire, pleasure or fear. It is an action not founded exclusively on reason.

[8] Christiano coined the term "public equality", which is closely aligned with the more common term "political equality" found in the related literature. For the sake of clarity, I will use the latter term.

Alternatively, one can act according to principles guided by reason and follow them autonomously. Only when one acts autonomously can she or he be considered free. Autonomy, Kant affirms, is "the ground of dignity of human nature and of every rational nature" (Kant, 2012 [1785], p. 43 4:436). Scruton, in his interpretation of Kant's concept of autonomy, adds that "the autonomous being is both the agent and the repository of all value, and exists, as Kant puts it 'as an end in himself'" (Scruton, 2001, p. 86). Therefore, not all laws that we may autonomously come up with can be accepted as valid; only those respecting the freedom of all other individuals are worth praising – i.e. those that can be applied universally. Or as Kant framed it in the first formulation of his categorical imperative: "act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction" (Kant, 2012 [1785], p. 34).

The only way that our laws become universal is by restricting our own freedom and making sure that I respect everybody else's freedom. Therefore, as the second formulation of Kant's categorical imperative states, one shall treat humanity "never merely as a means to an end, but always at the same time as an end in itself" (Kant, 2012 [1785], p. 45). When we treat others as means serving our own ends we are denying their autonomy and, hence, violating their claim to our respect (Scruton, 2001, p. 87).

The respect for the dignity of any human being is indissolubly linked to acknowledging that all human beings share an equal capacity to reason autonomously and to act accordingly. Held (1995, p. 146) defines autonomy as the "capacity of human beings to reason self-consciously, to be self-reflective and to be self-determining. It involves the ability to deliberate, judge, choose and act […] upon different possible courses of action in private as well as public life".

However, to effectively self-determine their life, individuals are contingent on the opportunity to develop the capacities necessary to do so, which in turn are intimately related to the capacities required for political rule (Warren, 2011, p. 526). Self-determination inevitably requires self-development. Taking all these elements into consideration, we can define democracy as:

"[…] any system of institutions, social structures, and practices that maximizes self-determination and self-development relative to other possible alternatives given (a) the social interdependencies of human life, and (b) an ethic that views each human life as intrinsically and equally worthy" (Warren, 2011, p. 525)

Autonomy or self-determination, is the ultimate principle underlying all justifications of moral judgments and norms (Wettstein, 2009, pp. 30-31). The political realm should not be an exception. The political realm ought not to stay immune to the respect of human being's dignity. The political realm must also reflect the respect for the equal capacity of all human beings to morally self-determine their own path in life (Waldron, 2012, p. 193). Democracy, when grounded on political equality, is the political system that best fulfills and respects the principles of human autonomy and self-determination.

4.2.3 Democracy and Justice: Liberals and Deliberative Democrats

Arguments justifying the connection between democracy and justice abound. Broadly speaking, they can be intrinsic or instrumental. Democracy, Rainer Forst contends, must be promoted in the public realm because, ultimately, "it is what justice demands" (Forst, 2014, p. 201). Contrastingly, Iris Marion Young holds that democracy is "the best political form for restraining rulers from the abuses of power that are their inevitable temptations. Only in a democratic political system, […], do all members of a society in principle have the opportunity to try to influence public policy to serve or protect their interests" (I. M. Young, 2002, p. 17). Democracy, Young concludes, represents "the best

means for changing conditions of injustice and promoting justice" (ibid.). In both cases, though, the conclusion is the same: democracy and justice are intimately interconnected.

In his celebrated book "A Theory of Justice", Rawls presents his account of justice and discusses what a just society should look like (Rawls, 1999b). Democracy and its principles are at its core. Rawls presents a thought experiment, the original agreement, to determine the principles upon which "free and rational persons, concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association" (Rawls, 1999b, p. 10). Parties taking part in the original position thought experiment discuss the principles of justice covered under the *veil of ignorance*. Under the veil "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like" (Rawls, 1999b, p. 11). Agreements reached in this *original position* would be considered fair. Hence, Rawls presents *justice as fairness*. Two principles, Rawls argues, would be fairly agreed in the original position (Rawls, 2001, p. 42):

1. Each person has an equal right to a fully adequate scheme of equal basic rights and liberties, whose scheme is compatible with a similar scheme for all (principle of equal liberty).
2. Social and economic inequalities are to satisfy two conditions: first, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society (principle of difference).

Through the principle of equal liberty Rawls endorses democracy as part of his account of justice when he acknowledges that among the important liberties

one can find the political liberty consisting of the right to vote and to hold office (Rawls, 1999b, p. 53). Later, he specifies that the main institutions of a basic structure of society complying with the principles of justice emerging out of the original position are those of a constitutional democracy (Rawls, 1999b, p. 171). This is the case because "[i]deally a just constitution would be a just procedure arranged to insure a just outcome" (Rawls, 1999b, p. 173)

However, Rawls warns us that democracy does not necessarily lead to just outcomes:

"Clearly any feasible political procedure may yield an unjust outcome. In fact, there is no scheme of procedural political rules that guarantees that unjust legislation will not be enacted. In the case of a constitutional regime, or indeed of any political form, the ideal of perfect procedural justice cannot be realized. The best attainable scheme is one of imperfect procedural justice" (Rawls, 1999b, p. 173).

The criterion of what constitutes a just outcome resulting out of a democratic decision making process cannot be found in the definition of an appropriate procedure. Just democratic procedures can lead to unjust outcomes. Hence, through Rawls lens one can conclude that "the standard of justice is independent of the procedure" (Gould, 2004, p. 18).

Contrastingly, deliberative democrats hold the opposite. For them an outcome is just if it is the result of a democratic decision process. According to Habermas, one of the greatest exponents of the deliberative democracy approach, the validity of any norm is subject to the Discourse Principle. This principle "explains the point of view from which norms of action can be impartially justified" (Habermas, 1996, pp. 108-109). The principle states as follows:

"Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses" (Habermas, 1996, p. 107).

Deliberative democrats identify processes through which those individuals potentially affected by norms can take part in the elaboration of the rules and institutions that shall bind them. The priority is to "arrive at a rational consensus by means of argument in an ideal speech situation. This is an ideal-normative model of a procedure, in which norms are considered, validated, and agreed to solely by the force of the better argument" (Gould, 2004, p. 26).

Democracy, from a deliberative perspective, is conceived as a form of practical reason (I. M. Young, 2002, p. 21). A process in which problems, conflicts and legitimate needs are discussed, and participants present proposals on how to best resolve them. The aim is to embark participants in a dialogical process where arguments are fine-tuned and eventually decisions are taken according to what the collective agrees are the best reasons, not necessarily those that have the highest numerical support. What counts as just is the agreement that participants would reach in ideal discourse conditions, namely: inclusion, equality, reasonableness, and publicity (2002, pp. 23-25, 31).

The idea of inclusion is directly connected with the moral respect that all persons deserve. Those individuals who are to abide by a set of norms the elaboration of which they have not been able to take part or represent their interests in it are treated as means. The inclusion principle requires that all those affected take part in the decision making so the resulting outcome can be considered legitimate. By "affected", Young establishes all those individuals whose options for action result significantly conditioned by decisions or policies.

Political equality is a defining characteristic of democracy, and it inevitably plays a crucial role in a deliberative approach as well. In fact, not only all those affected should take part in the democratic deliberative process but also each

participant should be included on an equal basis. This implies that all participants ought to enjoy equal opportunities to express their interests and concerns as well as the opportunity to enter into a dialogue where they can respond and criticize one another's arguments. These conditions, however, cannot be realized unless a third condition is warranted: the freedom from domination (I. M. Young, 2002, p. 24). That is to say, all participants ought to play an equal role in the democratic process so none is able to coerce or threaten others to adopt a given argument.

Reasonableness is the fourth defining feature outlined by Young. Participants are required to be reasonable to enter into the democratic process. Reasonableness is not determined by a certain type of content brought forward by the participant but by her willingness to enter the discussion with the intention to reach an agreement. "Only if the participants believe that some kind of agreement among them is possible in principle can they in good faith trust one another to listen and aim to persuade one another" (I. M. Young, 2002, p. 24). Reasonableness demands the will from the participant to listen to other participant's contributions, respect them and make an effort to understand their position. One ought to join the discussion with a mindset open to challenge one's own positions as well as to be persuaded by others' arguments.

The conditions of inclusion, equality and reasonableness, lead to the creation of a public sphere[9] where decision-making happens and participants hold one

[9] The concept of the "public sphere" is not used, as liberal scholars would, as a synonym of "what belongs to the state or the government administration". Instead, I adopt a deliberative approach to the concept where the public sphere is defined as a "sphere of public information, argumentation, and contestation constituted by a variety of actors such as associations, movements, etc. and by various media" (Forst, 2001, p. 369). Bauer (2011, pp. 57-70) discusses the grounds on which corporations can be considered part of the public sphere.

another accountable. Publicity is Young's final definitional pillar of the deliberative democracy approach. A public context consists of a plurality of individuals with different interests, backgrounds and goals. Therefore, when participants in the democratic process speak, they ought to speak for this plurality and convey their messages and proposals not only in a way that is understandable to all of them, but also in a way that others could accept even if they would not agree. Publicity is not about being understood or accepted by all other participants but about presenting arguments that are understandable and acceptable by all (I. M. Young, 2002, p. 25).

4.2.4 Beyond the Aggregative Model of Democracy

Both accounts of democracy, the liberal represented by John Rawls and the deliberative represented by Young and Habermas, share in common a concern for the fact that modern societies are no longer culturally homogeneous. Societies contain a plurality of worldviews or "comprehensive doctrines"; no political or legal structure ought to assume the prevalence of one view over others. Hence, both accounts have the notion of consensus as a common ground and prioritize what is right (or just) over a pre-defined conception of the good, or as Rawls pointed: "justice draws the limit, the good shows the point" (Finlayson, 2005, p. 100; Rawls, 2005, p. 174). Both accounts share common requirements, namely: a rule of law, the adoption of voting as the decision making mechanism when agreement is unreachable or too costly, the provision of freedoms of speech, assembly association and others (I. M. Young, 2002, p. 18).

Yet, they profoundly differ on what should be the path leading to what is just. While for deliberative scholars, inspired by discursive ethics, the discursive conditions of a democratic procedure set the tone for justice, liberals emphasize that procedure is no guarantee of it. According to Rawls, the principles of justice are independent from the democratic processes they constrain; they rely on the authority of a hypothetical original agreement that is

not the result of an actual voting or deliberation. Both liberal and deliberative democrats "seem to hover between a substantive justification of procedure and a procedural justification of substance" (Gould, 2004, p. 21).

Liberals, in contrast to deliberative democrats, tend to rely on an aggregative understanding of democracy. The greatest exponents of this approach are Josef Schumpeter (1947) and Anthony Dows (1957) who developed the Competitive Elitist model of democracy (Held, 2006, pp. 125-157). They conceived democracy as a market competition between party elites to capture the biggest share of voter's preferences. Ultimately, democracy "means only that the people have the opportunity of accepting or refusing the men who are to rule them" (Schumpeter, 1947, pp. 284-285). Citizens, in turn, are assumed to act and vote exclusively on the grounds of their self-interest and they are required by democracy to "do no more than vote and then sleep between elections" (Dryzek, 2001, p. 663). Not surprisingly, Schumpeter affirmed that "there exists no more democratic institution than a market" (Schumpeter, 1947, p. 184). Eventually, the commitment to politics is understood as "purely instrumental, a kind of continuation of private business with public means" (Ulrich, 2008, p. 291).

According to Young, this model is oriented towards the adoption of those policies, leaders and rules that best match with the most strongly and widely shared preferences among the community. They do so behaving strategically: they adjust their actions and messages, build coalitions and exert pressures. Eventually, this competition is reflected on the outcomes of elections and legislative decisions (I. M. Young, 2002, p. 19).

The aggregative model faces several problems in its attempt to connect democracy with the advancement of justice. Young provides three arguments underpinning this position. First, preferences are taken as a given. Neither their origin, nor their content, nor their motivation are significant factors considered

by the aggregative model of democracy. Thus, no quality, discrimination or prioritization of preference is valid. Preferences are presented as external factors; hence, no emphasis or interest is placed on understanding how such preferences may change as a result of the interaction in the political process with other participants with different preferences.

Secondly, the role of democracy is limited to the identification and aggregation of preferences to determine which are the most widely supported. The approach to politics is founded on individualistic terms. Participants in the process are requested to stay within their private realm of interests and preferences. They are not required to reflect on a common idea of the public and thus discard any potential need for co-ordination or co-operation.

Thirdly, Young argues that within an aggregative model of democracy, reasons presented under moral grounds do not enjoy any type of priority. They are treated as any other preference "which is no more rational or objective than any other" (I. M. Young, 2002, p. 21). Taking all things into consideration, the aggregative democracy approach offers weak arguments to consider its outcomes legitimate. Although the outcomes may point to the most widely supported set of preferences, no convincing reasons are provided that justify why those who do not share these preferences ought to abide by them.

The difficulties the liberal democratic project encounters in the advancement of justice are particularly relevant in a Post-Westphalia governance context. The arguments just presented by Young only add to the struggles of the Westphalia model of governance outlined in chapter 2. In a context where the lines between the public and private blur and states no longer exercise a hegemonic role in the political sphere, the liberal normative precepts of democracy actually hold back justice. The waning of the state role requires exactly the opposite of what liberal aggregative democracy prescribes. Participants in the political process should take a step forward out of their

private role and think in terms of the common good. This requires building legitimacy through the exchange of valid reasons among participants. The liberal aggregative view cannot support these premises; only a deliberative approach to democracy offers a coherent path forward.

4.3 Autonomy, Democracy and Human Rights

Among the most remarkable and innovative contributions to democratic thought made by Habermas is his understanding of autonomy. He combines into an entirely new approach two democratic traditions usually thought to be alternatives: liberal democracy and civic republicanism (Habermas, 1994, 1996).

Finlayson does a good job explaining how Habermas marries both accounts (Finlayson, 2005, pp. 109-113). Liberal democracy places the understanding of autonomy on the individual equipped with a set of human rights. These rights protect the freedom of the individual in its quest for pursuing her interests as long as they are compatible with everybody else's freedom. Freedom is conceived as an opportunity. Hence, citizenship or the participation in the politics of the community has only an instrumental value in securing my interests and my opportunities. The state or any other public authority ought to be neutral and not to represent any particular set of beliefs or values, but enable its citizens the opportunity to exercise them. The liberal idea of human rights, Finlayson emphasizes, is "a moral idea that is inevitably biased against any value or world view that is inconsistent with basic rights and liberties for all" (Finlayson, 2005, p. 110).

For civic republicans, instead, the idea of public autonomy that should drive democracy is not the glorification of the individual's private autonomy in form of opportunities, but popular sovereignty (Finlayson, 2005, p. 111). Freedom lies in the collective decision-making emerging from the assembly of the

community. Individual rights are rooted and dependent on the values and ideals of the community. Thus, neither the state nor any public institution can be considered neutral; they ought to reflect the will of the community (ibid.).

Habermas takes both accounts of autonomy, the republican public sovereignty and the liberal human rights, and merges them into one. For him, one is not the opposite of the other; both notions of autonomy are co-original and presuppose each other. Politics, it turns out, becomes the expression of the "freedom that springs simultaneously from the subjectivity of the individual and the sovereignty of the people" (Habermas, 1996, p. 468). However, Habermas does so at the expense of modifying and rejecting some key features of both republicanism and liberalism. Habermas, for instance, rejects the liberal idea of human rights as pre-political instruments and the accompanying neutrality of the state. Rights should not depend on the ethical self-understanding of the community nor should the state embody their values exclusively (Finlayson, 2005, p. 112). Rights, according to Habermas, ought to establish the "conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized" (Habermas, 1996, p. 103).

The deliberative understanding of human rights and democracy causes profound discomfort among liberal based scholars. The work of Carol C. Gould is representative of such unease and it allows us to dig deeper into the connection that binds democracy and human rights. Gould holds that the Habermas approach is stuck into a problem of infinite regress. To create just norms we need to deliberate and validate the norms that shall guide the discussion regarding the norm creation, which at the same time require that they be justly discussed (Gould, 2004, p. 25). Non-discourse related human activities (e.g. art, research, care, etc.) are discarded as contributors or requirements to freedom and equality. Only those conditions required for the conduct of an effective discourse process count. Additionally, those who are unable or unwilling to take part in the discourse are dropped from the process;

an aspect that gives Gould the basis to qualify the Habermasian approach to democracy and human rights as culturally relative (Gould, 2004, p. 27). Gould holds that rights cannot be grounded on what may result out of a discourse process but can only be grounded on the feature that uniquely characterize human beings: freedom.

Gould does value deliberation and sees it as part of a democratic process but does not conceive it as the source of justice. Instead, "the common root or the common foundation grounding justice and democracy is freedom, as the distinguishing feature of human action" (Gould, 2004, p. 33). Gould speaks of "positive freedom", a concept she connects with self-development. That is, "the freedom to develop oneself through one's actions, or as a process of realizing one's projects through activity in the course of which one forms one's character and develops capacities" (Gould, 1988, p. 40). Such conception of freedom requires people to have access to the material and social conditions deemed necessary to realize their freedom. Gould, then, starts from the premise that the capacity to exercise free choice (capacity for self-determination) is an inherent characteristic of human agency – i.e. it is common to all human beings in virtue of being human. However, the recognition or the possession of the capacity for self-determination is not sufficient to enjoy freedom, it remains abstract and empty unless it is exercised (Gould, 2004, p. 33).

Freedom is contingent on material and social conditions that allow self-determination; hence, Gould concludes, each agent must have a "prima facie" equal access to these material and social conditions (Gould, 1988, p. 40). The rights that provide access to the conditions of self-development and freedom need to be recognized as "human rights" (Gould, 2004, p. 37). Gould finds, in her foundational equal right to the conditions of self-development, the normative justification for democracy. In her own words democracy provides "the institutional form of decision-making that most fully serves as a condition

for freedom" (Gould, 1988, p. 90). Gould's account gives justice normative priority over democracy and, consequently "justice may legitimately constrain the democratic process when it leads to outcomes that violate the equal freedom of individuals" (Gould, 2004, p. 37). Largely, Gould confronts us with a comprehensive normative approach where justice, democracy and human rights remain all tied up together by the notion of individual freedom as self-development.

Gould's approach, I find, is overreaching and, eventually, detrimental for the advancement of both democracy and human rights. We discussed earlier in this chapter the limitations of founding democracy on the exclusive pillar of freedom. It is true that all human beings enjoy an equal capacity for moral reasoning and the self-determination of their path in life. This is the genuine cornerstone of democracy. However, Gould takes a step into a dangerous direction when she affirms that the capacity for self-determination gives rise to an equal right to self-development. In fact, what is truly problematic is not the connection between self-determination and self-development; but associating self-development with a pre-defined set of social and material conditions that she defines as human rights.

Democracy should not be based exclusively on self-development as Gould contends. Democracy is about the possibility to decide and participate, as a self-determining agent, in shaping those institutions that bind me (Christiano, 1996, p. 47; 2008). Gould does not pre-establish a list of specific social and material conditions for self-development; this would directly constrain freedom. However, she rejects any option that may subject these conditions to questions or to a discourse process. The social and material conditions that enable self-development are taken for granted, as if they were politically neutral. Human rights, though, do have a political load, particularly when they have to be applied to specific contexts or societies. Actualizing human rights requires putting in place key institutions enabling self-development (e.g.

minimum care, education, justice, government, etc.). These institutions are essentially political and must count on the input and consent of those affected to truly enable genuine self-determination. In other words, human rights inevitably require democracy for their just realization. They not only concern the access to certain goods or capabilities but, more essentially, they incarnate the opportunity to raise one's voice over those institutions that bind me.

4.4 Democracy and Human Rights: Beyond Suum Cuique

The connection between democracy and human rights defended by Gould is representative of a common perspective within liberal thought [10]. It is essentially rooted on an understanding of justice as "Suum Cuique": to each (or from each) his own. From a "Suum Cuique" point of view, the central issue of justice revolves around the discussion of what goods (or "social and material conditions enabling self-development" as Gould would claim) individuals can justly receive, claim or deserve. The political philosopher Rainer Forst defines this approach to justice as "recipient centered" and points out some of its relevant limitations (Forst, 2014, pp. 4-5).

The Suum Cuique perspective is absolutely centered on solving the problem of how to distribute certain goods justly. It is in this sense that Gould's equal right to social and material conditions seems to exist foundationally. No arguments are provided regarding how these goods are produced, their just organization; questions regarding their structure of production and distribution

[10] Another potential connection is represented by the discussion around the question of whether there exists a human right to democracy (cf. Benhabib, 2012; Christiano, 2011; Cohen, 2006). Yet, I decided not to enter into this debate because the argument put forward in this dissertation should work independently of any argument supporting or rejecting a hypothetical human right to democracy.

are systematically neglected. Her approach, as well as any approach grounded on a Suum Cuique perspective, takes individuals as passive recipients of goods. In these terms, "justice can no longer be understood as a political accomplishment of the subjects themselves" (Forst, 2014, p. 5). Claims to goods do not simply "exist" but must be justified. Moreover, justification can only occur via "discourse in the context of corresponding procedures of justification in which – and this is the fundamental requirement of justice – all can in principle participate as free and equal individuals" (ibid.).

Forst points out an additional neglect of the Suum Cuique perspective: the question of injustice. Putting goods at the center of justice, and hence at the center of human rights and democracy, does not allow us to distinguish human suffering resulting from a natural catastrophe from the suffering resulting out of economic or political conditions of exploitation. In the first case, what justice requires from us, Forst argues, is moral solidarity and generous assistance. In the later situation justice require us to challenge not the scarcity or provision of goods but the political structures that lead to exploitation. Therefore, "justice must be geared to intersubjective relations and structures, not to subjective or putatively objective states of provisions of goods or well-being. […]" (Forst, 2014, p. 6). Justice has to be approached through the analysis and transformation of the types of relationships that bind us. It should not be understood exclusively in terms of the ability to access pre-defined goods. Forst elegantly synthesizes that point: "the basic question of justice is not what you have but how you are treated" (ibid.).

Justice can be defined by its opposite, arbitrariness as domination: "arbitrary rule of some over others – that is, rule without proper reasons and justifications" (Forst, 2014, p. 7). Similarly, Iris Marion Young connects democracy's dimensions of self-determination and self-development with two opposing conditions of injustice: domination and oppression (I. M. Young, 2002, pp. 31-33).

On the one hand, Young conceives self-determination as the ability to participate in the determination and the condition of one's action. *Domination*, instead, represents an institutional constraint on self-determination. To live under the structures of domination implies that other individuals or agents, either directly or indirectly through other institutions, determine without reciprocity your conditions for action (I. M. Young, 2002, p. 32). Under these circumstances, freedom understood as the absence of relations of non-domination (Pettit, 1997) is curtailed.

As we plan our own path for action we may not only find interference from other actors but also, and more importantly, we may encounter institutional relations of domination – i.e. institutional actors attributing power to other agents to coerce and limit our choices. Potentially, our life plans and projects of different agents may conflict and therefore there is a need for institutions regulating domination and interference. Self-determination as non-domination necessarily implies the participation of individuals in the collective regulations that prevent domination (I. M. Young, 2002, p. 33).

On the other hand, Young refers to *oppression* as any institutional constrain on self-development. The underlying idea is that just (democratic) institutions ought to provide the means for all persons to learn and expand the capacities that are required to participate and elaborate with others on a common vision for a given social context. Self-development is hence related to access to goods such as health, food, shelter, education, etc.

Young's approach to self-development is closely related to the arguments held by Carol C. Gould and Amartya Sen. As discussed above, Gould understands self-development as enjoying access to social and material goods – i.e. what she equates as human rights. Similarly, Sen's account of justice is grounded on the provision of the goods or opportunities to enjoy the capabilities required to live a "good life" (Sen, 1999).

These two accounts are a results-oriented conception of justice; they presuppose from the start what should be the desirable outcome and, hence, the process that leads to this outcome plays a secondary role (Forst, 2014, p. 12). In Gould and Sen's accounts, dimensions of justice like the origin, the construction process or even the institutions involved are neglected. Thus, neither one nor the other can distinguish whether the causes of a famine are related to a dramatic drought or to a monopolistic control of land by the food industry. Both approaches would praise the indispensability of food and the imperious need to be provided to victims; none would go further to challenge and bring light into how institutions' work may violate justice. Justice is not only about a particular outcome but also about who determines the basic structure of society and the process it uses to do so (ibid.).

Eventually, Young opts not to look exclusively into self-development as the equal distribution of certain goods or capabilities. She is concerned that this would entail a too limiting perspective on justice. Young, instead, suggests to look at how the division of labor and the structures of communication and co-operation are organized in society (I. M. Young, 2002, p. 32).

Forst further elaborates and expands upon Young's views on democracy and justice. "The basic impulse that opposes injustice", Forst argues, "is not primarily one of wanting something, or more of something, but is instead that of not wanting to be dominated, harassed or overruled […] (Forst, 2014, p. 8). To fully respect an individual's autonomy and dignity is to be subject to norms for which one offers and has been offered justification. This is exactly the opposite of what happens when individuals are "regarded merely as recipients of redistributive measures and not as independent agents of justice" (Forst, 2014, p. 22). Hence, Forst advances the idea that justice demands that all individuals enjoy an equal right to "take part in the social and political order of justification in which the conditions under which goods are produced and distributed are determined" (2014, p. 11).

This approach to justice directly implies that human rights should not be conceived as "immediate claims to certain substantive 'goods' but to a certain social and political standing of persons as 'norm-givers'" (Forst, 2010, p. 733). Democracy becomes an indispensable tool through which this political standing can be realized.

Altogether, this chapter emphasizes the inadequacy of grounding the concepts of democracy and human rights exclusively on the idea of freedom. Only the notion of political equality can take seriously our common condition as moral autonomous creatures – i.e. our capacity to self-determination. Self-determination, nevertheless, cannot be narrowed down to the material and social conditions necessary for self-development as Gould would argue. Democracy is about the possibility to decide and participate, as a self-determining agent, in shaping those institutions that bind me (Christiano, 1996, p. 47; 2008). This inevitably includes participating in those institutions that actualize human rights. Put differently, the realization of human rights in the public sphere requires a decision-making process that is consistent with democracy. Part III of this dissertation, and particularly chapter 6, will elaborate on the implications of adopting such democracy perspective on human rights.

Part III

5 The Contour Lines of the Human Rights Concept

Part III of this dissertation presents the concept of human rights. The notion of human rights is used in a myriad of arenas, from law, international relations or politics to, the case of this study, business. Its content, meaning and scope vary from field to field. However, it is safe to argue that across these disciplines exist some elements and characteristics allowing to identify a common basic conception of human rights. The business and human rights discussion is perhaps one of the latest domains to start using it; it still has a long way to cover but it has made significant progress over the last years, particularly thanks to the mandate and the work done by the UN Special Representative of the Secretary General (SRSG) John Ruggie.

The goal of chapter 5 is not to provide the reader with a comprehensive outline of the human rights concept. Instead, the aim is to present what I think are the most indispensable elements and definitional characteristics of human rights that should inform any BHR discussion. Hence, most of the chapter is dedicated to highlight the specific nature of human rights, its key characteristics as well as an initial overview of the types of duties that human rights generate.

The subsequent chapter 6 goes one step further and reviews different justificatory accounts of human rights. The goal will be to shed light on what should be the most suitable understanding of human rights to confront the Post-Westphalia governance context. Eventually, I will opt for a deliberative approach to human rights based on the work of the German philosopher Rainer Forst. Foreshadowing a bit, I will argue that Forst's understanding of human rights is best positioned to guide corporations in the realization of their human rights responsibilities. Before we get into the details, though, let us go step-by-step and start here, in chapter 5, with the basics.

5.1 Human Rights as (Moral) Rights

It sounds a bit redundant to start the discussion by affirming that human rights are *rights*. Yet, human rights are essentially this: rights. The concept of *right* already contains key aspects of the human rights idea. Rights, according to Leif Wenar, "are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states" (Wenar, 2015).

Rights identify what actions are permissible and what institutions are just. They structure the form of governments, the content of laws, and the shape of morality as it is currently perceived. To accept a set of rights is to approve a distribution of freedom and authority, and so to endorse a certain view of what may, must, and must not be done (ibid.). Rights have a special normative force (Wenar, 2015). Rights are conceived as instruments of "last resort", one invokes them when things do not look good. Likewise, human rights are the last resort in the realm of rights; there are no higher rights where to appeal (Donnelly, 2003, p. 12).

A right is an instrument by which agent A (the right holder) is entitled to an object of right, a purpose, a right to something. Every right has a duty bearer or addressee: an agent B who has a corresponding duty to agent A to provide or realize the object of agent A's right. If agent B failed to discharge its obligations in regards to agent A, agent B would be harming agent A's right and agent B would be subject to special remedial claims or sanctions. Agent A is not simply a passive beneficiary, a right empowers agent A. Agent A can "exercise" her right when it decides to claim the right to which she is entitled to agent B (Donnelly, 2003, p. 8). The more specified the elements of object, content, addressee and rights-holder, as well as the accompanying qualifications, the more determined the right (Nickel & Reidy, 2010).

Yet, human rights are rights of a very special nature. They are moral rights of the highest order (Donnelly, 2003, p. 11). As moral rights, human rights provide "the rational basis for a justified demand that the actual enjoyment of a substance be socially guaranteed against standard threats" (Shue, 1996, p. 13). Yet, how can we distinguish a regular moral right from a "higher order" human right?

Wettstein compiles three criteria to sort out this question (Wettstein, 2009, p. 58). First, human rights cannot further specify its rights-holders other than to the whole of human race. Rights are enjoyed exclusively on the base of being human. Secondly, human rights protect "our most fundamental human freedoms, that is, the freedoms that are constitutive and thus inevitable for being human". Finally, the third criteria is adopted from Amartya Sen's work (Sen, 2004, p. 329). Sen claims that a right, in order to qualify as a human right, must not only be connected to a fundamental human freedom but it must also be, in principle, susceptible to the claims of others. Take, for example, the hypothetical human right to be loved by your parents. There is no doubt that enjoying the love and support of parents is a crucial variable for the emotional well-being and future development of any child. Still, the "right to have supportive and caring parents" would not qualify as a human right. The reason is that we cannot influence nor force individuals to love their children.

Human rights are norms establishing limits to conditions beyond which no human being should endure. They protect the essence of being human: our autonomy as free beings. Henry Shue conceives basic rights as "everyone's minimum reasonable demands upon the rest of humanity. They are the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept" (Shue, 1996, p. 19). Nickel offers four reasons why human rights should remain as minimal standards (Nickel, 2007, p. 37). First, by remaining minimal we ensure their high priority and universality. Secondly, their minimalistic approach leave plenty of room for

democratic decision-making and for shaping institutions and practices so they fit in diverse cultures and traditions. Thirdly, such ample leeway also allows for circumventing a country's calls for zealous protection of independence and self-determination. Fourthly, their conception of minimal standards also helps to make them feasible in most countries around the world.

5.2 The Basic Features of Moral Human Rights

Human rights can also be distinguished from other rights because they meet a series of characteristics that make them unique in front of other rights. Human rights, as one can tell by their name, are rights applying to humans. They are rights that humans enjoy just by virtue of being human (Cranston, 1973; Gewirth, 1996, p. 9). No other condition or variable plays a role in defining the scope of beneficiaries of human rights. These are rights directly connected to our human condition; therefore, it logically follows that human rights are equal rights applying to all human beings or to none at all.

The universality condition of human rights is perhaps one of its most prominent characteristics. Human rights apply to all living human beings irrespective of any condition nationality, sex, religion, race, etcetera (Art. 2 United Nations, 1948). Nickel (2014, p. 3) argues that in the universality idea of human rights resides a conception of "independent existence". Human rights apply independently of the practices, morality, law or culture of a particular context (Campbell, 2006, p. 103) and they are not restricted by political boundaries (Nickel, 2007, p. 10).

Universality, however, is not an absolute condition; it requires specification. Some rights are applicable only to adults (e.g. right to vote), others may be restricted temporarily (e.g. a convicted) and others apply exclusively to minority groups, women or children who require special attention because of their vulnerability. Human rights are neither set in stone, in the sense of

applying in the same way at all times. Human rights are connected and presuppose the contemporary forms of social and political institutions (e.g. rule of law, the modern state). Thus, human rights are not universal. They do not apply to challenges and threats of every age. The right to join a trade union would have been pointless before the industrial revolution. Specific human rights are only as timeless as the specific problems they address (Nickel, 2007, p. 38).

Additionally, given the fact that one cannot be partially human or stop being human at all, human rights are considered inalienable, nonforfeitable and irrevocable (Donnelly, 2003, p. 10; Feinberg, 1973, p. 88). The condition of inalienability means that a right cannot be permanently forfeited or given up entirely (Nickel, 2007, p. 45). Its holders, Pogge points out, "cannot lose, not through anything they do themselves (waiver or forfeiture), nor through anything others do, for instance through an alteration of the law" (Pogge, 2011, p. 7). Any attempt to renounce a human right, either by the right holder or by any other agent, shall be declared null and void. Anybody acting as if human rights have been eliminated will be accused of its violation. However, the same way that occurs with the universality condition, human rights are not completely inalienable. Individuals, on occasions, opt for modes of living where they give up part of their basic rights; e.g. entering a monastery or joining the army. Still, few remain strictly inalienable; e.g. the right to life.

Human rights are high-priority rights. They can indistinctly confront national laws, ancestral traditions or private interests. Human rights create overriding obligations. As Nickel points out, human rights are not dependent for their existence on recognition or enactment by particular governments or authorities (Nickel, 2007, p. 10). Dworkin conceives rights as "trumps" (R. Dworkin, 1977). With this metaphor, Dworkin wants to emphasize that rights prevail over other strong considerations such as national prosperity or administrative

convenience (Nickel, 2007, p. 24). John Stuart Mill elegantly illustrates the trumpeting power of the right to free expression:

"If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be in silencing mankind" (J. S. Mill, 2012 [1859], p. 20).

Human rights exist beyond, and regardless of any other norm. They override other norms because they provide powerful reasons: they enable human beings to self-determine and self-develop along the lines that they dictate to themselves; human rights realize the meaning of human dignity. Thus, human rights are demands that cannot be postponed. They are "justified and urgent claims to certain types of urgent treatment" that people have "no matter what the world around them has done about that" (Nussbaum, 1997, p. 295).

A perhaps less laudable definitional feature of human rights is that there are few criteria available to help us determine when the concept is used correctly or incorrectly. Griffin claims that the terms human rights is criterionless, it is "less determinate than most common nouns" (Griffin, 2008, p. 14). He is concerned by their indeterminacy because, he argues, it makes them vulnerable to proliferation as new rights are systematically invented and existing ones see their content ballooning non-stop. However, as he himself recognizes, the protection of an individual's agency, as human rights intend, inevitably encounters lots of threats that can only be counteracted by lots of rights (Griffin, 2008, pp. 14-15).

5.3 Rights, not Goals

The interpretation of the content of human rights is not always clearly delimited. A widely spread approach to human rights is one in which they are interpreted as "goal-oriented" rights. Joel Feinberg's concept of "manifesto

rights" (1973; 1980, p. 153) is probably one of the most popular examples. Feinberg distinguished between claim-rights and manifesto rights. On the former type of rights, one can clearly identify the bearer of the right's obligation (addressee), while this is not the case for the latter.

"To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles. To have a claim in turn, is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming. The activity of claiming, finally, as much as any other thing, makes for self-respect and respect for others, gives a sense to the notion of personal dignity". (Feinberg, 1980, p. 155).

Thus, manifesto rights represent a sort of a catalogue of grievances and requests representing "the appeals of the injured and outraged to their all too indifferent fellow citizens or even humanity in general" (Shklar, 1986, p. 25). Manifesto rights are "based on needs alone, [they] are 'permanent possibilities of rights', the natural seed from which rights grow" […] "that usage, I think, is a valid exercise of rhetorical license" (Feinberg, 1980, p. 153).

Human rights, though, are neither a rhetorical instrument nor do they express mere suggestions, aspirations or goals. In fact, to think of human rights as mere demands or goals would belittle them "in just those cases where it is most urgent to assert them" (Pogge, 2002, p. 57). The fact that human rights often aim for a never-reaching horizon and call for deep political and social change "does not make them less truly rights" (Donnelly, 2003, p. 12). Rights have a mandatory character that serves as a basis for complaint that a high priority goal has not (Nickel, 2007, p. 25). A goal does not stipulate the path for achieving it. Rights are more definite than goals, and hence more suitable to enforcement. They have identifiable holders, scopes and addressees: they specify who is the one entitled to the object of the right (right-holder) and who

must act so to actualize the right (the addressee) (Nickel, 2007, p. 25). Therefore, human rights generate powerful morally grounded obligations.

5.4 A Matter of Justice

The American legal scholar Wesley Hohfeld defined four basic components of rights: privilege, claim, power and immunity (Hohfeld, 1964; Wenar, 2015). One enjoys a privilege to do X only when one owes no duty to X. I have the privilege to write a PhD dissertation only because I have no duty to write it. A claim requires that a duty be assigned to a duty bearer who owes it to the right-holder. I have a right to attend classes at school because I paid the tuition fees. Claim rights, though, may connect with more than one duty bearer and may require to refrain from action. For example, I have a right *not to be* tortured by *anybody*. The dimension of power within the Hohfeldian understanding of rights represents the ability to alter the privileges or the claims of another agent. As a professor, I have the "power-right" to request a noisy student to leave the classroom even though he paid his tuition fees. Conversely, immunity stresses the lack of ability to alter ones privilege or claims. As a citizen, I am immune to the claims of other citizens to send me to prison, only a judge has the power to do so.

Almost all of the human rights are or include claim-rights. They generate obligations and identify "party or parties (the addressees or duty bearers) who must act to make available the freedom or benefit identified by the right's scope" (Nickel, 2007, p. 23). Often, identifying who is responsible for specific rights-based obligations is far from a straightforward process. Immanuel Kant already proposed to distinguish between perfect and imperfect obligations (Kant, 2012 [1785], pp. 70-71 4:421). A perfect obligation allows us to identify three different components: the right, the obligation derived from it, and the corresponding agents that should bear the obligations. Imperfect

obligations, instead do identify the right and the obligation but fail to assign them to specific duty bearers (Wettstein, 2009, p. 124).

John Stuart Mill argued that "duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right" (J. S. Mill, 2001 [1861], p. 49). According to Mill, only perfect obligations emerge from justice while imperfect ones are related to "other obligations of morality", or what Wettstein labels as "required virtues" (J. S. Mill, 2001 [1861], p. 50; Wettstein, 2009, p. 127).

Similarly, Onora O'Neill (1996, pp. 139-147) defines imperfect obligations as well defined obligations without assigning a counterpart to assume them. Thus, for her these obligations depend only to the virtuous character of the agent. In other words, for both O'Neill and Mill, imperfect obligations fall outside the scope of justice and remain in the realm of virtue. Imperfect obligations are, consequently, equated to gifts or favors motivated by good will and for which the only response can be gratitude. Contrastingly, perfect obligations (or real rights) "can be demanded, claimed, insisted upon, without embarrassment or shame. When not forthcoming, the appropriate reaction is indignation; and when duly done there is no place for gratitude, an expression of which would suggest that it is not simply one's own or one's due that one was given" (Feinberg, 1980, p. 142). Mill and O'Neill's approach to rights parallels the one put forward by Feinberg. Let us recall that according to him, to have a right is to have "reasons or grounds that put one in a position to engage in performative and propositional claiming" (1980, p. 155). Put differently, Mill, O'Neill and Feinberg coincide in that a right exists if it can be effectively claimed. And to claim a right, these authors contend, requires to connect rights-holders to specific potential bearers of the corresponding obligations; otherwise "claims to have rights amount only to rhetoric" (O'Neill, 1996, p. 129). The philosopher Susan James has even gone further to suggest that a

right, in order to qualify as such, needs not only to point to a duty bearer but also that it must be effectively attainable - e.g. if there are no teachers, the right to education does not exist (James, 2005, p. 79).

The approach to imperfect human rights obligations taken by three featured authors directly weakens the justice-based account of human rights that this dissertation attempts to strengthen through a democracy perspective. Amartya Sen refutes head on this approach. He rejects that loosely specified obligations imply no obligations at all. Imperfect obligations "involve the demand that serious consideration be given by anyone in a position to provide reasonable help to the person whose human right is threatened" (Sen, 2004, p. 341). Imperfect and perfect obligations connect in the same way with rights. The difference, thought, lies in "the nature and form of the obligations, not in the general correspondence between rights and obligations, which apply in the same way to imperfect as well as perfect obligations" (ibid.). Therefore, imperfect obligations go beyond the realms of volunteered charity and elective virtues (Sen, 2004, p. 319), they are fully integrated in the realm of justice.

Human rights give rise to imperfect obligations and these obligations are no less connected to human rights than perfect obligations are. Human rights are obligations of justice, and so are imperfect obligations emanating from human rights. Thus, one should not own gratitude for seeing her human rights fulfilled; this would only be coherent if they were grounded on virtue instead of justice. In fact, in practical terms, virtue or charity, provide a false start upon which to construct human rights. As Beitz points out, it is difficult to foresee any agent enduring potential substantial sacrifices connected to the fulfillment of human rights obligations only on the basis of beneficence (Beitz, 2009, p. 167). Human rights obligations can be perfect or imperfect but they are all obligations of justice.

5.5 Human Rights Duties

Perfect obligations are typically associated with negative or passive rights, that is, rights for which their realization only requires to abstain from doing harm to others. The so-called "liberty rights" – i.e. rights protecting individuals' physical security and freedoms like speech, belief, privacy, etc. – nicely fit in this category; apparently one has simply not to interfere with other's rights. Perfect obligations are based on a causal connection between certain specific actions and a resulting violation of other's moral right (Wettstein, 2009, p. 124). Since the event that causes the right's violation is independent from who commits the violation, the corresponding obligation to the right becomes universal. Perfect obligations, according to Wettstein, are context independent (ibid.).

Imperfect obligations, instead, are often presented as positive rights – i.e. they require a positive action from another actor to actualize the right. This would be the case of subsistence or "welfare rights". The basic idea is "to have *available for consumption* what is needed for a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic interventions" (Shue, 1996, p. 23 emphasis added). E.g. without a government committed to funding and developing the structures and resources required for public and free education, the universal right to education of its citizens may not be effectively fulfilled.

Henry Shue dismantled the positive/negative rights dichotomy (Shue, 1996, pp. 36-40). Shue refuted that liberty rights – or security rights as he named them- were negative while subsistence - or welfare rights - were positive rights. The distinction between positive and negative rights is futile. Both, security and subsistence rights require of positive and negative actions. Shue illustrates the absurdity of the distinction between positive and negative rights with the example of the right to physical security and the right to food. At first sight,

securing the right to physical security may look like a pure negative right. However, the realization of this right does not only depend on others refraining from physically assaulting an individual, but it requires the readiness of a structure of justice (e.g. judges, lawyers, police, prisons, etc.) that can help prevent and prosecute aggressions. Such structure certainly requires lot of "positive action" to be developed and maintained. Compare this now with the actions required to secure a pure positive right like the right to food via a food-stamps scheme. Seems obvious that the positive-negative rights distinction does not provide much insight.

Shue suggests that, instead of filing rights into positive and negative categories, what proves meaningful is to look into the types of obligations they generate. Ultimately, the dichotomy between positive and negative duties relies on the premise that for every right there exists one, and only one, corresponding duty. Shue not only pointed out the meaninglessness of such schemes but also provided an entire new way to look at the duties that emerge from every human right.

Shue argued that the complete fulfillment of a basic right requires three different types of duties; not all of them must necessary be borne by the same agent. The three corresponding duties to every right are (Shue, 1996, pp. 51-64):

I. Duties to *avoid* depriving
II. Duties to *protect* from deprivation
III. Duties to *aid* the deprived

According to Shue the duties listed above would cascade down progressively. That is, the moment the duty to avoid depriving is unattended, the duty to protect would kick in; similarly, the duty to aid the deprived would be activated once protection from deprivation failed. Therefore, in an ideal world, when everybody voluntarily complied with his or her duty to avoid deprivation

there would be no need to protect from deprivation or to aid the deprived. Still, Shue fine-tuned his tripartite scheme by introducing further specifications to its second and third correlative duties (Shue, 1996, pp. 56-60):

I. To *avoid* depriving
II. To *protect* from deprivation
    II.1. By enforcing duty (I) and
    II.2. By designing institutions that avoid the creation of strong incentives to violate duty (I)
III. To *aid* the deprived
    III.1. Who are the one's special responsibility
    III.2. Who are victims of social failures in the performance of duties (I), (II-1), (II-2) and
    III.3. Who are victims of natural disasters

Shue argued that the duty to protect from deprivation (II) should not be understood as secondary, or subsidiary, to the duty to avoid deprivation. He acknowledged that to avoid the deprivation of a right, its enforcement is key. On occasions, rights deprivation may come unintended. Thus, he sets duty II.2 to construct institutions that can help in this respect. Finally, the duty to aid the deprived further specifies the circumstances upon which deprivation has occurred and thus aid is required.

Shue's work had a terrific impact, not only on the normative scholarly field, but also in the policy-making discussions at an international level. In 1999 the UN Committee on Economic, Social and Cultural Right issued General Comment 12 (1999). In its article 15, it recognizes that each human right imposes three correlative obligations on states: to respect, to protect, and to fulfill. The article reads as follows:

"The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and

to fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters"

Article 15 of the General Comment 12 is often taken as a clarifying article on what refers to the allocations of human rights responsibilities, at least from an international legal understanding of human rights. It clearly defines that states are the ones dealing with the three associated responsibilities to the right to food. Article 15 would later deeply influence the business and human rights debate on the human rights duties of corporations. In fact, the premise of the state's exclusivity in the fulfillment of human rights obligations and its suiting to a Post-Westphalian context will be a key discussion in the upcoming chapters.

5.6 Human Rights, Moral or Legal?

Human Rights have their most tangible representation in the form of international legal rights as embodied in a number of declarations, conventions, charters and international treaty bodies. The Human Rights Council, the Universal Declaration of Human Rights, the International Covenant on

Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR) are among the core instruments through which human rights take form in both practice and legal terms[11]. Human rights, though, are not simply legal claims; they are, in Sen's words, "quintessentially ethical articulations" (Sen, 2004, p. 321). That is to say, human rights are moral rights that often see themselves translated into constitutional or international laws.

There is no contradiction, dispute or conflict between legal and moral rights. A large number of human rights scholars embrace what Buchanan (2013, p. 280) and Tasioulas (2010) define as the "Grounding View" (GV) – i.e. the notion that international legal human rights must be grounded on moral human rights. In fact, most of the international legal human rights do make explicit reference to moral considerations in their wording. The Universal Declaration of Human Rights (UDHR), in its preamble, speaks of the "inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (United Nations, 1948). Similar statements based on moral principles can be found in other key legal human rights documents like the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights.

According to Buchanan international legal human rights are not regular rights, they are "rights designed chiefly to further the central goal of respecting the dignity or equal moral worth of individuals by realizing moral rights" (Buchanan, 2013, p. 282). Contrary to other types of law, international human rights law is not sourced on a legislative or judicial body that can revise or adopt new rights. They appeal to moral reasons found outside the law or any political entity: human dignity. Thus, the existence of human rights does not

[11] For a complete list of the core human rights documents consult the following link: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

depend on being instantiated into a treaty or convention; they "existed before they were codified and would continue to exist even if governments were to withdraw their legal recognition" (Pogge, 2011, p. 8). Sen even questions that human rights be approached as potential "laws in the making" and highlights the need to adopt and acknowledge other ways to realize the moral claims of human rights other than converting them into hard law (Sen, 2004, p. 326).

5.7 Human Rights as Political Instruments

A key take away from this chapter is that human rights are moral rights that express minimal requirements of justice to which all human beings are entitled. Human rights define basic standards that should shape our life in common. The realization of human rights is, essentially, a political endeavor. Human rights prescribe political content that should be translated into specific laws, policies, behaviors, and institutions in the public sphere. Human rights are moral rights. Article 15 of General Comment 12 is a good example of how the international legal human rights regime sets the expectations, and the legal obligations, of states to realize human rights through the establishment of the appropriate instruments. Additionally, take for example article 24 of the universal declaration of human rights. It reads as follows:

"Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay".

The idea of resting and enjoying time off is clearly expressed by the right. However, to secure the enjoyment of this right we would first have to define what counts as resting time and leisure. More importantly, one would have to clarify aspects such as, when does it take place and for how long, who should enforce the right, what would be the penalties for not abiding by this article, etc. These are all political aspects. Thus, the agents engaging in their definition inevitably become political actors.

As discussed in chapter 2, the Westphalia governance framework set the state as the exclusive center of political life. In addition, democracy granted states the legitimacy to shape and deliver the instruments that would realize human rights. In a democratic state, all specific forms and contents required to actualize human rights are defined under the auspice of democratic legitimacy. Public schooling, courts of law, health infrastructures or security forces; all these institutions crucial to deliver human rights are accountable for and are designed according to citizens' democratic mandate.

Globalization, though, defies the cardinal role allocated to the state in terms of human rights. Consequently, the concept of human rights has also to endure transformations and detach itself from the state. The question is thus not only who should join or replace the state, but also how can this be done under a legitimate democratic scheme.

Adapting human rights to the requirements of globalization requires going beyond simply outlining its most celebrated characteristics. In fact, it demands a deeper understanding of the concept. Hence, next chapter will do just that: explore the foundations of human rights to help better conceptualize their role in a Post-Westphalian context. The assessment of their principles will show that the political dimension of human rights is intricately connected to the notions of autonomy and agency that characterize all human beings. As we will see in subsequent chapters, the perspective adopted in chapter 6 will deeply influence our understanding of the human rights concept and, more importantly to this project, the way corporations should discharge their human rights responsibilities.

6 The Sources of Human Rights

Human rights are a very special normative construct. The previous chapter presented their most conspicuous characteristics, namely: their universality, inalienability, their moral nature grounded on justice, etc. Human rights enjoy an overriding status. Dowrkin (1977) refers to them as trumps, against any other rights, privileges and claims from other actors or institutions.

Globalization, as argued in a previous chapter, shakes the governance assumptions on which human rights were constructed. The state played an exclusive role in not only bearing human rights responsibilities but also in their definition and actualization within its borders. The changing conditions of the Post-Westphalia governance framework, nevertheless, cause doubts on the functioning of the traditional understanding of the human rights regime.

This chapter proposes to dig deep into the justificatory arguments that ground human rights. The intention is twofold. On the one hand, we want to find the way to preserve the human rights unique characteristics and the nature that crucially defines them. On the other hand, we want to find the guidance to update and adapt the human rights concept. The goal is to understand human rights in a way that secures their crucial relevancy in front of the challenges of the globalization context.

The debate on the justificatory foundations of human rights is rich and nuanced. However, I have here limited the discussion to what I think are the most prominent and promising accounts with the potential to take the concept one step beyond. The different accounts will be assessed according to their ability to fulfill three basic requirements that the current globalization context requires.

First, human rights should be understood as a construct that is independent from the role and capacities of the state. This would require thinking human rights well beyond their legal enactment as national or international law. Secondly, the priority function of the human rights account should be to serve the victims. In a context of weak or absent states, if we are to preserve the definitional characteristics of human rights, the discussion about the institutions that should realize them should take a second priority. Finally, as discussed in chapter 3, human rights are inherently connected to justice. They are not simply provisions of social or material goods. In fact, their universality condition and the plurality of human life projects require going beyond any material condition. Human rights ought to be conceived as instruments that secure and facilitate self-determination.

The work of James Griffin is the first of the three sets of normative theories of human rights to be assessed. Griffin's theory is one of the most robust accounts of human rights justification and his book "On Human Rights" (2008), is currently recognized as the state of the art in the field. The second set of normative arguments encompasses the body of the so-called political or functionalist theories of human rights whose main representative scholars are John Rawls, Charles Beitz and Joseph Raz. They accuse traditional normative theories of being too centered in discussing the values and foundations of human rights. Instead, they urge us to place our attention on the contemporary practice of human rights, and on how and what parameters are used to identify them (Beitz, 2009, p. 8; Raz, 2010, p. 327). Finally, I present the deliberative theories of human rights represented by the work of Jürgen Habermas and Rainer Forst. I will argue that this last block of theory, and specially Forst's ideas, provide a promising avenue to re-think human rights and re-shape them according to the challenges outlined.

6.1 The Deontic-Teleological Continuum

Most of the theories exploring the conceptual groundings of human rights can be placed along a continuum. Their position in such continuum would depend on whether their arguments share more or less deontological or teleological features. The two perspectives are two opposing views. Deontic theories do not require further justification for human rights other than the recognition of an individual's human nature. Instead, to justify human rights, teleologically inspired theories focus on the good consequences human rights offer society as a whole.

The purpose of exploring the features and differences between status and interest-based theories is neither to defend a strict division between two opposing views or ways of understanding human rights nor to opt for one or the other. The goal is to prepare us to critically assess the three different candidate theories to guide us through the demands that the Post-Westphalia context imposes not only on human rights, but also on justice and democracy.

6.1.1 Status-based Theories

On one end of the continuum, we would find purely deontological based theories also known as "status theories". That is, theories holding that "human beings have attributes that make it fitting to ascribe certain rights to them, and make respect for these rights appropriate" (Wenar, 2015). Such attributes can differ from theory to theory but most of them take Kant's morality as their beacon. They support the idea that our morality should not be grounded on our desires but on the duties emerging from the categorical imperative: never treat others as means but as ends in themselves. Human rights represent the kind of respect that is due to the entire humanity. To deny human rights to any human being is a grave indignity. It implies not to recognize in an individual the condition shared by all human beings: the fact that we are all self-determined

individuals with ends of our own for which we deserve recognition (Quinn, 1993, p. 170).

Status theories have their roots in the natural law tradition. Natural law theories claim that human beings are entitled to certain rights just because of the intrinsic nature of being human. “The state of nature”, Locke claimed, “has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions […]” (J. Locke, 1997 [1690], p. 94). The American Declaration of Independence contains one of the most representative paragraphs of natural law theory:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness.” (As reproduced in Ishay, 1997 [1776], p. 127)

The rights accounts of H.L.A. Hart or Robert Nozick are often quoted as examples of status based theories of rights. Hart grounds his idea of rights in the “equal right of all men to be free” (Hart, 1955 quoted by Fagan, 2015). Nozick forcefully affirms that “Individuals have rights, and there are things no person or group may do to them (without violating their rights)” (Nozick, 1974, p. ix), even if their violation yields some greater benefit for society. Rights, from Nozick’s perspective, must contribute to the realization of Kant’s second formulation of the categorical imperative – i.e. to treat humanity as an end never merely as a means to an end. Nozick finds in conceptualizing rights as “side- constrains” the best way to serve this purpose:

“Side constraints express the inviolability of others, […]. These modes of inviolability are expressed by the following injunction: “Don’t use people in specified ways” (Nozick, 1974, p. 32)

Thus, Nozick presents rights not as means for the promotion of good consequences but as side constraints for the pursuit of good consequences (Mack, 2015; Wenar, 2015).

Alan Gewirth is probably the scholar that researched human rights most in depth following a status-based approach. Gewirth grounds his defense of human rights on the unique capacity of human beings for rationally purposive agency (Gewirth, 1996). He presented a logical flow of arguments, a sort of eleven-step syllogism, to demonstrate that if you want others to respect your liberties and well-being you must logically respect others' freedom and well-being. Gewirth's point is not a sort of "golden rule" claiming that you should treat others the way you want to be treated. It is not an enlightened self-interest type of argument. Gewirth frames it as a matter of being rationally consistent. In other words, that because other individuals are in the same position that I am, I should be consistent and recognize on them the same set of claims that I find valid for myself (Nickel & Reidy, 2010, p. 11).

Status-based theories offer robust grounds upon which to construct the human rights building. At the core of their arguments, we find the intuitive an appealing idea that all human beings deserve to be treated with dignity. However, as Wenar (2015) points out, the strength of this account can also be seen as its weakness. Status theories run the risk of conflating the importance of an individual with the "implausible position that all fundamental rights are absolute" (ibid.). As Nagel stresses (1998, p. 36 as quoted by Wenar 2015), "there are evils great enough so that one would be justified in murdering or torturing an innocent person to prevent them". Additionally, status based theories often rely their justification of human rights on an unquestionable connection to the inherent dignity of human beings. This can be perceived as a rather foundationalist position, and therefore as an argument that does not answer convincingly the question of why should human beings be granted human rights at all.

6.1.2 Interest-based Theories

On the opposite end of the continuum on which we would place the different justificatory theories of human rights we would find the interest-based or teleological theories. Typically, they appeal to the desirable outcomes generated by human rights in order to justify their existence. They are commonly known as "interest-based" theories (Buchanan, 2013; Fagan, 2015); others have used adjectives like orthodox, naturalistic (Beitz, 2009) or traditional (Raz, 2010) to identify them.

The emphasis is placed on the consequences that come along with the embracement of human rights which should entail the protection and promotion of intrinsic (basic or non-instrumental) goods (Nickel & Reidy, 2010, p. 7). James Nickel's account is a good example of a consequentialist theory of human rights. He builds the case for justifying human rights on the basis that embracing them produces outcomes that help advance my own interests. Nickel speaks of a "prudential justification of human rights", one that everybody should endorse as it is in everybody's self-interests:

"The general idea of a prudential justification is that I (or you) will have better chances for a good life in a society that respects and protects human rights. […] In terms of my (your) own interests, I am (you are) likely to be better off, and hence I (you) have good reason to accept and support human rights" (Nickel, 2007, pp. 54-55).

Utilitarianism provides another teleological perspective to the discussion. It puts a special focus on those consequences resulting out of applying human rights that maximize utility understood as the greatest aggregated happiness or well-being. John Stuart Mill speaks clearly in this regard and conceived rights as "something which society ought to defend me in the possession of." (J. S. Mill, 2001 [1861], p. 80 as quoted by Wenar, 2015). According to Mill and

other teleologically-oriented scholars, rights are "a tool for producing an optimal distribution of interests across some groups" (Wenar, 2015).

Teleological approaches are vulnerable to a series of challenges. The most disturbing weakness is directly rooted in their dependence on effectively producing the outcome that serves as their justification. That is, in utilitarian terms, human rights are justified by the utility they generate. If an alternative scheme generates more utility for the overall society, the status of the human right is downgraded and placed in the background. Think of the case of an "uncomfortable" religious minority in a society. It generates lots of unrest among citizens because of their opinions and beliefs. A utilitarian argument could be built to ignore the rights of this minority in order to maximize the total happiness of the overall society.

Eventually, all interest-based theories of human rights are dependent on calculating their consequences. Their narrow focus on maximizing utility or producing the desired outcomes systematically overlooks questions regarding the methods for distribution (Wenar, 2015) or production of these outcomes or utilities.

Implicit in all the goods, outcomes and utilities to which human rights are to be instrumental lies an inherent substantive notion of what constitutes well-being. Explicitly or implicitly, interest-based scholars attempt to smuggle a predefined conception of what they think should constitute "a good life" and try to make sure that human rights respond to this conception. Take, for example, the capability based accounts of human rights as developed by Sen (2004, 2009) and, particularly, Nussbaum (2002, 2011) with her list of "central human capabilities". Forst underlines that they intend to push, through human rights, for the advancement of certain human capabilities that, to their understanding, lead to a good human life (Forst, 2015, pp. 72-73). Similarly, Beitz accuses Sen and Nussbaum to present their notions of capability as if

they were normatively neutral and both, the content and the nature of human rights, could be defined without reference to politics (Beitz, 2009, pp. 62-65).

The status-interest based dichotomy has been presented as a continuum along which all human rights theories can be located. This is not a "black or white" categorization. No theory can be labeled as completely status-based or interest-based. Even the opposing theories and authors mentioned above share attributes and influences between one another. The rest of the chapter is dedicated to the assessment of three different accounts of human rights. The notion of the deontic-teleological continuum offers a scheme against which the strengths and weaknesses of these theories can be more easily assessed.

6.2 Griffin's Normative Agency Theory

James Griffin's theory of Normative Agency shares many commonalities with interest-based approaches to human rights, although deontic components like dignity or normative agency play a key role in it as well. We can see this right from the start as he sets two grounds for human rights: personhood and practicalities (Griffin, 2008, p. 44).

Griffin presents human rights as instruments to protect what defines us as human beings: our personhood (Griffin, 2008, p. 33). As humans, we have the capacity to conceive pictures of what a good life consists of and our attempts to realize them are what make the human existence distinctive. Our personhood is what allows us to deliberate, assess, choose and act "to make what we see as good life for ourselves" (Griffin, 2008, p. 32). Since we all attach paramount importance to our status of human beings, we all have a special interest in personhood. Hence, personhood ought to be protected in the form of human rights (ibid.).

At the heart of the concept of personhood lies the notion of normative agency. Griffin uses this term to emphasize that we are talking about the agency related to the decisions taken to live a worthwhile life. The capacity to choose and to pursue our conception of a worthwhile life is precisely what we regard as giving dignity to human life (2008, p. 45). In other words, human dignity derives from the value we attach to our normative agency (2008, p. 200). Normative agency, however, does not only consist of a bunch of capacities but it is also concerned with exercising them. Therefore, human rights are not only about providing these capacities but also about protecting their exercise (Griffin, 2008, p. 47).

Normative agency is a threshold-concept. There are no degrees of normative agency in the same way that there exist no degrees of being a person. Once we pass the threshold and we are recognized as human beings we are all equally entitled to the same rights. In Griffin's words "Anyone who crosses the borderline, anyone who rises any degree above the threshold, is equally inside the class of agents, because everyone in the class thereby possesses the status to which we attach high value" (Griffin, 2008, p. 45). Understanding normative agency as a threshold, therefore, sets the ground to justify the universality of human rights (Griffin, 2008, p. 48).

The concept of personhood is comprised of three components out of which any human right emerges, namely: autonomy, minimum proviso (welfare) and liberty. These three dimensions constitute the three highest-level human rights (Griffin, 2008, p. 133). Griffin synthesizes their scope and relevance in this passage:

"To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life – that is, not be dominated or controlled by someone or something else (call it 'autonomy'). And (second) one's choice must be real; one must have at least a certain minimum education and

information. And having chosen, one must then be able to act; that is one must have at least the minimum provision of resources and capabilities that it takes (call of this 'minimum provision'). And none of this is any good of someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty'). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected" (Griffin, 2008, p. 33).

What Griffin (2008, p. 37) describes as "practicalities" is the second ground for human rights. He recognizes that personhood alone may not be conclusive enough to determine how a right is brought into practice. Practicalities, instead, aim at providing clear boundaries for rights while trying to avoid "too many complicated bends". Imagine that because I am a young kid the law compels me to attend school and pursue mandatory education until the age of sixteen. My personhood would certainly not be impacted and no additional steps would need to be considered so my rights are fulfilled. In fact, my right to education is being realized. Instead, imagine now that the state requires me to keep on studying until I obtain my PhD, which usually takes until the age of forty. This would definitely impact my personhood as it would limit my ability to opt for other ways of life that I might think of being more fulfilling. Hence, practicalities aim at drawing a line in the implementation of rights.

Griffin's notion of practicalities tries to bring in the idea that a right, in practice, has to be a socially manageable claim on others. Practicalities, as rights, are universal, and provide "empirical information about, […], human nature and human societies, prominently about the limits of human understanding and motivation" (2008, p. 37). Gathering this information is key to determine the content of many rights.

Griffin's account, more complex and nuanced than traditional interest-based accounts, leaves few scholars indifferent. Criticism and comments are

abundant[12]. Generally speaking, Griffin's account does not scape some of the typical challenges common to its dominant teleological approach. It is not my purpose to extensively review them all here, but I would like to emphasize two weaknesses directly connected to the requirement set at the beginning of this chapter: the universality of human rights and their connection to justice.

First, Griffin's account can be perceived as an attempt to promote a pre-defined view of a "good life". This is a fact that limits the universality of the human rights concept. In this respect, Rainer Forst and Joseph Raz are both critical about Griffin's ideas. Forst holds that a qualified notion of the good underlies Griffin's account (Forst, 2010, p. 722; 2015, p. 74). He agrees with Griffin on the central role that personhood should have in the human rights discourse. However, Forst is concerned that in connecting personhood with specific interests to pursue the good life and transforming them into rights, Griffin is leaving out of the picture other interests (like being loved) that may also hold weight and be valuable for the good life without qualification.

Raz (2010, p. 325) is not convinced. He subscribes Forst's idea that Griffin attempts to smuggle a particular idea of the good life into the idea of personhood. Raz targets Griffin's notion of personhood defined as the capacity to "choose one's own path through life – that is, not be dominated or controlled by someone or something else" (Griffin, 2008, p. 33). Raz (2010, p. 325) wonders if someone who is being dominated by a mother, or controlled by his commitment to his employer (e.g. having signed a 10 year contract, on condition that the employer first pay his education) is less of a person because of the situation. Raz's argument is on the same page as Forst; they share the idea that Griffin's autonomy depends on "the belief that the good life can only

[12] See special issue #120 of the Journal Ethics for different authors commenting on his work. The issue included a reply by Griffin to his critics (Griffin, 2010).

be called such when it has been autonomously chosen and pursued" (Forst, 2010, p. 723).

Griffin's proposition, Forst points out, inevitably conflicts with someone for whom the good life may, for instance, consist on following the precepts of a higher spiritual or community entity. Thus, Griffin "seems to be a partial non-universalizable conception of the good and of a basic human interest in pursuing it. Hence, such a conception cannot ground universal human rights" (ibid.) and can easily encounter problems in intercultural contexts.

The second relevant weakness that prevents us from endorsing Griffin's account of human rights is that it is poorly equipped to defend rights against discrimination. Therefore, it is questionable to what extend Griffin's understanding of human rights is fully aligned with an idea of justice. As Buchanan points out (2010, p. 696; 2013, p. 288), there is a social-comparative aspect attached to the notion of human dignity.

Consider the following example. A black woman may enjoy a life in which her normative agency is well secured. Yet, she may have to sit at the back of the bus because the front seats are reserved for white people. The black woman may be able to take the bus to attend mass in the church she likes across town as she pleases; nobody will effectively stop her from doing so. Still, she is being considered a person of inferior status. According to Griffin (2008, p. 42), racism (or sexism) is likely to violate human rights because of its potential impact on self-esteem, which is directly correlated with normative agency. However, when this is not the case and you still enjoy a vigorous self-esteem, Griffin would argue, we may confront a flagrant violation of equal respect, not necessary a human rights violation.

The difficulty of Griffin in regards to discrimination is rooted in his definition of liberty as "not to be forcibly stopped from pursuing one's conception of the worthwhile life" (Griffin, 2008, p. 33 see above). Griffin's approach, as well as

the one taken by other interest-based theories, does not pay sufficient attention to the equal moral worth dimension that comes along with human dignity (Buchanan, 2010, pp. 696-698; 2013, pp. 288-289; Forst, 2010, p. 725). Buchanan insists:

"The social comparative aspect of dignity focuses not on whether an individual's life is minimally good (Nickel, 2007), or whether she is living reasonably well as normative agent (Griffin, 2008), or whether her needs are being satisfied (Altman & Wellman, 2009; D. Miller, 2007) but rather on whether she is being treated as if she had a lower basic moral status by virtue of the fact that she is a woman or a person of color" (Buchanan, 2013, p. 288).

Globalization triggers the fragmentation of cultural homogeneity (Habermas, 1996, p. 97). Rather than acting as a destroyer of identities, globalization becomes the most important force in their creation, proliferation and amplification of their meaning (Tomlinson, 2003, pp. 69-71). The values and attitudes that conform traditional cultures contrast with new values and life-styles. The result is the heightening of the pluralism of cultures and values as well as a growing heterogeneity of social expectations (Scherer & Palazzo, 2008, p. 417). Against this backdrop, the difficulties that Griffin's account encounters in universalizing his conception of good, as well as its rather ambiguous arguments on discrimination, cause significant doubts on its guiding potential in the mist of globalization's transformations.

6.3 Political Human Rights Theories

The label "political theories" of human rights is typically associated with the work on human rights developed by John Rawls, Charles Beitz and Joseph Raz (e.g. Buchanan, 2013; Forst, 2015; Nickel, 2014). These three authors share many commonalities regarding the foundations and the role that human rights should play at a political and legal international level. Interestingly, the three

argue for an approach that attempts to place ethical considerations in the background in favor of an allegedly more pragmatic political approach.

They see no point in discussing the connection between the good life, universality and human rights' justification. What matters in the first place is the function that these rights can carry on. Hence, political human rights theorists are also known as "functionalists" (Forst, 2010, p. 726). Rawls clearly specifies the functions: to "provide a suitable definition of, and limits on, a government's internal sovereignty" as well as to "restrict the justifying reasons for war and its conduct […] and […] specify limits to a regime's internal autonomy" (Rawls, 1999a, pp. 27, 79). Similarly, Beitz defines the human rights function as the "justifying grounds of interference by the international community in the internal affairs of states" (Beitz, 2004, p. 197; 2009, pp. 41-42, 65).

Functionalists understand human rights as a collection of standards of treatment that states should grant to their citizens. Its violation gives rise to "remedial or preventive action by the world community or those acting as its agents" (Beitz, 2009, p. 13). To put it differently, human rights are understood as a legitimacy check that prevents the state from the interference from other states or third parties.

Political human rights scholars reject to root their conception of human rights to a particular fixed philosophical view (Beitz, 2009, p. 103). Raz is perhaps the most critical of the functionalist scholars. He does not deny that human rights have a particular identity as normative standards. However, he accuses traditional status and interest-based theories of relying on "no contingent fact except laws of nature, the nature of humanity and that the right holder is a human being" (Raz, 2010, p. 323). The true identity of human rights, he argues, is to be found in the role they play in global politics. Thus, individuals have human rights only where "the conditions are appropriate for governments to

have the duties to protect the interests which the right protect" (Raz, 2010, p. 335). In other words, Raz rejects the universality of human rights.

Rawls pioneered the political or functionalist account; an entirely new perspective on the theoretical conceptualization of human rights. Nevertheless, it should be noted that Rawls did not intend to construct a comprehensive theory of human rights. He discussed the concept rather succinctly in his work "The Law of Peoples" (Rawls, 1999a). Human rights are a basic element of Rawls' Law of Peoples but they are not the central object of his theorization efforts. Literally, the space human rights occupy in his book is rather secondary with only one section (section 10) out of eighteen dedicated to the topic. Still, Rawls' work notoriously established the main lines upon which Beitz and Raz, as well as many other scholars, would later build their own perspectives (e.g. Beitz, 2004, 2009; Raz, 2010).

Rawls' conception of human rights totally disrupts the foundations of status based as well as interest-based accounts. He is direct and concise: "[Human rights] express a special class of urgent rights" and "[they] restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy" (Rawls, 1999a, pp. 79-80). He does not refer to them as moral standards of behavior nor does he refer to an inalienable dignity of the human being. He thinks of human rights as standards that set a "necessary, though not sufficient, standard for the decency of domestic political and social institutions" (1999a, p. 80). Human rights are presented as instruments to help us identify those societies that are in "good standing in a reasonably just Society of Peoples" (ibid.). He goes on specifying the three characteristic roles of human rights (ibid.):

1. "Their fulfillment is a necessary condition of the decency of a society's political institutions and of its legal order.

2. Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, […].
3. They set a limit to the pluralism among peoples".

Human rights establish a universal threshold of acceptability. Human rights are universal in the sense that their scope binds all societies, irrespective of whether a particular society adopts them. Their political and moral force, Rawls contends, extends to all societies to include outlaw states. Below the threshold imposed by human rights, outlaw states violating these rights set themselves in a position to be the object of forceful sanctions and even intervention by well-ordered and decent peoples. Instead, for liberal constitutional democratic regimes or decent hierarchical societies, human rights only represent a subset of the rights enjoyed by their citizens (Rawls, 1999a, pp. 80-81)

Rawls' understanding of human rights must be contextualized within the broader theory developed in his book titled "The Law of Peoples" (1999a). In it, Rawls aims at ending what he qualifies as the great evils of human history: "unjust war and oppression, religious persecution and the denial of liberty of conscience, starvation and poverty, not to mention genocide and mass murder", all of which follow from political injustice (1999a, pp. 6-7). Rawls contends that political injustice can be overcome by establishing just or decent basic institutions. Once these institutions are established, great evils will eventually disappear (ibid.).

Rawls inquires himself about the characteristics of the basic structures that should regulate the relations of peoples at an international level. Rawls specifies that he refers to peoples, not states. These are two concepts that often overlap but do not necessarily coincide in meaning. Peoples, in Rawls terms, are defined as a group of individuals "ruled by a common government, bound together by common sympathies, and firmly attached to a common conception

of right and justice" (Rawls, 1999a, p. 28). States, instead, do not have this moral dimension (Wenar, 2013). In fact, states differ drastically from peoples when they try to impose specific interests to other societies by, for example, converting a society to the state's religion, or by enlarging its empire and territory (Rawls, 1999a, p. 28).

Rawls holds that there are two types of minimally just societies (1999a, p. 4). First, there are reasonable liberal peoples. They enjoy legitimate democratic constitutions, their governments are under popular control and they are not driven by a large concentration of private economic power (Wenar, 2013). The second type, decent peoples, are not entirely just and their basic institutions do not recognize reasonable pluralism or realize the liberal ideas of free and equal citizens cooperating fairly (ibid.).

Both types of peoples, liberal and decent, would reasonably and unanimously agree to be bound by the Law of Peoples, a list of eight principles that would govern their relations in the international sphere (Rawls, 1999a, pp. 35-38):

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples
2. Peoples are to observe treaties and undertakings
3. Peoples are equal and are parties to the agreements that bind them
4. Peoples are to observe a duty of non-intervention.
5. Peoples have a right of self-defense, but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime

Complying with human rights is, therefore, part of the core definition of what constitutes a just society. Rawls (1999a, pp. 67-70) presents them as requirements without which social cooperation cannot exist; instead, when violated only command by force and slavery remain. Therefore, he argues, they become standards to be protected by any well-ordered society, be it a liberal or a decent one.

States not respecting human rights are considered outlaw states. They represent a threat to peace. Well-ordered societies should not tolerate outlaw states and should take action to trigger effective change in them. Other societies may not be able to fully comply with the entire list of the seven remaining principles of the Law of Peoples. These are "burdened societies" (Rawls, 1999a, pp. 105-113). These societies are not expansive or aggressive, [they] lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered" (Rawls, 1999a, p. 106). Such deficiencies, unlike human rights violations, do not trigger interventions from third state parties. In fact, well-ordered societies bear a duty to assist burdened societies to help them, over the long term, become well-ordered societies as well[13]. Rawls, nevertheless, qualifies that such assistance should not be paternalistically oriented, but deployed "in measured ways that do not conflict with the final aim of assistance: freedom and equality for the formerly burdened society" (Rawls, 1999a, p. 111).

Rawls' conceptualization of human rights certainly leaves many questions unanswered, particularly regarding their justification. The content of human rights is restricted to international legal human rights; no role is allocated for moral rights to ground such legal rights. Rawls delimits human rights to two classes of rights (Rawls, 1999a, p. 80 n23). On the one hand are articles 3 to 18

[13] This is an argument explored as well by the business ethicist scholar Nien-he Hsieh (2004, 2009). Its implications for the BHR debate will be reviewed in chapters 9 and 10.

of the 1948 Universal Declaration of Human Rights (UDHR). On the other hand, are the special conventions on genocide (1948) and on apartheid (1973). These are what Rawls labels as the human rights proper. For Rawls these two classes of rights are connected with the common good. The rest of the articles and conventions that today constitute the international legal body of human rights are discarded because either they state liberal aspirations or presuppose the existence of specific institutions (e.g. periodic holidays with pay in article 24 or social security in article 22). Additionally, rights like freedom of expression or the right to participate in assemblies or create associations are not included in Rawls' human rights account.

Rawls aims at answering the following question: "on what principles would well ordered societies, under fair conditions, agree to regulate their cooperation and exist as free and equal peoples?" The answer is in the list of principles that comprise "The Law of Peoples". The Law of Peoples derives directly from the concept of Justice as Fairness as developed in "A Theory of Justice" (1999b). There, he attempts to define the principles by which the basic structure of a just society should be governed. In the Law of Peoples the aim is similar, although the scope changes. He is not interested in the principles for the basic structure of a particular society, but in the principles that should underlie the relationships among different societies. In both "A Theory of Justice" and in "The Law of Peoples" the process for arriving at the principles of basic structure is the same: the original position and the veil of ignorance (see chapter 3).

In the Law of Peoples, Rawls reproduces the same scheme and goes on to apply a second round of the original position thought experiment (1999a, pp. 30-35). Now the subjects of the experiment are not citizens of a particular society, but representatives of citizens from liberal societies. They are also placed under a veil of ignorance that limits their knowledge about their own society that they represent and are positioned in conditions they would

consider fair. They do know, nevertheless, what "reasonably favorable condition obtain[ed] that make constitutional democracy possible" (1999a, p. 33). Under these circumstances, Rawls argues, citizens' representative would arrive at the eight principles that conform the Law of Peoples.

The conception Rawls has of human rights is certainly controversial and at odds with any morally grounded theory of human rights, either teleological or deontological. The reason is that it "would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures" (1999a, p. 68). In other words, Rawls avoids presenting human rights as moral standards so decent hierarchical societies can also fit in the picture of the Law of Peoples. Human rights are not moral rights, but political standards that a society must meet to qualify as a form of cooperation (Rawls, 1999a, p. 65).

Decent hierarchical peoples are not aggressive. They enjoy a bona fide legal system with a common good idea of justice and, although they are not democratic societies, their governments have consultation mechanisms (1999a, pp. 62-68). These are societies that deserve respect and that should not be forced to become liberal democratic societies. Rawls' restricted list of human rights, therefore, responds to his will to tolerate decent hierarchical peoples. Because of the philosophical and moral differences that divide decent hierarchical peoples and liberal peoples according to Rawls, human rights can no longer be presented as moral standards. Instead, they are presented as political standards since, to reach an agreement among well-ordered peoples, "one has to appeal to public reasons, this is, reasons that do not derive from any particular comprehensive view and will be accepted as authoritative by all parties to the agreement" (Griffin, 2008, p. 23).

Rawls aims at avoiding an ethnocentric approach to human rights and at serving a basic feature of liberal democracy: "reasonable pluralism" (Rawls, 1999a, pp. 11-12, 30; 2005, p. 36). By reasonable pluralism Rawls means the commitment liberalism has to respect diversity of cultures as well as philosophical or (non-) religious perspectives that deserve respect by reasonable people. Rawls (1999a, p. 32) perceives all this diverse background of comprehensive doctrines as an inconvenient to reach a conception of justice that arises an overlapping consensus. Thus, he proposes to leave these comprehensive doctrines behind the veil of ignorance. The reasonable pluralism "suggests that there is not a single normative ground for a conception of human rights but that there are liberal grounds for liberal conceptions of human rights and other for other conceptions" (Forst, 2010, p. 714). Consequently, Rawls finds himself in a position where he has to tailor human rights to a simplified version to accommodate decent hierarchical peoples.

As Wenar explains (2013), Rawls' human rights set a limit for toleration. This limit for tolerance for decent hierarchical peoples is too low or, at least, unjustifiably low. Eventually, he distorts the essence of moral equality of human beings residing in the original concept of human rights. Imagine a decent hierarchical society where women could not hold public office because of religious prescription. On what grounds would institutions in this society have respect for women of other societies holding public office when they are incapable to show respect for the worth and dignity of its own female citizens? Rights protecting freedom of expression, assembly, education or cultural minorities, just to name a few, are left out of Rawls' portrayal of human rights.

Furthermore, almost no justification is provided for the account of human rights he embraces. Why is the list of Rawls' human rights configured in the way that it is? What criteria justify the selection of these rights and not others? Rawls presents them as rights of a special urgency (1999a, p. 79), but no

justification is provided that clarifies why and to what degree this is the case. Griffin (2008, p. 24) even wonders why did Rawls pick up the label "human rights" when he makes no effort to show that these are rights covering all human beings. Rawls' account of human rights has many uncertainties about its moral grounds; and perhaps the most worrying aspect is that they do not seem to be anchored on solid egalitarian principles (Buchanan, 2013, p. 285).

6.3.1 Beitz and Raz, Taking Rawls Further

Charles Beitz and Joseph Raz further elaborated the political human rights perspective advanced by John Rawls. Although Beitz and Raz's theories eventually point towards different directions that I do not aim to explore here, they keep close ties with Rawls' account and share some similar developments. The three of them emphasize the importance of the actual human rights practice as a guide towards the conceptualization of human rights. They coincide in accusing traditional theories of being too absorbed with discussions regarding the deeper values that ground human rights while neglecting how their conceptualization can guide actual practice. They pay special attention to how contemporary human rights practice recognizes rights and what moral parameters they use to identify them (Beitz, 2009, p. 8; Raz, 2010, p. 327).

Beitz and Raz conceive human rights in a broader sense than Rawls does, at least in terms of content. They are conceived as rights that go beyond guaranteeing security, liberty and protection from state abuse. The social, the economic and the cultural dimensions, unlike Rawls, are also part of the human rights package (Beitz, 2009, pp. 30-31).

Another commonality is that both, Beitz and Raz, embrace the essence of Rawls' definition of the human rights function. Human rights set limits to what states can do to their citizens; they trigger action. Where these limits are trespassed, human rights provide justified reasons for action (Beitz, 2009, p. 104; Raz, 2010, p. 328). Human rights are presented as limits of the moral

sovereignty of states and as standards of international legitimacy (Beitz, 2009, p. 100; Raz, 2010, p. 330). Beitz and Raz coincide in pointing out that Rawls is not sufficiently forceful in calling for other states to intervene or set coercive measures to a state that is not respecting human rights. They find Rawls particularly ambiguous when it comes to human rights violations of a lesser degree of extremity that could justify action as well (Beitz, 2009, p. 101; Raz, 2010, p. 328 note 321). Human rights are rights that "disable a certain argument against interference by outsiders in the affairs of a state", they have the power to disarm sovereignty and deny legitimacy (Raz, 2010, p. 332).

The political account not only presupposes the existence of a system of states but it requires their absolute supremacy in the international realm. In light of the context discussed in chapter 2, this is an assumption that is being called into question. In fact, functionalists are so biased towards discussing the limits of sovereignty and the justified interference of third party states that they lose track of what should be the focus of human rights (Forst, 2010, p. 726). The emphasis of political theories is placed on the external legitimacy, on checking whether the intervention in other states is legitimately required. The political account, instead, should work exactly in the opposite way. Human rights should help construct or test internal legitimacy. As Forst argues, first should come the construction of a set of rights that any legitimate political authority should respect and guarantee; later we will see what kind of legal structures are required to oversee these rights. Doing otherwise is to put the cart before the horses (Forst, 2010, p. 726).

Functionalist human rights scholars focus on the practice of human rights and try to conceptualize human rights from that point. They do not discuss what human rights are in normative philosophical terms, but try to guide what human rights should imply in practice. However, how can one advance a concept of human rights and argue for its relevance and application at the international political agenda without justifying why human rights deserve this

priority of respect? What is so special in human rights that they are capable to limit a state's sovereignty?

Political theories do not seem to care much about these questions. For example, Beitz refers to human rights as rights that "protect urgent individual interests against certain predictable dangers ('standard threats') to which they are vulnerable under typical circumstances of life in a modern world order composed of states" (Beitz, 2009, p. 109). Similar references can be found in Rawls or Raz's accounts (e.g Rawls, 1999a, p. 79; Raz, 2010, p. 323). In these accounts, the nature and grounding of these rights remains unspecified. Hence, the guidance they can offer to practice is compromised. In fact, their adherence to the protection of "interests" places the political approach in the same vulnerable position as the interest-based theories previously discussed. By embracing the concept of "urgent individual interests", they become suspicious of smuggling a particular view of the good life, or of endorsing a comprehensive moral doctrine. These are precisely the same allegations often raised against interest-based theories and exactly the same allegations political theories attempt to avoid by arguing that human rights have no foundations (Raz, 2010).

Generally, functionalist accounts of human rights cannot provide a solid understanding of human rights in a Post-Westphalia context. And the main reason why this is the case is quite straightforward. Political scholars oriented their theory building efforts almost exclusively towards the role of the state. What is more, their theory serves exclusively states, not victims. In each of the three theories discussed, the dignity and value of the individual seems to fall to the background. Priority number one is the terms in which a state's sovereignty can be preserved or challenged. Human rights become a tool to establish the criteria by which states can be considered legitimate and, thus, avoid unsolicited interference by other states.

In these terms, it seems obvious that none of the three political accounts of human rights reviewed is well equipped to confront a context in which states are forced to share the limelight with other non-state actors. Human rights are not anymore an exclusive matter of states. However, this is a premise that neither Rawls, Beitz, nor Raz anticipated.

6.4 Deliberative Human Rights Theories

Deliberative theories of human rights start from the premise that individuals are morally and politically autonomous agents capable of providing and accepting justifications when they participate in discourses oriented towards the generation of norms that bind them (Forst, 2015, p. 73). Thus, in contrast to the accounts previously analyzed, discursive theories do not look at human rights as the result of the enlightenment of a philosopher on the nature of the human being or the function of rights at the international political arena. Human rights, instead, are the result of a deliberation process aiming at a consensus on those norms that should universally bind us.

Forst remarkably synthesizes that,

"What [deliberative theories of human rights] have in common is the emphasis on the social aspect of human rights in a historical perspective, namely that when and where they have been claimed it has been because the individuals concerned suffered from and protested against forms of oppression and /or exploitation that they believed disregarded their dignity as human persons to whom a justification is owed for the norms and institutions to which they are subject. Human rights thus not only protect autonomy and agency of persons; they also express their autonomy politically" (Forst, 2015, p. 74).

Discursive theories of human rights keep close links with discourse democratic theory. In fact, discourse theories of human rights are unique in conditioning

the legitimacy of rights and duties to deliberation processes. No norms should be imposed on individuals without their rational consent. Such consent, the theory claims, has to be impartial and reached under just conditions – it should contribute to the equal advancement of all of those who are affected by the norm and doing so free from the effects of power (Ingram, 2009, p. 193). The impartial consent should be the outcome of a real deliberation, not the results of a hypothetical thought experiment as Kantian or Rawlsian theories would propose (Ingram, 2009, p. 193).

Jürgen Habermas and Rainer Forst are the most representative scholars of the discursive approach to human rights. The differences among them lay basically on where they locate the origin or the source of the rights' legitimacy. For Habermas the source is found in discourse. Forst, instead, leverages on a "moral principle of justification and autonomy" (Forst, 2015, pp. 73-74).

6.4.1 Habermas and Human Rights

Habermas connects human rights directly with democracy; as a matter of fact, he speaks of the co-originality of both concepts (e.g. Habermas, 1996, p. 107; 1998b, p. 91). Habermas' conceptualization of human rights is, in part, rooted on the question of what constitutes a legitimate claim within a political system. According to him, there are two instruments to provide an answer to this question, namely: human rights and popular sovereignty. On the one hand, human rights represent an inherently legitimate body of rights that guarantees citizens the frame within which they can pursue their life plans. On the other, popular sovereignty[14] establishes a set of processes whose outcomes are considered legitimate. Political theory has already been discussing for a long time which of the two instruments should go first. For republicans, popular sovereignty is the cornerstone upon which human rights can be constructed

[14] Popular sovereignty is a formula used by Habermas that, for our purposes, we can equate to the concept of democracy as discussed in chapter 3.

and the source of their legitimacy (public autonomy). Liberals, instead, conceive human rights as pre-political and detached from the potential tyrannical majority rulings that may result from popular sovereignty (private autonomy). In contrast with the two previous accounts, Habermas claims that,

"Political philosophy has never really been able to strike a balance between popular sovereignty and human rights, or between the freedom of the ancients and the freedom of the moderns." (Habermas, 1998b, p. 89)

Habermas aims at solving the paradox between human rights and democracy. He finds the desired balance between the two concepts in conceiving them as inseparable, reciprocally presupposing each other; in short, co-originals. Hence, the ideal relationship between the two concepts should be one in which,

"on the one hand, citizens can make appropriate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; on the other hand, they can realize equality in the enjoyment of their private autonomy only if they make appropriate use of their political autonomy as citizens" (Habermas, 1998b, p. 91).

In Habermas' theory, human rights are inextricably linked to democracy and popular sovereignty. He asserts that the human rights discourse is "set up to provide every voice with a hearing" (1998b, p. 93). According to Habermas, Ingram (2009, p. 194) reminds us, the provision of voice shall take place "under the supervision of either a constitutional state or a constitutional international body (or both)". These are the entities that set the conditions allowing the construction of a legitimate legal system. Thus, human rights are not "mere imitations of moral rights" but requirements of justification of legal rules (Habermas, 1996, p. 107).

Eventually, these justifications must meet the criteria of legitimacy collected by the famous *Discourse Principle*:

“just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.” (ibid.)

The discourse principle provides a position from where law can be impartially justified. A condition that can only be obtained if the legal norms count with the assent (Zustimmung) of all citizens in a discursive process that in turn has been legally constituted.” (Habermas, 1996, pp. 108-110). Hence, citizens become not only the addressees of law but also the authors of their legal order (Habermas, 1996, p. 123).

Habermas conceives human rights as an instrument to establish the conditions upon which communication can exist, allowing law to be fully legitimized and institutionalized in a legal system. In contrast to the traditional theories, no reference is made to the human condition or dignity to appeal to human rights. Human rights are not pre-political or natural endowments, but precisely political, emerging out of the relations between individuals that recognize each other when they regulate their life in common through positive law (Schaffer, 2015, p. 8). Habermas (1998b, p. 93) understands human rights as legal claims “against the state held by private actors”.

The co-originality and discourse principle approaches have direct impacts on both the scope and content of the Habermasian ideal of human rights. Habermas presents five different categories of basic rights deriving directly from the co-originality clause and the discourse principle (Habermas, 1996, pp. 122-123):

1. Basic right to “the greatest possible measure of equal individual liberties”.
2. Basic rights providing political membership.
3. Basic right to legal protection, i.e. the existence of due process mechanisms that allow for claiming and enforcing legal rights.

4. Basic rights to "equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law."
5. Basic right to the provision of living conditions necessary for citizens to have equal opportunities to enjoy the rights listed from I to IV

The first three categories of basic rights derive from the direct application of the discourse principle. They attempt to establish the conditions upon which law can take shape among free and equal persons. The fourth category of rights emphasizes the authorship of the legal order by legal subjects (citizens). Finally, Habermas realizes that none of these categories of basic rights can be realized in conditions of extreme need or insecurity. Thus, Habermas proposes the fifth category of welfare rights as contingent (Ingram, 2009, p. 202).

Out of this rights categorization it is obvious that political human rights – particularly those connected with the rights of communication and participation – enjoy special consideration over other potential human rights. In contrast, welfare, cultural or social rights are conceived as mere add-ons, justified as long as they instrumentally contribute to realize rights of a higher category. As Ingram puts it, the content of these rights is eventually left to the will and sympathy of legislators and citizens for their worst-off compatriots (Ingram, 2009, p. 202). Rights related to the communication and the participation of citizens in the deliberation process are not simple instrumental contributions to democratic will formation but they are considered to have intrinsic value (Habermas, 1998b, p. 90). Because citizens are simultaneously authors and addressees of the law, human rights are not conceived as a closed list; their content is left open to the outcomes of "discursive processes of opinion-and will-formation in which the sovereignty of the people assumes a binding character" (Habermas, 1996, p. 104).

Habermas presents human rights as Janus-faced (Habermas, 1996, 2010). They point simultaneously in two directions: to morality and law. As moral norms, they cover all human beings, as legal norms they cover only those individuals who are part of the legal community. Habermas interprets human rights in two different ways (Ingram, 2009, p. 206). On the one hand, Habermas speaks of human rights as aspirations that emerge out of dialogues and that, through an indefinite moral learning process, are gradually materialized into the legal order. On the other hand, human rights designate legal claims that define the core of human rights declarations that become rights against the state held by citizens (Habermas, 1996, p. 174). In any case, Habermas leaves no doubt about the ground of human rights:

"The concept of human rights does not have its origins in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human rights are juridical by their very nature" (Habermas, 1998a, p. 190).

Habermas' particular conception of human rights, with its lack of moral content and its almost exclusive view through the lens of positive law, comes at the expense of important challenges. Habermas' legalistic approach only leaves space for justifying rights connected with the set of freedoms that enable us to participate effectively in discursive processes. Human rights are eventually presented as a sort of standards of legitimacy which, in the context of the "disappearing world of sovereign subjects of international law", they "provide the sole recognized basis of legitimation for the politics of the international community" (Habermas, 1998b, p. 92). Here, Habermas' approach reminds us of the position taken by functionalist scholars – i.e. Rawls, Beitz and Raz. Both accounts have in common that they avoid endorsing a moral conception of human rights that could jeopardize the pluralistic tenets of political liberalism and impose a liberal doctrine onto other societies who may also deserve respect for their own views. For Habermas, the system of rights is

complete only if we follow those norms that we have reasonably agreed and accepted together through actual deliberation.

A direct consequence of Habermas' legalistic approach is that the account struggles when trying to explain how human rights can be universal in the absence of a global democratic legal order (Schaffer, 2010, p. 14). Given the co-originality condition, human rights and democracy go hand in hand within the boundaries of a state who basically have two tasks: securing peace and implementing human rights globally (Schaffer, 2010, p. 20). The state is the ultimate anchor of legitimacy; human rights are not pre-political. Where there is no state, there cannot be human rights. Thus, when human rights are extrapolated to an international level, the Habermasian conception of human rights struggles to justify their existence in the absence of a state. Due to the co-originality condition, Habermas would insist that there could be no international human rights without institutionalizing, at the same time, discourse procedures globally. This can only be achieved by putting in place a world government; an option himself rejects (Habermas, 2001; 2010, pp. 18-19). Thus, the Habermasian account neglects human rights in situations where they are most urgently needed.

Habermas creates an unavoidable tension between legal and moral human rights that, as discussed above, directly limits the universality and the scope of rights. Hence, the entire concept of human rights trembles. The tension could only be resolved if human rights were conceived as moral aspirations with a non-juridical functioning and not only as legal claims as Habermas suggests (Ingram, 2009, p. 193).

An additional limitation derived from Habermas' legal approach is that the legislation, enforcement and allocation of responsibilities connected to human rights become restricted to claims against formal legal public authorities. In short: the state. No other entity or agent is considered. Therefore, one cannot

use human rights to, for example, claim against oppressive economic structures or agents imposing direct or indirect, intended or unintended, human rights burdens on individuals or communities.

For the most part, we cannot claim that Habermas is offering a promising account on which to understand human rights in a Post-Westphalia scenario. Habermas knows very well the challenges that democracy and states are facing in the XXIst century (Habermas, 2001). Yet, in light of what has been discussed, his body of human rights theory seems not very well prepared to confront them. He insists on a state-centric perspective where rights have a limited scope. They are made contingent on their legal enactment and totally dependent on the existence of the state.

Still, the idea of a discursive approach to human rights is valuable. As Ingram points out "the problem of human rights abuse – not just the problem of human rights definition – is political (forward looking) and not merely juridical (backward looking)", and therefore it is "a philosophical matter of dialogically clarifying who we as persons and as individuals are" (Ingram, 2009, p. 212). It is on these terms that Rainer Forst's account of human rights can provide encouraging and meaningful guidance.

6.5 A Basic Right to Justification: Rainer Forst

Forst's account of human rights can be placed under the umbrella of deliberative theories. Yet one can easily spot influences and turns that directly refer to the concerns and challenges highlighted by previously reviewed theories. For instance, at its core, Forst adopts a deontic perspective. He claims that human rights emerge from a foundational right that is the most universal and basic claim of every human being: the right to justification (Forst, 1999, p. 40). As human beings, we are all entitled to a fundamental demand: not to be treated in a way for which we have not been provided sound moral justification.

The right to justification is conceived as a sort of fundamental ground upon which the human rights building can be built and justified. The right to justification is directly connected with the capacity that individuals have to give and demand moral arguments for those social relations that involve them in a particular context. It is in this sense that Forst conceives human beings as equally autonomous normative agents, a characteristic that essentially requires a fundamental equal demand of respect for each and every individual. All human beings are, per definition, capable of providing and receiving justifications. Hence, all of them share a fundamental and universal demand: the right to justification.

The goal of human rights is to protect and nurture the right to justification. They do not only protect the normative agency of individuals as Griffin would defend, but go one step beyond to also protect their expression – i.e. the process by which, as "norm-givers", our normative agency and autonomy take shape in a practical sense (Forst, 2010, p. 724). Thus, human rights ensure an equal standing not only at the social but also at the political level.

Forst questions Griffin's argument that the most important function to be realized by a human agent is the "capacity to choose and to pursue our conception of a worthwhile life" (Griffin, 2008, p. 45). According to Forst, Griffin's argument is misleading as it advances the idea that the good life can only be enjoyed when one pursues and choses his life project autonomously. This is an approach that can be "reasonably doubted by someone who believes the good to consist in following a higher calling or in one's duties as a member of a particular community in a traditional sense" (Forst, 2010, p. 723).

As discussed above, Griffin's approach would face difficulties in universalizing its concept of human rights based on an approach to the "good life". Forst's account, instead, attempts to cover this shortfall and aims at providing a conception of human rights that is "as culturally sensitive as it is

culturally neutral – a conception that proves to be interculturally non-rejectable, universally valid, and applicable in particular cases" (Forst, 1999, p. 36). Therefore, human rights should not be conceived as instruments that facilitate enjoying a life plan within pre-determined desirable conditions. Human rights "should not be seen as rights to goods necessary for the 'good life'. Rather, they should be seen as rights that put an end to political oppression and the imposition of a social status which deprives one of the freedom and the access to the social means necessary to being a person of equal standing" (Forst, 2010, p. 725).

Chapter 3 made it clear that the autonomy of individuals cannot be ignored. The advancement or preservation of any social institution or power relation should not depend on the denial or undermining of an individual's autonomy. Otherwise, in Kantian terms, this would imply to treat individuals as means and not as ends in themselves. To be an end, Forst argues, inevitably implies to be able to demand and be provided with justification for all those social structures that bind me in a particular context (1999, p. 42). Hence, the respect for human persons as autonomous normative agents becomes the ground of all human rights. They protect the equal standing of persons in the political and the social arenas and they do so not on the basis that they contribute to the good life of individuals but on the grounds that individuals require independently owed respect (Forst, 2010, p. 719). Hence, Forst rejects to justify human rights upon the basis of the advancement of certain higher human interests allegedly connected with the pursuit of the good life as teleological accounts would advise.

Forst also transforms the meaning of the concept of rights with a discursive touch. A right "expresses a fundamental, absolutely binding subjective claim that cannot be denied intersubjectively" (Forst, 1999, p. 40). Human rights, because of their condition of rights and their aim at binding the actions of human beings, require acceptable reasons for their justification. Human rights

are not a pre-defined set of norms provided by a superior enlightened entity (or philosopher). They are to be understood horizontally and relatively open for challenge and contestation. The content of every human right requires to be constructed and justified through a discourse where every morally affected person can provide and be provided with acceptable reasons. Forst proposes two criteria to distinguish between reasonably acceptable and unacceptable claims: the criteria of reciprocity and generality.

By reciprocity Forst means that "no one may make a normative claim […] he or she denies to others […] and that no one may simply project one's own perspective, values, interests, or needs onto others such as that one claims to speak in their 'true' interest or in the name of some truth beyond mutual justification […]" (2010, p. 719).

Generality, for its part, is defined as "the reasons that are to ground general normative validity have to be shareable by all affected persons, given their (reciprocally) legitimate interests and claims" (2010, p. 720).

Hence, human rights are not imposed norms but are constructed through a reflexive discourse. They are the result of a discursive process where "human beings deliberate and decide in common about the social institutions that apply to them and about the interpretation and concrete realization of their rights" (2010, p. 736). Individuals have a veto-right on those proposed rights that do not qualify with the conditions of reciprocity and generality.

The discourse process constructs human right at two levels: the moral and the political (Forst, 1999, p. 43). The first step for a human rights claim is to pass the filters of the reciprocity and generality criteria as already discussed. Only after complying with these two principles can a claim be considered a moral norm justified in front of the moral community of all human beings (Forst, 1999, p. 47). A moral norm cannot be rejected unless it undergoes the same criteria of presenting reciprocal and general arguments. These two criteria in

conjunction with the basic right to justification comprise the *moral construction* of human rights. The rights emanating from this moral construction are very general but at the same time are rights that no agent (individual, state or organization) should withhold from others.

The moral construction of human rights is followed by a political construction. The moral constructivist dimension provides a starting point, the right to justification, which is culturally neutral and hence universal. From there, and through actual discourse, human rights become legal, social and political structures molded and realized in particular historic and social contexts. The political construction step gives rise to laws, policies, organizations, and agreements that realize the human rights claims emerging out of the moral constructivist level.

The political construction process is open enough to accommodate the necessary interpretations and specifications that different social and cultural context may require. In this way, the constructivist approach avoids paternalistic ticks that come with the imposition of a pre-defined interpretation of human rights. Thus, the constructivist approach to human rights does not respond to the implementation of a comprehensive doctrine, there are neither "one size fits all" nor "platonic truths". Thus, human rights are not considered eternal. They are provisional and open to contestation through a discourse that provides arguments complying with the criteria of reciprocity and generality.

It is key to highlight that Forst defines a political context as any context where "demands for human rights concretely arise and towards which those human rights are directed" (Forst, 1999, p. 48). Human rights are not allocated or circumscribed exclusively to a predefined institution. In fact, Forst asserts that "[human rights] are agnostic with respect to the question of the proper political context for their realization" (Forst, 2010, p. 738). The political context for the justification of human rights is where demands for human rights arise. It is

circumscribed to those who are expected to accept a given norm and those who may be affected by it in a morally relevant way. Likewise, such political community does not necessarily have to be located within the borders or the reach of the public institutions of a state. The right to justification determines from the outset neither which substantial reasons are adequate, nor which rights can be demanded, nor which institutions or social relationships can be justified (Forst, 1999, p. 42). The first priority is the construction of a justified set of human rights that a legitimate political authority ought to respect and guarantee, and later comes the design of the structures that ensure the establishment of such political authority (Forst, 2010, p. 726; 2015, p. 76).

Forst considers the state as the primary responsible agent for securing and providing human rights. He is also aware that limiting the concept of human rights violations exclusively to the wrongs perpetrated by official actors is a too narrow approach. It misses an important part of the picture: the role of non-state actors. The state, Forst argues, has the task to "secure human rights and to protect citizens from human rights violations by private actors such as large companies" (Forst, 2010, p. 738). The state is conceived as the "*main addressee* of claims to protect rights, even though it is not the only agent who can violate them" (ibid. emphasis added). Forst recognizes that corporations, as well as other non-state actors, can and unfortunately do breach human rights.

The fact that the state is presented as the "main addressee" does not exclude the possibility that there might exist other potential addressees of human rights, e.g. corporations. Forst, though, remains silent about the idea that non-state agents play a role in the realization of human rights. What he does address is the fact that states, on occasions, fail to protect and secure human rights. Reasons for this may be found on the state's inability to stop abuses or to its unwillingness to act. In these situations, Forst calls upon the "world community" to "react not just morally but also politically" (Forst, 2010, p. 738) for the provision of human rights. In fact, he adopts a universalist

approach towards human rights responsibilities. He allocates the responsibility to act to all human beings who, together with other agents (e.g. states, United Nations, NGOs) should establish institutions to oppose the human rights violations (1999, p. 53). However, as will be discussed in chapter 8, the universalist approach to human rights responsibilities presents important limitations in the allocation of duties as well as their realization.

To channel all the human rights responsibilities Forst calls for the creation of institutions that can mediate the duties to prevent or put a stop to human rights violations. Such institutions, Forst argues, should not only help determine who owns what kind of duty to assist those in need but also help build a structure of justification that while assigning duties avoids arbitrary judgments on who has to aid and intervene (Forst, 2010, p. 739).

The term "world community", nevertheless, remains vaguely defined. It connects with a universalist understanding of the human rights responsibilities; an approach that leaves many questions unanswered. For example, who counts as the "world community"? And, who does not? Are corporations part of it? On what grounds are "world community" agents identified and called into action to provide the protection and securitization of human rights? Unless, one provides answers to these questions it is difficult to foresee how Forst's account can guide corporations in their human rights responsibilities.

Besides the weaknesses spotted on Forst's account, his theory of human rights offers an innovative approach that is worth exploring further in the context of the BHR discussions. In contrast to all the theories exposed previously in this chapter, Forst's theory opens the door towards understanding human rights as independent from the state and law. This is an essential feature if we are to advance human rights in a Post-Westphalia context were states' authority is increasingly contested by other non-state actors.

Forst's broad understanding of what constitutes a political context, as well as the prioritization of the construction of a legitimate set of human rights irrespective of the specific underlying political structure, opens the door to non-state actors to take part in the governance of human rights issues. Telescoping a bit, part V of this dissertation will put specific emphasis on elaborating upon Forst's idea of creating institutions. It will be argued that corporations facing human rights responsibilities should create institutions that are able to guarantee victims' right to justification. However, before we get there, Part IV will detail the challenges and limitations that both the corporate social responsibility and the BHR debate face in terms of how corporations should realize their human rights responsibilities. Part IV will set the scene for the justification of applying Forst's right to justification of the BHR debate.

Part IV

7 CSR or Human Rights, is There a Way?

Part IV tackles the question of whether corporations have human rights responsibilities and, if so, on what grounds can they be justified. The discussion starts, in chapter 7, with a broad approach by examining the corporate social responsibility (CSR) concept. Chapter 8, by contrast, focuses on field specific initiatives and arguments detailing the human rights responsibilities of corporations (e.g. the UN Guiding Principles, the capabilities approach, etc.).

Since the 1970's, the concept of CSR has become a mandatory stopover for scholars aiming to discuss any kind of corporate responsibility beyond an economic or legal perspective. Thus, a priori, one could expect CSR to be the perfect harbor for the business and human rights discussion. However, the dominant economistic nature of CSR has hindered the integration of human rights into its theories and arguments. Chapter 7 looks into these difficulties and seeks alternatives to overcome them. Political CSR will come up as a promising perspective to reframe the CSR debate in a Post-Westphalia context. Still, besides its innovative approach, political CSR faces profound challenges when confronted with the concept of human rights. Chapter 8 specifically focuses on the more recent BHR debate to find further guidance on the human rights responsibilities of corporations.

7.1 Corporate Social Responsibility, an Unbounded Concept

The concept of "Corporate Social Responsibility" (CSR) has always been elusive in its definition. Bowen's (1953) book titled "Social Responsibilities of Businessmen" is said to mark the genesis of the CSR field (Carroll, 1979, p.

497). Since then, there has never been consensus on a definition. In 1979 Archie B. Carroll already listed nine different views on the meaning of social responsibility, e.g. the "Friedmanian" profit orientation, corporate voluntary activities, or going beyond the economic and legal requirements, just to name a few. He attempted to integrate all of them into a four-dimension scheme. CSR was defined as the societal expectations at a given point in time for businesses at four levels of responsibility: economic, legal, ethical and discretionary (Carroll, 1979, p. 500). He would later influentially depict these responsibilities in the form of a pyramid. At the base one could find the economic responsibilities; on top of it he subsequently added, in this order, the legal, ethical and philanthropic responsibilities (Carroll, 1991).

There are probably as many definitions of CSR as authors discussing it. The definition problem was already prevalent in the 1970s as Votaw, quoted by Garriga and Melé (2004, pp. 51-52), complained that,

"Corporate social responsibility means something, but not always the same thing to everybody. To some it conveys the idea of legal responsibility or liability; to others, it means socially responsible behavior in the ethical sense; to still others, the meaning transmitted is that of 'responsible for' in a causal mode; many simply equate it with a charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a mere synonym for legitimacy in the context of belonging or being proper or valid; a few see a sort of fiduciary duty imposing higher standards of behavior on businessmen than on citizens at large" (Votaw, 1972, p. 25).

CSR is certainly a broad concept. It is, apparently, almost incommensurable. The scholarly debate regarding its definition is one of colossal dimensions. It is the intention of this study to neither review it nor draft a definitive definition of the concept. Some scholars, in an attempt to avoid falling into the CSR

definition trap, have opted to refer to it as an "umbrella term"[15] (e.g. Jonker, 2005, p. 20; Scherer & Palazzo, 2007, p. 1096). For our purposes here, I find this is a felicitous approach that matches the needs of this study. The "umbrella term" is an uncomplicated and at the same time overarching conceptualization of the notion of CSR.

Broadly speaking, the goal of CSR is none other than to help understand business as an activity that goes beyond a mere economic dimension. Jonker, along similar lines, refers to CSR as a "sensitizing concept" that highlights the complexity of issues that come along with business activities and that helps to illuminate what needs to be debated. CSR's function is to "awaken sensitivity to a complex and multi-dimensional debate challenging the role of business in contemporary society" (Jonker, 2005, pp. 20-21).

In both the scholarly and the practitioner debate, the conceptualization of the corporate social responsibilities of corporations has been (and is) largely dominated by an empirically based liberal-economistic approach. This, as we will see below, has contributed to create a gulf between the concept of CSR and human rights; two concepts that, intuitively, should go hand in hand.

7.1.1 The Dominant Instrumental CSR Perspective

The debate on the social responsibilities of corporations and, more extensively, the one on business ethics, is often presented as divided into two separate dimensions or worlds: the normative and the empirical (e.g. Donaldson, 2003; Schreck, Aaken, & Donaldson, 2013; Treviño & Weaver, 1994).

On the one hand, the normative approach is value-driven (Treviño & Weaver, 1994, p. 116). It focuses its attention on the question of "how things should be"

[15] Following Scherer and Palazzo's approach, under the umbrella of the CSR banner I include terms like business ethics, business and society, corporate accountability, corporate citizenship, sustainability, stakeholder theory, etc.

- i.e. attempts to prescribe how individuals or business firms ought to behave. Thus, the normative approach makes use and constructs philosophical arguments to justify a certain version of "how things should be". On the other hand, the positive or empirical approach is fact-driven. It is oriented towards the description, explanation or prediction of phenomena in the empirical world through scientific methods (Treviño & Weaver, 1994, p. 117).

The relationship between these two dimensions is certainly controversial. As Donaldson and Dunfee put it: "the two worlds […] remain at a respectful distance from each other" (1994). Weaver and Treviño (1994) present three ways to understand these dimensions. First, they can be thought as parallel or independent realms with no connection between one and the other. Secondly, as a symbiotic relationship - i.e. a relationship where both, normative and positive approaches, can benefit from each other. Finally, they can be approached as an integrated debate capable of generating new theories and methodologies. Regardless of the approach we take, normative and positive research on corporate social responsibility responds to different questions and, therefore, serves different purposes.

The research on CSR over the last decades has been overwhelmingly empirically grounded; normative works represent a marginal contribution to the debate. Schreck, Aaken and Donaldson (2013, p. 298) refer to a study that shows that between the years 1992 and 2002 95% of CSR related articles in leading management journals took an empirical approach (Lockett, Moon, & Visser, 2006). That is, they were centered on the study of the empirical laws, causal relations and correlations that connect business and society. Positive research is not oriented towards the determination of the norms and goals that ought to guide behavior (Schreck et al., 2013, p. 297). It aims at the description and observation of social phenomenon (Scherer & Palazzo, 2007, p. 1096). Therefore, it is incapable to critically assess or justify norms. Donaldson complains that one of the problems that is holding back the field of

management from seriously discussing ethics is, precisely, a "scientific naiveté" that regards ethics as soft because it is perceived to be connected to emotions, not facts and therefore missing theoretical foundations (Donaldson, 2003, p. 364).

An empirical research approach to CSR is certainly useful in the determination of causes and description of events that connect businesses with society. It contributes to the understanding of the CSR internal mechanisms. In fact, a prescriptive approach without the support of rigorous empirical knowledge is doomed; it leads to a "normativistic fallacy": "the fallacy of supposing that norms alone constitute a sufficient basis for action" (Schreck et al., 2013, p. 297). However, taking the opposite perspective is equally inadvisable. A positive approach cannot serve as the exclusive ground for prescribing norms or behaviors. Deriving an "ought" from an "is" is logically flawed; it leads to committing a naturalistic fallacy (Donaldson & Dunfee, 1994, p. 253). Therefore, an empirical approach to researching CSR ought to be discarded as a suitable moral grounding for the determination and justification of the social responsibilities of corporations (Scherer & Palazzo, 2007, p. 1098) including, as well, the human rights responsibilities of corporations.

The empirical approach to CSR research plays a crucial role in the dominant economic and instrumental understanding of CSR. The economic view of CSR builds on positive research to justify CSR efforts on those cases where a specific (e.g. monetary, reputational, strategic or other) payback can be identified that positively impacts a firm's value and, reversely, rejects any CSR initiative where no profit can be spotted (e.g. Mackey, Mackey, & Barney, 2007).

Economistic-centered CSR scholars often embrace the "scientific method" as a neutral conduit to demonstrate that firms must be subjected to no other goal rather than the maximization of shareholder value. The justification of this

premise is simple, apparently: "it is the best alternative among all available and thus preferred goals for managers formulating and implementing strategy" (Sundaram & Inkpen, 2004, p. 350). The scientific method serves to justify an approach to business responsibilities that "would make Adam Smith smile" (McWilliams, Siegel, & Wright, 2006, p. 15). The underlying thesis is that social welfare is maximized when all firms in an economy maximize their total firm value (Jensen, 2002, p. 239). Thus, any CSR initiative or a stakeholder approach can only be justified as long as they instrumentally contribute to enhance firm value over the long run. This is what Jensen names the "enlightened value maximization" (Jensen, 2002, p. 235). He proposes that managers should decide along the criterion of what is best, which is in fact measured by the increase in the long term market value of the firm (Jensen, 2002, p. 236).

Given this background, it is not surprising then that CSR has often been presented as a source of competitive advantage for corporations endorsing it (Jones, 1995); or alternatively, as an instrument whose degree of application can be determined by a cost-benefit analysis (McWilliams & Siegel, 2001) - hence, the tag "instrumental CSR". A notable example along these lines that enjoyed a warm mainstream welcome can be found in Porter and Kramer's article "Creating Shared Value" (2011).

An instrumentalist perspective on CSR disables any chance for a critical scrutiny of the activities of the corporation. Sundaram and Inkpen highlight that "[i]n the field of finance, the logic of shareholder value maximization is accepted as being so obvious that textbooks just assert, rather than argue for it" (Sundaram & Inkpen, 2004, p. 350). Strikingly, empirical research is far from confirming that managers engage in CSR initiatives exclusively on the grounds of "doing good in the hope of doing well"; more complex motivations rather than the single goal of maximizing firm value seem to underlie (Spar & La Mure, 2003, p. 96). Additionally, one struggles to find unequivocal evidence

of the positive impact between corporate engagement in CSR and its impact on a firm's profits (Margolis & Walsh, 2003).

7.1.2 CSR and the (neo-) Liberal Project

The economistic approach to CSR fits perfectly with a liberal division of moral labor. The term *division of moral labor* "refers to the ways in which responsibilities for the political, social and economic dimensions of a society are divided among different political and socioeconomic institutions and various actors operating within these structures" (Mäkinen & Kourula, 2012, p. 651). Therefore, the division of moral labor sets the expectations for what can be demanded from states, firms, civil associations, trade unions, etc. Liberalism, broadly speaking, divides moral labor into two sharply defined dimensions: the public and the private. These two dimensions do not overlap in their responsibilities; they remain isolated one from the other.

Through the lens of Rawls' theory, Mäkinen and Kourula (2012, p. 652) argue, the division of labor in a liberal democratic society responds to the plurality of the citizens' conceptions of the good life. On the one hand, citizens should be treated as equal and free while the basic structures that define and shape society are not voluntary. Corporations, on the other hand, are voluntary organizations allowed to pursue their own goals and to treat its members on a meritocratic basis. Given the divide on the types of relationships that are expected in a liberal democratic society it is essential, from a Rawlsian perspective, "to set boundaries between the basic structure of society and business firms" (Mäkinen & Kourula, 2012, p. 652).

The (ultra-)liberal views of the 1976 Nobel Prize in Economics, Milton Friedman, have exerted a profound influence and become a source of challenge for the entire field of business ethics, and particularly for those scholars with an instrumental-CSR orientation. Friedman's views on CSR (1970, 2002 [1962]) incarnate the very essence of the normative and,

particularly, the political role that corporations should play within the framework of a strict liberal division of moral labor. He denied that businesses had any other social responsibility other than doing business. Friedman rejected any attempt from corporate managers to devote company resources to any kind of social activity. He famously stated in his renowned New York Times article as well as in his book "Capitalism and Freedom" that:

"there is one and only one social responsibility of business to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud" (Friedman, 1970; 2002 [1962], p. 133).

According to Friedman the corporation must be devoted exclusively to pursue its private goals – i.e. generate shareholder value. The state, in turn, has also clearly delimited functions. Among them the safeguarding of law and order, the definition of property rights and other rules of the economic game, the enforcement of contracts, the promotion of competition or the maintenance of a monetary scheme (Friedman, 2002 [1962], p. 34).

Instrumentalist CSR scholars rejected Friedman's argument that corporations have no social responsibilities. Yet, instrumentalist can be identified as Friedman's intellectual heirs. Instrumentalists acknowledge that corporations do have "social responsibilities" that go beyond conducting business properly and according to the rules of the game. However, such responsibilities are made contingent on their contribution to the value of the firm. Still, the political role of the corporation is left untouched and assumed not to interfere and stay away from public issues for which state is the exclusive duty bearer. The corporation is understood as an apolitical agent. In fact, as Mäkinen and Kourula aptly point out, the instrumental approach developed a wider voluntary conception of CSR that went beyond Friedman's narrow view.

Nevertheless, it did not lose Friedman's political doctrine, which is essentially representative of classical liberalism. The conclusion is that, "as a matter of fact, the classical liberal political doctrine as a background assumption fits well with the instrumental CSR discussion (Mäkinen & Kourula, 2012, p. 663).

On the whole, the dominant economistic conception of the corporate social responsibility concept is weakly positioned to effectively and, more importantly, justly respond to the challenges corporations face in terms of globalization and human rights. It is ill equipped to respond to complex questions such as: how are corporations going to manage their responsibilities in a transnational context with incomplete legal regulations? How can the business case logic, with its imperative on value maximization, be reconciled with a construct like human rights that aims at overriding any norm or premise standing on its way? Is the business case enough to justify a corporation's legitimacy to provide for human rights responsibilities where the state is absent? How does the exclusive reliance of the instrumental CSR approach on the state capacity and willingness to confront public issues deal with the emergence of non-state actors that are, slowly but steadily, displacing nation-states as exclusive agents in global governance affairs (Zürn, 2002)?

As discussed earlier, it is not only international organizations or non-governmental organizations (NGOs) that are increasingly active in political terms. Corporations too are already assuming political roles by engaging in the provision of public services and goods in countries or areas where the state is fragile. The retreat of the welfare state in western countries has increased the expectations on corporations to deliver on rights and goods formerly assigned exclusively to the state (Moon, Crane, & Matten, 2005, p. 440; Valente & Crane, 2010, p. 52). Furthermore, corporations engage as well in processes aiming at the setting and redefinition of standards and expectations by which they bind themselves (Matten & Crane, 2005; Scherer et al., 2006). The traditional economistic understanding of CSR, as described above, is incapable

of responding and reacting judiciously to an increasingly Post-Westphalian context. And even more critical for this study is that it is unable to provide meaningful guidance to corporations in terms of their potential human rights responsibilities.

7.2 Human Rights and the Limits of the CSR Concept

Given the inherent social affinity of the CSR concept, it seems perfectly plausible to expect human rights to play an important, if not crucial role in it. After all, human rights, as discussed in chapters 5 and 6, are essentially moral universal rights. They are meant to trump any social, political or legal arrangement anywhere and, certainly, they override the business case mantra.

Surprisingly as it may be though, human rights have played a rather peripheral role in the construction of the CSR concept (Wettstein, 2012b, p. 746). And the reason why this is the case is, to a great extent, because the dominant instrumental approach to CSR is basically incompatible with the advancement of and the sincere respect for human rights [16]. For instance, take the economistic-CSR assumption that any social responsibility borne by the corporation should be contingent on the generation of value for the firm. Such condition directly implies that corporations, in the event that they find themselves directly or indirectly connected to a human rights violation, would only have to take responsibility for those wrongs in which addressing them had a positive impact for the firm's value. This, from a human rights logic, would be nonsensical.

[16] Here I do not use the word "respect for human rights" in the sense of John Ruggie's framework "Protect, Respect, Remedy". By "respect for human rights" here I mean to act according and coherently with the premises that human rights set forward (Karp, 2014).

Wettstein further explores two arguments to explain the root cause of the bewildering poor attention placed by the CSR field on the topic of human rights (2012b, pp. 748-750).

The first argument is connected to the notion of voluntariness; an aspect that is intimately related to the CSR concept. Corporate social responsibility has traditionally been associated to voluntariness at three levels. First, CSR is associated with those responsibilities that extend beyond what is required by law, and therefore conceived as discretionary. Human rights have, since their modern inception in 1948, been repeatedly framed in political and legal terms. Within this logic, if human rights ought to play any role in connection to the corporation it would be through the scope of the legal obligations of the corporation rather than through its CSR efforts.

A second aspect of distress in relation to the voluntary character of CSR is the eminent imperative and overriding nature of human rights. They accept no questioning or discretion. Human rights trump any other rights or obligations. Their nature conflicts head-on with a conception of CSR often presented as "not universal or objective but culturally relative, largely philanthropic and subjective by nature" (Robinson, 2003, p. 9 as quoted in Wettstein 2012b, p. 749).

Thirdly, human rights, in connection to CSR, have also been associated with a form of imperfect obligations - i.e. those obligations that we are required to address but for which we still enjoy a high degree of discretion in regards to their terms of execution. For Wettstein, this implies a downgrading of the obligations derived from human rights as they are taken as a matter of virtue or beneficence, not as matter of justice[17].

[17] We can recall the discussion over perfect and imperfect obligations and their connection to justice and virtue on chapter 5.

The second problem outlined by Wettstein in terms of the scant relationship between human rights and CSR is the problem of non-political responsibility. As discussed above, CSR is a product emerging out of the western liberal tradition. Firms, and their social responsibilities, are located in the private domain. Human rights, instead, are conceived as tools to curtail and limit public power. They are, in liberal terms, and particularly in their international legal version, almost exclusively addressed to states. Thus, from a classical CSR perspective, a corporation taking action in terms of human rights may be interfering with the responsibilities of public institutions (e.g. states) and consequently perceived as conducting a political activity that is outside of its proper domain (Wettstein, 2012b, p. 750).

However, in light of the Post-Westphalia context where the exclusivity and mighty power of state is challenged, the sharp liberal division of moral labor assumed by instrumental CSR is put into question. Therefore, the question that follows is: on those situations where the state is not available, capable or willing, on what institutions or entities would transnational corporations avail themselves when they see themselves connected to human rights violations?

Having these considerations as a background, one could hastily conclude that the integration of human rights into CSR is a futile endeavor, that it is worthless to keep exploring the concept of CSR as a potential source for guidance in terms of how to discharge the human rights responsibilities of corporations. Over the last decade, though, under the banner of "Political CSR", a series of scholars have developed and debated arguments that provide new and promising avenues that allow reassessing the connection between CSR and human rights (e.g. Hsieh, 2004, 2009; Palazzo & Scherer, 2006; Rasche, 2015; Scherer & Palazzo, 2007; Scherer & Palazzo, 2011).

7.3 Political CSR as an Alternative to Instrumental CSR

The political CSR account represents the most advanced account assessing the social responsibilities corporations hold in terms of global governance. It is crucially important for the discussion of the human rights responsibilities of corporations to examine the field of political CSR because it offers two unique insights. First, political CSR, with its leverage on deliberative democracy, understands the political beyond the geographic boundaries of the state. It conceives the corporation, as well as other non-state actors (e.g. NGOs and civil society) as political or public agents and thus sets the basis for identifying them as full bearers of human rights responsibilities. Second, political CSR discusses and identifies the conditions under which the corporation can become a legitimate political actor and thus provides a ground for guiding corporations on how to discharge their human rights responsibilities.

Political CSR emerges as a reaction to the inability of the traditional CSR accounts to provide meaningful guidance to corporations to understand their social responsibilities in the enmeshed context of increasing globalization[18]. Political CSR proposes to tame the newly "extended" corporate power and put it back under the rule of democracy. The aim is to secure the "democratic integration of the corporate use of power, especially in the transnational context of incomplete legal and moral regulation" (Scherer & Palazzo, 2007, p. 1108). It attempts to do so by conceptualizing and scrutinizing corporations' responsibilities through the discourse mechanisms of deliberative democracy. Broadly, political CSR theory contributes to the management literature on the political role of corporations on two levels. On the one hand, it describes and

[18] For an alternative approach presenting political CSR as a form of globalization rather than a consequence or reaction to it see Scherer and Palazzo (2011, pp. 922-923 note 1); Whelan (2012).

explains how corporations are actually assuming this role; on the other, it offers normative guidance in carrying out this role.

To acknowledge that there is a political dimension in the concept of CSR is, by itself, nothing new. CSR had a political dimension since its inception[19]. Typically, an important chunk of the political discussions regarding CSR were related to the lobbying practices or corporate political actions (Rasche, 2015).

Over the last two decades, though, an increasing number of researchers from the field of business ethics have explored the connections and the implications that questions related to politics but also, more extensively, to political philosophy, have for the field of management (e.g. Heath, Moriarty, & Norman, 2010; Whelan, 2012, pp. 712-715). For example, inquiries about the participation of businesses in the construction of just institutions (e.g. Hsieh, 2004; Hsieh, 2009; Ulrich, 2008; Wettstein, 2009), the introduction of democracy into corporate governance (Singer, 2015), the role of democracy in the workplace (Moriarty, 2007), or reshaping the corporate responsibilities through the concept of citizenship (e.g. Matten & Crane, 2005; Scherer & Palazzo, 2007; Scherer et al., 2006). All these have become recurring topics within management and business ethics publications.

Political CSR today can be inscribed within this broader stream of politically grounded discussions in the management field. It has flourished into a multitude of perspectives: NGOs and corporations (Baur, 2011; Baur & Palazzo, 2011), multi-stakeholder initiatives (Mena & Palazzo, 2012; Scherer et al., 2006), accountability mechanism (Gilbert, Rasche, & Waddock, 2011; Rasche, 2012). In this regard Hsieh (Hsieh, 2004, 2009) and Whelan (2012), as

[19] For a brief overview see the section entitled "Political Plurality in Classic CSR" in Mäkinen and Kourula (2012, pp. 659-661).

well as Logson and Wood (2002) from a communitarian perspective, constitute notable examples.

The state of the art in the political CSR discussion, though, is represented by the work of Scherer and Palazzo (Scherer & Palazzo, 2007, 2011). They pioneered a deliberative democracy approach to CSR through which corporations could be conceived as political agents.

The conception of the corporation as a political actor is not a novelty. Peter Ulrich, for several decades the leading business ethicist in the German speaking area, was among the first to discuss its implications. In earlier works, but particularly in his magnum opus "Integrative Economic Ethics" (Ulrich, 2008), first published in German in 1997, Ulrich presents an account of corporate responsibility that goes beyond the internal dimension of the corporation. Ulrich coins the term "republican corporate citizenship" - i.e. the co-responsibility of private corporations for the regulatory environment in which they operate (2008, p. 414). He asserts that leading business figures should not "simply shrug their shoulders and point to the practical constraints of self-assertion under the given competitive conditions. Instead they will welcome and initiate ethically justified reforms of the institutional framework" (ibid.). Ulrich qualifies large corporations as "quasi-public institutions" since they are private in terms of their property basis, but the effects of their activities have a public relevance. They are, in fact, political actors. Thus, Ulrich proposes that the questions regarding the distribution of the value creation (benefits) and value consumption (costs) should be the focus of a "deliberative corporate policy making" scheme (2008, p. 419).

It is not my intention here to discuss the technicalities of Ulrich's proposition. However, I would like to highlight that Ulrich introduces the idea that corporations, as political agents, should provide justification for their behavior and they should do so via deliberation. In a nutshell, the idea is that, in the

same way public institutions are accountable to their constituency and renovate their legitimacy vis-à-vis their constituency, corporations ought to gain their legitimacy through discourse processes in front of civil society (Baur, 2011, p. 16).

Ulrich's account, nevertheless, was originally confined to the role of corporations within the nation state (Scherer et al., 2006, p. 517) and hence it is not well positioned to discuss corporate social (or human rights responsibilities) at the transnational level as political CSR does.

Scherer and Palazzo take the challenge to re-formulate this corporate role into a broader transnational context. They propose to change the way in which CSR has traditionally understood legitimacy – i.e. one based on profit maximization. They move on from an apolitical role of the corporation, complying with national law and acting within a context where social expectations are relatively homogenous. In contrast, they propose "a fundamental shift to moral legitimacy, from an output and power oriented approach to an input related and discursive concept of legitimacy" (Palazzo & Scherer, 2006, p. 71).

Legitimacy can be defined as a "generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions" (Suchman, 1995, p. 574). An important point to keep in mind is that the shape that legitimacy may adopt is contingent on the context as well as on the nature of the problem at which it attempts to respond (1995, p. 573). Suchman (1995, pp. 577-584) depicts three types of legitimacy, namely: cognitive, pragmatic and moral. Cognitive legitimacy relates to the acceptance of an organization as necessary or inevitably based on a set of cultural values that are taken for granted. Pragmatic legitimacy is grounded on the "self-interested calculation of an organization's most immediate audiences" (1995, p. 578). The audience assesses what costs or benefits it may extract out of a given organization

activity and may consequently bestow legitimacy. Finally, moral legitimacy is based on a normative assessment of the organization's activities; it is not based on a cost-benefit analysis as pragmatic legitimacy suggests. The assessment is based on the audience's socially constructed value system and is usually connected to the effective promotion of societal welfare.

Scherer and Palazzo (2006, p. 75; 2011, p. 915) point out that the dominant instrumental account of CSR has traditionally relied on pragmatic and cognitive legitimacy by calling on corporations to meet the expectations of society or by adapting to the rules of society or community. Globalization, they argue, makes it more difficult than ever to accommodate to these parameters due to both the pluralization of society and the multiple locations in which corporations operate. "On the global playing field", Scherer and Palazzo observe, "there are no broadly accepted normative standards, neither in legal, not in moral terms" (2006, p. 77). Corporations can no longer stick to a consistent and homogeneous set of ethical precepts. Therefore, corporations have often no other option than to embrace moral legitimacy, which in contrast to cognitive and strategic legitimacy,

"requires the explicit consideration of the legitimacy of capitalist mechanisms and corporate activities by giving credit to the interests and arguments of a wide range of constituencies that are affected by the activities of (multinational) corporations. Moral legitimacy is a result of a communicative process and finally rests on the 'forceless force of the better argument' (Habermas, 1990, p. 185)" (Scherer & Palazzo, 2011, p. 916).

Given that moral legitimacy rests on "public explicit discussions", organizations can gain legitimacy through vigorously participating in these debates (Suchman, 1995, p. 585). The participation of corporations in these kinds of deliberations should follow, Scherer and Palazzo suggest (2006; 2007),

the conditions of the "ideal speech situation" as outlined by the philosopher Jürgen Habermas (1993).

Habermas' discursive theory serves Scherer and Palazzo as inspiration as well as foundational stone upon which to construct their theoretical building. It is through the conditions of "ideal speech" that decisions can be adequately and justly taken. These conditions consist of the freedom of access, participation with equal rights, truthfulness of the participants, and the absence of coercion (Habermas, 1993, p. 56; Scherer & Palazzo, 2007, p. 1104).

Habermas' theory does not predefine or constrain the content or outcome of the discourse. Instead, it presents discourse as a process through which participants, respecting the conditions of ideal speech, should reach a consensus on the decision to be taken. Eventually, the discursive approach proposed by Habermas should virtuously lead us to the "unforced force of the better argument" (Habermas, 1996, pp. 305-306).

Scherer and Palazzo's discursive perspective on CSR aims at reaching the acceptance by all those involved in the decision. This is an idea that deeply contrasts with the economic-instrumentalist understanding of CSR where decisions are exclusively contingent on maximizing value for the firm.

However, the novelty of the political CSR approach, as presented by Scherer and Palazzo, does not lie in the introduction of the discursive perspective into the management and CSR literature. Neither is their substantive contribution located in the internal and strategic discursive perspective to address managerial issues as put forward by scholars of critical studies[20]. The qualitative leap is the presentation of the discursive perspective beyond the

[20] Scherer and Palazzo comment and leverage on the work developed by scholars on critical management studies (e.g. Alvesson & Willmott, 1995; Burrell & Morgan, 1979; Deetz, 1995; Shrivastava, 1986).

private realm of the corporation and placing it on the public sphere. Without disengaging from the discursive ethics principles, they jump into the next level and propose to adopt Habermas' theory of deliberative democracy to conceptualize the corporation as a political actor in the Post-Westphalia context. To understand the corporation as a political actor implies that the corporation joins other governmental actors in the processes of civic self-determination and becomes object of democratic scrutiny (Gutmann & Thompson, 2004; Habermas, 1996; Scherer & Palazzo, 2007, p. 1106).

Scherer and Palazzo's move represents a direct challenge to the principles of traditional liberal democratic theory. Liberal democracy forbids the corporation from any direct democratic legitimacy. It does so in two ways (Scherer & Palazzo, 2007, p. 1106). First, by holding that only political and public actors should give account of their actions to the citizenry. Corporations, instead, are understood as private apolitical actors whose decisions are only accountable to their owners (shareholders), except in those occasions where they trespass the law and moral customs (Friedman, 2002 [1962]). Second, the unique condition required for corporations to earn their legitimacy is to contribute to society through the generation of economic profits. Public institutions, in contrast to corporations, construct their legitimacy through the outcomes obtained in electoral mechanisms where citizens express and aggregate their preferences usually through casting votes. As outlined earlier in this chapter, liberal democratic theory builds a big wall between the private realm, where economic activities are located, and the public, where political activities are located.

Deliberative democracy, as discussed in chapter 3, profoundly challenges many of the liberal assumptions. It does not buy the liberal assumptions of the fixed and self-interested preferences of citizens. Preferences are changed and molded through a deliberation process. The source of legitimacy is rooted in the quality of the deliberations. The process and conditions through which

discourses take place become one of the central concerns of the deliberative democracy approach. Hence, one speaks of the procedural approach of deliberative democracy.

The instrumental approach to CSR indispensably requires a strict liberal division of labor between the roles and responsibilities of private actors (e.g. corporations) and those corresponding to public actors (e.g. the state). Globalization directly challenges this assumption. The increasingly prominent political role of corporations, their participation in the elaboration of private systems of rule by which they abide themselves, the waning capacities of nation-states to effectively regulate business activities; all these conditions provide unquestionable proof that the liberal public-private division of roles is floundering.

Political CSR disables the instrumental approach to CSR on two levels. On the one hand, it shows its incapacity to provide truly critical guidance beyond the business case and the risks associated with its exclusive orientation towards positive research. On the other, it exposes the limitations of the instrumental paradigm in the Post-Westphalia context.

For the most part, "political CSR suggests an extended model of governance with business firms contributing to global regulation and providing public goods. It goes beyond the instrumental view of politics in order to develop a new understanding of global politics where private actors such as corporations and civil society organizations play an active role in the democratic regulation and control of market transactions" (Scherer & Palazzo, 2011, p. 901).

7.4 Political CSR, a Way Forward for the Advancement of Human Rights?

Chapters 4 and 5 argued that human rights hold an intimate connection with justice, one that ultimately grounds their special status and characteristics. Human rights also have a political dimension in the sense that they define a threshold of what can and cannot be accepted in human social life. Political CSR allows identifying corporations as political actors, and it opens the door for them to assume human rights responsibilities. This represents a major change to the instrumental CSR account, which conceptualizes corporations as exclusive economic agents and, therefore, it is only driven by the business case.

Besides the advantages outlined above, I argue that the normative foundations of Political CSR entail challenges that cause doubt on its ability to act as a platform upon which to discuss corporate human rights responsibilities.

Political CSR, as developed by Scherer and Palazzo, is intimately connected to the pragmatism of John Dewey (1981) and Richard Rorty (1991), as well as Habermas' (1996) idea of the primacy of democracy over philosophy. Eventually, what prevails "[…] is not the purity of the philosophical argument but its link to the established context of democratic procedures and the problems and interests of the citizens" (Scherer & Palazzo, 2007, p. 1109). The pragmatism and the primacy of democracy to philosophy lead Scherer and Palazzo to reject what they call the monological approach to business ethics. That is to say, they refuse to endorse any ethical universal approach for the protection of local historical rationalities (Rorty, 1989; Scherer & Palazzo, 2011, p. 905).

Often, scholars working in the field of business ethics have adopted the lenses of other philosophers and theories through which they assess corporate social issues - e.g. Kant's deontology, Aristotle's virtue ethics, Mill's utilitarianism,

etc. Scherer and Palazzo (2007, p. 1101) are skeptical that such particular "monological" lenses can provide a valid moral guidance in a globalized world characterized by a pluralism of cultures, values and life-styles. They find in discursive ethics a more adequate tool to confront this background; an approach that does not impose any given view but that is capable to adapt and transform itself to any particular context:

"If normative conflicts can no longer be solved by referring to a shared background of values and traditions, communication becomes the sole source of peaceful interaction and mutual recognition (cf. Habermas, 2001, p. 74). This is especially true in a context of non-existing or weak global governance mechanisms" (Palazzo & Scherer, 2006, p. 79).

Globalization, they argue, also weakens the regulatory framework on which corporations operate and "the moral context of managerial decision making is fragmentized" as well (Scherer & Palazzo, 2011, p. 905). Scherer and Palazzo are uneasy with the picture of the philosopher sitting on her desk designing how values, institutions or responsibilities should look like through the lenses of one of these monological theories. The key take away for them is not to forget that,

"the theory, its conclusions, or any claims about the validity of norms or hypernorms are shaped by the cultural background of their authors and, thus, cannot claim universal validity. […] [T]here is no "view from nowhere." (Scherer & Palazzo, 2007, p. 1102).

Scherer and Palazzo repeatedly emphasize this last aspect by, for instance, denying the existence of any "Archimedes point", nor any ahistorical or acultural perspective outside the social world where to construct ethical views that are "universal, dispassionate, and impartial" (Scherer & Palazzo, 2007, p. 1101). In fact, they insist that,

"[a]gainst the background of the transnationalization of corporate activities, it is difficult to grasp the idea of conformity to some more or less implicit rules of some more or less contained communities. On the global playing field, there are no broadly accepted standards, either in legal or in moral terms" (Scherer & Palazzo, 2007, p. 1108).

Generally, the normative ground of Political CSR makes it extremely difficult, if not impossible to reconcile with the idea of human rights. Ultimately, the goal of human rights, as discussed in chapters 5 and 6, is precisely to emerge as a universal standard of behavior across peoples, nations and communities. Human rights want to represent those minimal values shared across humanity that shall not be undermined; a sort of ultimate ethical frame of reference. And this is precisely what Scherer and Palazzo deny when they endorse the postmodern assumption that "there is no ultimate frame of reference, no ultimate truth, no universal knowledge, and no universal business ethics either" (Scherer & Palazzo, 2007, p. 1103). Additionally, one should bear in mind that, as discussed in chapter 6, Habermas' concept of human rights "does not have its origins in morality, but rather bears the imprint of the modem concept of individual liberties, hence of a specifically juridical concept. Human rights are juridical by their very nature" (Habermas, 1998a, p. 190). In other words, he denies that human rights are, first of all, moral rights.

Besides such controversial premises, Political CSR scholars are far from rejecting human rights. Human rights are not a central concern in their account; theirs is not a theory about human rights. In fact, they constantly make references and highlight human rights as a relevant topic to global governance affairs. They do acknowledge their importance and need, nonetheless (e.g. Scherer & Palazzo, 2007, pp. 1109, 1112). Yet, in light of the normative background just reviewed, their arguments seem to incur into potential contradictions when confronted with the concept of human rights.

Furthermore, the normative foundations of political CSR are not the only hurdles to overcome in terms of human rights. Its core Habermasian deliberative premises also represent a risk of relativizing human rights. Political CSR encourages corporations to explore and define their social responsibilities through discourse. It implies that corporate responsibilities may change or evolve according to different social or cultural backgrounds. We cannot draw, however, the same analogy for human rights without betraying their original meaning. A deliberative approach, as proposed by Political CSR, would require that human rights and the accompanying responsibilities are to become the outcome of a particular discourse. Hence, different discourses may lead to different conceptions of human rights. To assume that human rights change, and that both their content and responsibilities depend on the results of a discourse, necessarily implies to deny their universal moral nature as well as its equal worth to all human beings. Through this lens, the content and the responsibilities connected to human rights would become very susceptible to criticisms of moral relativism.

7.5 Political CSR Through the BHR Lens

The political approach to CSR put forward by Scherer and Palazzo has also caught the attention of business and human rights scholars. Interestingly, the BHR field received the Political CSR debate with mixed feelings. On the one hand, some business and human rights commentators have demonstrated their sympathies with the political conceptualization of corporate responsibilities in the Post-Westphalia context (e.g. Arnold, 2010, 2013; Santoro, 2010). For instance, Wettstein points out that corporate human rights responsibilities can lead to the recognition of a morally grounded duty to play a political role (Wettstein, 2009; 2012c, p. 49); an idea that will be further assessed in chapter 8. Others have reacted more skeptically towards what Political CSR could bring to the business and human rights discussion. The grounds for their

distrust are often connected to the fact that a narrow political approach to human rights may carry along positions grounded on moral relativism[21], which in turn may weaken and subvert the concept of human rights.

Michael Santoro, for example, is concerned that a Political CSR approach to human rights would imply that "human rights responsibilities of TNCs are not based on immutable, transcendent moral principles. They are rather a product of 'inclusive' supranational political bargaining" (Santoro, 2010, p. 290). Santoro draws a line between philosophically oriented business ethicists and proponents of the Political CSR account or "Post- Westphalians" as he calls them. The former are concerned with whether corporate power is exercised in an ethical manner. The later, instead, put the focus on whether this power is politically legitimate. What is troublesome is that while "for moral philosophers the behavior of a TNC cannot be 'legitimate' if such behavior violates moral principles" (read human rights), "Post-Westphalians seem to leave open this possibility" (Santoro, 2010, p. 288).

The concern of moral philosophy grounded business ethics is "whether (corporate) power is being exercised in an ethical manner and not whether the exercise of that power is politically legitimate" (ibid.).

According to Santoro, the Political CSR's idea of political legitimacy is disconnected from questions of morality and justice that philosophically oriented business ethicists traditionally addressed (Santoro, 2010, p. 287).

[21] More specifically, I am here referring to metaethical moral relativism. That is, the idea that "the truth or falsity of moral judgments, or their justification, is not absolute or universal, but is relative to the traditions, convictions, or practices of a group of persons" (Gowans, 2015). Therefore, relativism directly challenges the universality and moral agreement represented by human rights (Donnelly, 2003, pp. 57-106). Relativism is often promoted as a way to encourage toleration and conversation, but in fact, in many occasions, it is presented as "just a reason to fall silent" (Appiah, 2006, pp. 30-31) in front of human rights violations.

Eventually, he concludes, “The challenge for the Post- Westphalians is to determine how TNCs will govern legitimately or be governed democratically in a world of declining national power. By contrast, more philosophically oriented business ethicists begin with basic and immutable moral principles and ask how they apply to the activities of TNCs” (Santoro, 2010, p. 292).

Denis Arnold (2010, 2013) expresses his doubts about the adequacy of political CSR along similar lines of reasoning as Santoro does. “On a political conception of human rights”, Arnold points out, “duties are derived from political agreements and are binding on those organizations or nations who are party to the agreement or who are legitimately subject to those who are party to the agreement” (Arnold, 2010, p. 382). Thus, Arnold concludes, “TNCs not party to the original agreement, or who did not subsequently endorse the agreement, would not be bound by the human rights duties articulated in the agreement and one would have no claim against them in jurisdictions with little or no protection of the rights of workers” (ibid.). Eventually, Arnold is rightfully concerned that, from a political perspective, the respect corporations should have for human rights would be contingent on strategic decisions of whether to join or not a political agreement; not necessarily on the overriding importance of human rights.

Arnold is convinced that the political account of corporate social responsibility cannot provide a solid ground upon which to build the human rights responsibilities of corporations (Arnold, 2013, p. 126). He discusses two major arguments (2013, pp. 129-130). Firstly, he points to a “process objection”. He is concerned that, given the fact that many of the biggest corporations impact the life of millions of individuals, pragmatically, he wonders how all these diverse voices may be engaged in a discourse process. Secondly, Arnold points to a “voice objection”. It is unclear to him how could those “at the bottom of the pyramid”, with their illiteracy and vulnerabilities, be able to make their voice heard and take part in discourse processes” (ibid.).

Arnold and Santoro's arguments questioning the desirability of the political CSR approach from a human rights perspective are rooted in a common idea: human rights ought to be fully respected at all times and equally enjoyed by all individuals. Arnold and Santoro's intuition is that discourse mechanisms should define neither the content nor the responsibilities emerging from human rights.

Their apprehension for the political approach, in the terms they frame it in, is reasonable and totally justified. However, an important part of their concern is connected to a rather constrained understanding of the concept of "politics". The overlap between politics and moral is far broader than their arguments seem to sustain. As Wettstein acknowledges, "moral responsibility is not opposed to but often constitutive of the way the notion of political responsibility is used in the debate on political CSR" (Wettstein, 2013a, p. 58). A broader understanding of the term "politics" certainly helps to emphasize its potential contribution rather than its perils for the role businesses can play for human rights.

Therefore, the problem is not a matter of either adopting a political or a moral understanding of human rights as if these two dimensions only shared an abridged connection between them, as Santoro and Arnold seem to assume. The problem with Political CSR, at least in terms of its connection to the human rights responsibilities of corporations, lies in its core normative assumptions as well as in its central emphasis on discourse mechanisms. Still, Political CSR offers invaluable insight confronting the extended political responsibilities of corporations in the Post-Westphalia context. As commented above, Political CSR allows recognizing corporations as political actors and provides avenues to reconfigure their associated responsibilities under a democratic scheme. It provides a robust alternative to the dominant instrumental CSR account by overcoming its shortsighted business case.

I aim to capitalize on these major advances from the Political CSR debate. However, to avoid the structural human rights limitations of their discourse-centered account requires a profound re-assessment of its premises. Chapter 8 will present an alternative account based on the work of the philosopher Rainer Forst. In it, I will suggest to switch from a deliberative discourse centered approach to a deliberative account grounded on Forst's "Right to Justification".

8 Business and Human Rights Responsibilities: a Political Approach

The previous chapter assessed the concept of Corporate Social Responsibility (CSR) with the intention to explore how it could effectively and coherently integrate human rights. In this regard, the body of Political CSR literature was distinguished among other CSR perspectives by its promising insights as well as its daunting challenges. Chapter 7 concluded that reframing the Political CSR along the terms of Rainer Forst's deliberative theory of human rights provides an interesting way forward.

Stepping back a bit, chapter 7 was built upon the premise that corporations do bear human rights obligations or responsibilities. Some scholars argue that corporations are already effectively dealing with these responsibilities (e.g. Crane & Matten, 2005; Scherer et al., 2006). Still, the fact that corporations are actually dealing with them does not justify the argument that they should at all. In fact, in response to the question of how should corporations deploy their human rights responsibilities requires two steps: first, to understand what human rights are and what responsibilities come along with them. Secondly, who and on what ground should bear these responsibilities.

Part III of this dissertation already addressed the question regarding the nature of human rights. This chapter now turns its attention to the question of who should bear the human rights responsibilities. It starts by assessing the four main approaches that the body of BHR literature employs in the discussions over the identification of potential human rights duty bearers, namely: the state-centric, the universalist, the capabilities and the publicness approach. As we will see, as soon as these accounts are taken out of the discussion about *who* should bear human rights responsibilities, and are requested to provide further detail about *how* should the actor in question realize its human rights

obligations. These approaches remain silent or provide incomplete or inadequate advice.

I will argue that the capabilities and publicness approach assign corporations a political role in the realization of their human rights responsibilities. They do so relying on a conception of human rights that is inclined to a materialistic understanding of the realization of rights, and in which victims are expected to play a rather passive role in the realization of their rights. The chapter will conclude that the realization of human rights responsibilities, if it aims to be just and avoid undue domination, inevitably requires to adopt a democratic perspective where all those affected can participate in all those decisions that significantly impact their human rights.

8.1 State-centrism: One to Rule Them All

The most common and widely shared approach to the allocation of human rights responsibilities is the state-centric approach. The state is identified as the exclusive actor holding human rights responsibilities. As we will see, the current state of the art on the allocation of human rights responsibilities for corporations takes a state-centric perspective.

The state-centric account relies on the fact that the entire human rights regime, including all conventions and declarations, was constructed by states and for states. States were the only actors who discussed, approved and ratified international human rights law, whose goal was never to bind any other agents other than states.

Historically, and still today, the state has been (and is) the main perpetrator of human rights violations. At the same time, it has been conceived as the exclusive bearer of the responsibilities to protect and promote human rights. Through history, we can find a number of declarations where states committed

to grant and protect citizen rights. Documents likes the Magna Carta (1215), the Declaration of Rights of Virginia (1776), the Declaration of the Rights of Man and of the Citizen (1789), or the Universal Declaration of Human Rights (1948) are great examples of the central role the state has traditionally played in the advancement of human rights. Furthermore, modern international law and human rights law have mainly, if not exclusively, focused on protecting individuals from government violations (Weissbrodt, 2005, p. 282). It has not been until recently that such a premise has been questioned and the focus started shifting towards non-state actors and alternative forms of regulation (see Buhmann, 2009; Deva, 2012; Kinley & Tadaki, 2004).

Within the state centric logic, to accuse corporations of human rights violations and to expect them to observe certain human rights duties is, as Peter Muchlinski (2001, p. 32) highlights, well beyond the scope of responsibilities set by international human rights law. Corporations cannot be held responsible for human rights violations, at least not directly. For example, imagine a corporation known for its forced labor practices in country X. Such practices, from an absolute state-centric point of view of the human rights responsibilities, cannot be framed as legal human rights violations. The corporation cannot be charged with breaching human rights since human rights are the exclusive obligation of states. Country X, instead, could be accused of human rights violations only if it failed to put in place the instruments to investigate, judge and prevent forced labor practices.

It is the state that is considered the only actor responsible for human rights violations, and where a corporation or any other non-state actor may have inflicted human rights wrongs, it is the state that may be accused of human rights violations for neglecting its duty to protect its citizens' human rights.

The state-centric approach does not deny that corporations have human rights responsibilities. Corporations, it is often argued under the state centric

perspective, have indirect human rights responsibilities (Cragg, 2012b, pp. 15-16). There is a broad agreement on the idea that corporations have a moral obligation to respect the law. National law shall be constructed to incorporate the premises of International Human Rights law. Thus, corporations do have human rights responsibilities although, it is argued, these responsibilities are imposed and mediated by (national) law (Cragg, 2012b, pp. 15-16).

The assumption that lies behind the state-centric view of human rights coincides with the assumption driving the dominant instrumental CSR approach discussed in the previous chapter. That is, one in which corporations operate in liberal market societies ruled by a strict division of labor between the public and the private where the allocation of human rights responsibilities is neat and straightforward. Corporations have no direct obligations other than to comply with the law. They have no morally based human rights responsibilities, only those legal responsibilities that (national) law may assign to them.

The state-centric approach wields two main reasons to argue that human rights responsibilities should be prevented from being allocated to corporations.

First, if corporate responsibilities were allocated to actors other than the state it would create a democratic disruption. Human rights are a matter of public interest; they are standards by which any society should guide itself. The state, per definition, should be the ultimate guarantor and protector of the public interest. Thus, a state-centrist would argue that given the public nature of human rights, it would be democratically inconsistent that these responsibilities were carried out by other agents or institutions other than publicly elected officials (Cragg, 2012a, p. 15). Eventually, corporate managers are accountable to the private interests of their shareholders and to the law that binds them. States, instead, are accountable to their citizens and to the international community for their human rights responsibilities. Peter

Muchlinski warns us that extending human rights responsibilities to corporations may make them appear more important than they should be. By treating them as quasi-governmental public institutions, one runs the risk to downplay the state responsibilities for human rights (Muchlinski, 2001, p. 44). On a similar tone, Bishop issues a cautionary note on the allocation of human rights responsibilities to corporations. Bishop warns us that with responsibilities should come legal rights that allow fulfilling them. Hence, this may imply granting corporations rights that they ought not to enjoy. (Bishop, 2012).

A second line of argument for state-centrists is to justify the exclusivity of the state in matters of human rights responsibilities on the alleged unique capacities the state treasures (not corporations). Cragg (2012b, p. 19) points out that rules and regulations requiring a right or rights to be respected can only be institutionalized by and within organizations that share two distinct features. Firstly, the organization's goals have to be compatible with the full respect of human rights. Secondly, the organization has to have the means to put in place and enforce the rules and regulations that are to be institutionalized. Cragg concludes that states certainly fulfill these two characteristics as they have "the moral authority, but also the legal and financial capacity to make laws and build the institutional structures required to enforce the laws they create" (2012b, p. 20).

The unparalleled capabilities of the sovereign state to bear human rights responsibilities are often taken for granted. Henry Shue, for example, allocates human rights obligations to states on the premise that they have unique institutional abilities to affect and to protect against threats of fundamental human interests (Shue, 1988; 1996, pp. 29-34). However, the idea that states have unique capacities that other actors lack is part of the "utopia" of sovereignty (Karp, 2014, p. 93).

Furthermore, another recurrent argument regarding the unique capacities of the state is that states autonomously accept or agree to be bound by international human rights laws (Karp, 2014, p. 93). State-centrism, with its exclusive reliance on the state, is an account of human rights responsibilities that is able to provide meaningful guidance in conditions of ideal theory. It assumes that the state has the capacity to fully realize its human rights responsibilities as well as to construct, provide, enforce and maintain a legal framework where all non-state agents comply with their indirect human rights responsibilities.

Already in 1990, Robert Jackson (1990) started questioning whether such conditions of ideal theory existed. He differentiated between states and "quasi-states". "Full states", Jackson argued, enjoy positive sovereignty – i.e. "presuppose capabilities which enable governments to be their own masters" (1990, p. 29). In contrast, "quasi-states" lack these capacities. They are devoid of "empirical statehood" and rely on a conception of "negative sovereignty" – i.e. they entirely base their sovereignty on the notion of "freedom from outside intervention" (1990, pp. 1,11, 30-11). These limitations served Toni Erskine to emphasize that weak states should not be assigned the same moral responsibilities as full states do and, consequently they should not bear the same human rights obligations as strong states bear (Erskine, 2001, pp. 83-85).

In addition, the globalization process further exacerbates the limitations of the state-centric approach to human rights responsibilities. It causes doubt on the ability and willingness of states to fulfill their corresponding human rights responsibilities (Cragg et al., 2012, p. 2). The forces of globalization erode the power of the state and partly transfer it to non-state actors (including corporations). The downside is that the shifting of powers between governments and corporations is also leading corporations to take part in significant and harmful human rights abuses (Clapham, 1993, pp. 137-138). In many occasions, the state simply lacks the capacities and the instruments to autonomously realize its basic human rights responsibilities, including

regulating and keeping track of non-state actors. Against this backdrop, Clapham already concluded, more than 20 years ago, that TNCs must be subjected to human rights responsibilities regardless of their status as private entities because human dignity must be protected in every circumstance (1993, p. 147).

From a state-centric perspective, the role of law is absolutely indispensable. There are only two ways to assign human rights responsibilities to corporations. On the one hand, one can work in interpreting the existing international law regulations in a way that demonstrates that corporations do already have such responsibilities. The most significant example of re-interpretation of current law oriented towards holding liable corporations for human rights violations is the Alien Tort Claims Act. On the other hand, one should encourage international governmental institutions to engage in the creation of specific regulations for corporations. Only if one of these two legal strategies, or a combination of both, succeed in being accepted, will corporations bear direct human rights responsibilities according to state-centrists. The UN Draft Norms were a first attempt to create an international normative body to bind corporations, a sort of international human rights law for corporations. They failed. Yet, they sow the seed in the BHR discussions for what would later evolve into the current debate's state of the art.

8.2 The Genesis of the Contemporary BHR Debate

On August 26, 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted a document entitled "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights". This document was also known as the "Draft Norms" (United Nations, 2003; Weissbrodt, 2005; Weissbrodt & Kruger, 2003). The Draft Norms were the first original attempt to create an

international legal platform upon which to assign direct human rights responsibilities to corporations.

The Draft Norms attempted to "impose direct responsibilities on business entities as a means of achieving comprehensive protection of all human rights" (United Nations, 2005c, para. 9) and listed specific rights that were considered to be potentially impacted by the activities of corporations. Additionally, the Draft Norms established that both states and corporations would bear responsibilities to promote, secure the fulfillment of, ensure respect of, and protect human rights recognized in international as well as national law (cf. United Nations, 2003 para. 1). The draft norms appointed the state as the primary agent to fulfill these responsibilities. Similarly, corporations had the same responsibilities as states, although, the Norms established, restricted to their sphere of activity and influence (cf. United Nations, 2003 para. 1). This implied that corporations were responsible not only for respecting rights but also for playing an active role in the provision, promotion and fulfillment of human rights (United Nations, 2003 preamble; Weissbrodt & Kruger, 2003, p. 911).

The norms were adopted as a non-voluntary initiative trying to differentiate themselves from voluntary guidelines like the UN Global Compact or the OECD Guidelines for Multinational Enterprises (Weissbrodt & Kruger, 2003, p. 913). However, they were not a treaty (Weissbrodt, 2005, p. 288). They were presented as a soft law instrument ready to be applied in national and international courts (United Nations, 2003 para. 18; Weissbrodt & Kruger, 2003, p. 914). The criticism from the business sector that followed was tremendous (e.g. ICC/IOE, 2003). Eventually, the Human Rights Commission, facing a significant lack of support from the business community and the states decided not to endorse the Draft Norms proposed by the sub-Commission. The Draft Norms were not rejected either. Instead, the Commission decided to recommend the UN Secretary General the appointment of a Special

Representative (SRSG) with the mission to help overcome the impasse in which the BHR debate found itself trapped in (cf. United Nations, 2005b).

According to Arnold, "Norms fail to provide a plausible and defensible account of those duties and in so doing undermine, rather than enhance, efforts to ensure that corporations contribute to the fulfillment of those basic human rights" (Arnold, 2010, p. 374). Arnold attributes their failure to three factors. First, Norms did not differentiate between corporations and states besides their distinct goals and practices, which led to confusion over the duties of each agent. Second, Norms dwelled on aspirational rights rather than minimum standards. The ICC and the IOE considered that "aspirational human rights" were political, social and economic aspects that should be a matter of governmental decision. Thirdly, the Norms were presented as non-voluntary and consequently as legally binding; this was probably the aspect that generated the strongest pushback from the business side (ibid.).

By the early 2000s, the negotiations over UN Draft Norms seemed to be in a dead end. In July 2005, the UN Secretary General Kofi Annan appointed professor John Ruggie as "Special Representative of the Secretary General on the issue of human rights, transnational corporations and other business enterprises" (SRSG) (United Nations, 2005b). His mission was no other than to bring light to a discussion that had become a complete muddle. Later, the work of the newly appointed SRSG would become the state of the art in the BHR field.

8.3 The State of the Art: the Work of John Ruggie as SRSG

Among the numerous reports produced by John Ruggie as SRSG, two documents are of crucial relevance: the UN Protect Respect and Remedy Framework (UNPRR) and the subsequent UN Guiding Principles (UNGPs). As of today, these two documents are considered the state of the art in the

BHR debate. The UNPRR framework contains the normative foundations upon which the SRSG establishes his understanding of the corporate human rights responsibilities. The UNGPs are a collection of guidelines towards the implementation and realization of the framework.

Three core principles or propositions ground the work of the SRSG. With them, Ruggie attempts to provide a clear cut between the role of the state and the corporation in regards to human rights responsibilities. The SRSG did not present these principles as independent artifacts but as complementary to each other. They are clearly explained in the UNPRR framework, namely (Ruggie, 2008 para. 9):

- The state duty to protect against human rights abuses by third parties, including business
- The corporate responsibility to respect human rights
- The need for more effective access to remedies

The SRSG recognized the state as the exclusive duty bearer for the protection of human rights from third party abuses, including business corporations. No other actor, besides the state, is considered to have a stake in this duty. In line with the state-centric view, the SRSG acknowledges that the state duty to protect is deeply rooted and established in international human rights law. The SRSG restricted himself to recommend tools states could consider to actively enhance their role and active participation for the protection of human rights; for example, the alignment of internal state policies and agencies or the influence the state can exercise in shaping corporate culture (Ruggie, 2008 para. 29-42).

The second principle establishes that corporations have the responsibility to respect human rights. The framework defines the meaning of this responsibility as “not to infringe on the rights of others - put simply, *to do no*

harm" (Ruggie, 2008 para. 24 emphasis added). According to the SRSG, any other responsibility going beyond the do no harm proviso must be the result of the corporation's voluntary commitment. The framework not only defines the content of the responsibility of corporations ("do no harm") but it also defines its scope. The UN Draft Norms limited the human rights responsibilities of corporations to a closed list of rights and accompanied it with a broad understanding of the responsibilities corporations should bear. The SRSG, instead, opted for the opposite approach, he narrowed the corporate responsibilities to "*do no harm*" but extended the scope of this responsibility to all human rights (Ruggie, 2008 para. 51).

Finally, the third pillar focuses on the need to provide better access to remedy and grievance mechanisms (juridical and non-juridical) to be put in place according to the state's duty to protect and the corporation's responsibility to respect human rights. Both states and corporations are equally called upon to participate and contribute to put in place tools that allow for investigation, monitoring and remedy of allegations related to human rights violations. This third pillar will become especially relevant in the discussion in chapter 10.

Both the UNPRR Framework and the Guiding Principles enjoyed the endorsement of a wide range of business organizations and NGOs. The UN Human Rights Council approved both documents unanimously. Since then, the BHR debate gained formidable visibility and gathered the attention of a broader audience. Few other UN initiatives have ever generated a similar consensus. The International Standards Organization 26000 norm, the International Finance Corporation and its Sustainability Framework and Performance Standards, or the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD) are only a few examples of initiatives that have embraced the principles and transformed their own guiding standards accordingly. A convergence of standards regarding the human rights responsibilities of corporations had taken off. The

work of the SRSG has become an authoritative focal point for the discussion on the human rights responsibilities of businesses.

In fact, John Ruggie, in his role as SRSG, marked a turning point for the BHR debate. It provided visibility and broad exposure to a debate that once was acrimonious and polarized. In the words of Scott Jerbi, as quoted by Florian Wettstein, "Ruggie has been largely responsible for moving what was a stalled and divisive debate to a new phase of dialogue and activity inside and outside the UN system" (Jerbi, 2009, p. 301). To which Wettstein adds: "one cannot but acknowledge the tremendous transformation the debate has undergone since John Ruggie took over" (Wettstein, 2015, pp. 1-2).

8.3.1 Assessing the Guiding Principles

Henry Shue and David Karp are scholars who have developed alternative accounts to the SRSG's understanding of human rights duties and responsibilities. A closer look into the classic work of Henry Shue on "basic rights" (1996), as well as the more recent approach developed by David Karp (2014), will help unearth a number of normative limitations to the UNGPs.

As discussed in chapter 5, one of the first scholars to discuss what sort of duties emerge out of "basic rights" was Henry Shue. Shue challenged the idea that to every right there is one single duty bearer. In fact, he pointed out that every basic right is connected to three correlative duties, all of them to be realized if we aim at the complete fulfillment of the right (1996, pp. 35-64). Namely:

- The duty to avoid depriving
- The duty to protect from deprivation
- The duty to aid the deprived

Different individuals or institutions can be called to take part in the fulfillment of a certain right at any of the three different correlative duties. However, Shue

never discussed who should bear these duties nor according to what criteria they should bear them. The discussion over the division of labor to fulfill the correlative duties is a matter that Shue explicitly refused to pursue (Shue, 1996, p. 61).

Back in 1989, Thomas Donaldson already argued that corporations did bear human rights duties along the lines advanced by Shue. Donaldson qualified Shue's arguments and suggested that corporations bear human rights duties to avoid deprivation and protected from deprivation but did not bear the duty to aid the deprived (Donaldson, 1989, pp. 83-86). Corporations are dispensed from this last duty as,

"It would be unfair, not to mention unreasonable, to hold corporations to the same standards of charity and love as human individuals. Nor can they be held to the same standards to which we hold civil governments for enhancing social welfare" (Donaldson, 1989, p. 84).

The SRSG's framework and guiding principles synthesize the "responsibility to respect" principle into a "do no harm" formula. Thus, it can be argued that in Shue's terms, Ruggie recognizes that corporations have a "duty to avoid deprivation". Moreover, at the same time, the SRSG allocates the duties to protect from deprivation and the duty to aid the deprived exclusively in the hands of the state.

The SRSG, nevertheless, did not resort, at least not officially, to the normative work of Shue, Donaldson, or anybody else's work. It is not surprising then, that his own tripartite framework encountered remarkable criticism for its weak normative foundations.

David Karp, in his outstanding book entitled "Responsibility for Human Rights" (2014), proposed a more nuanced approach to the human rights responsibilities that highlights Ruggie's deficiencies. According to Karp, the

fulfillment of any human rights involves three different responsibilities (2014, pp. 62-82):

- The responsibility to refrain from harming human rights
- The responsibility to protect and provide human rights
- The responsibility to respect human rights.

The first of Karp's principles, the responsibility to refrain from harming human rights, is presented as a universal responsibility. That is, a responsibility to be borne indistinctively by all moral agents, including corporations.

The second principle takes the responsibilities to provide and protect in the same category merging Shue's duty to protect and the duty to aid the deprived. The reason behind this move is that both responsibilities, to provide and to protect, require the identification of concrete actors for their realization (Karp, 2014). The responsibility to provide and protect, in contrast to the universal responsibility to refrain from harming, is *specific*; only certain moral agents fulfilling a given criteria can be identified as duty bearers.

The responsibilities to avoid harm and to protect and provide are independent from each other (Karp, 2014, p. 77). They generate different duties. An agent may breach human rights by either harming individual or group rights and/or by failing to protect and provide human rights when the agent is specifically identified to do so.

Interestingly, Karp qualifies that the responsibility to protect and provide is more important than the responsibility to "refrain from harming". To avoid harming human rights is an approach that has not proved useful in the prevention of gross human rights violations. Karp exposes his argument eloquently:

"The only recourse that victims of the holocaust, when stripped down to their naked humanity, had to fall back on was the benevolence of all others not to harm them. With this in mind, one can begin to see why a reliance on the universal duties to do no harm, as the supposed foundation of human rights, may be diagnosed as part of the problem rather than the solution" (Karp, 2014, p. 77).

It catches the reader's attention that the responsibility to respect human rights is presented as a separate category from the responsibility to refrain from harm. The responsibility to respect human rights is shaped by Karp in a different fashion from the responsibility discussed by the SRSG. The responsibility to respect is here presented not as a call for performing or refraining from performing certain actions. It is a call to acknowledge that other's human rights are reasons that ought to be taken seriously by all moral agents when taking decision of any kind. The responsibility to respect human rights means that agents ought to develop and refer to,

"[…] an overarching moral framework that incorporates the equal moral status of each human as a value, and which thereby enables justified contextual decisions on a case-by-case basis about how to treat others" (Karp, 2014, p. 79).

One does not breach the responsibility to respect human rights by acting or refraining from acting in a certain way. Instead, Karp argues, one breaches the responsibility to respect human rights when failing to construct a moral framework where others are valued as ends in themselves. This could be the case, for example, when I systematically fail to act in accordance to my own moral beliefs.

On the whole, Karp shows that to make progress in the human rights practice and prevent further human rights violations, it is imperative to go beyond the universal, and in fact non-controversial, responsibility to do no harm. Human

rights only acquire their meaning when they have been violated or are under threat. Therefore, the only way to advance human rights is by finding instruments and arguments that contribute to allocate specific responsibilities for the protection and provision of human rights. The UN Guiding Principles, by adopting a "do no harm" policy on the responsibilities of corporations, fall short to contribute towards this goal.

8.3.2 The United Nations Guiding Principles, Beyond the State Centric Premises?

Besides the advancements that the mandate of the SRSG John Ruggie achieved for the BHR debate, its framework remains stubbornly anchored in the state-centric premises discussed above. Ruggie's work, though, is a step in the right direction towards overcoming the limitations of the state-centric view. The SRSG recognizes that corporations do have direct human rights responsibilities independently of those of states. However, he falls short in overcoming the state-centric view when he limits these responsibilities to the "responsibility to do no harm" (Ruggie, 2008 para. 24).

The SRSG acknowledges that "the traditional view of international human rights instruments is that they impose only indirect responsibilities on corporations, i.e. responsibilities provided under domestic law in accordance with States' international obligations" (Ruggie, 2007, p. 12). His second principle, instead, recognizes that corporations do have a direct human rights responsibility: the responsibility to respect. This responsibility is framed as independent of the state's ability or willingness to fulfill its own human rights duties and, most notably, it exists over and above compliance with national laws and regulations protecting human rights (Ruggie, 2008 para. 55; 2011 para. 11). By recognizing that other actors besides the state do have a role to play in regards to human rights responsibilities, Ruggie moved the debate away from the traditional state exclusivity view. The recognition that corporations do have a direct human rights responsibility to respect truly

represents an advancement of the status quo, a "significant, if not [a] revolutionary" one (Muchlinski, 2012, p. 145). Ruggie, as Wettstein points out (2015, pp. 2-4), shifted the burden of proof to the opponents of corporate human responsibility while still remaining absolutely state-centric.

The SRSG's work is based on an established, non-enforced, body of international law but it is not itself international law. The Draft Norms, instead, represented an attempt to move towards a legally binding scheme. They emphasized the premise that international human rights law assigned direct legal obligations to corporations; a premise that the SRSG quickly refused as a path forward for his upcoming work. The two main reasons argued by the SRSG were that first, corporations do not have any legal human rights obligations as states do and, second, Norms ended up imposing higher obligations on corporations than on states (Ruggie, 2006 para. 64-66).

Ruggie accused the Norms of becoming "engulfed by its own doctrinal excesses" and creating "exaggerated legal claims and conceptual ambiguities created confusion and doubt". The SRSG discarded the Draft Norms on the basis that they took the debate towards a divisive path that "obscure[d] rather than illuminate[d] promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights" (Ruggie, 2006 para. 69).

The SRSG discarded the Draft Norms to become a tool to hold corporations legally bound on human rights responsibilities. He also refused to establish his own UNPRR framework and the Guiding Principles as legally binding instruments. The immediate question that follows is on what grounds should corporations adhere and abide to the Guiding Principles, then?

The reasons for abiding to the SRSG's principles are not to be found in an authoritative and legitimate body of international law, nor in any ethical reasoning emanating from the intrinsic value human rights may have.

Paragraph 54 of the UNPRR framework highlights that the reasons why a corporation should abide to their responsibility to respect human rights are rooted on a societal expectation to do so. The SRSG warns that,

"[failing] to meet this responsibility can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual courts" (Ruggie, 2008 para. 54).

As a consequence, the SRSG reduces the responsibilities of corporations to respect human rights to the management of a corporate reputational risk that corporations may incur if they do not live up to societal expectations to respect human rights. Paradoxically, corporations do not need to find reasons for respecting human rights in the moral worth of human rights but in what Cragg (2012b) defines as an "enlightened corporate self-interest".

The UNPRR framework is based on building the business case for corporations to respect human rights. It resembles an enlightened "win-win" scheme. Corporations, though, operate on a variety of complex contexts and situations where society may lack the potential to set and monitor expectations for corporate human rights responsibilities. A business case approach to human rights responsibilities pushes corporations towards breaching the responsibility to respect where economic profits of doing so may exceed significantly the associated reputational risks. As Cragg (2012b, p. 14) argues, the "enlightened self-interest" premise is a deficient justificatory argument. Arnold (2010, p. 270) points out that only a moral account of basic human rights duties can achieve what the SRSG wants to achieve; that is: the universal acceptance, compliance and enforcement of the corporate responsibility to do no harm.

Ruggie was probably right about the perils that the Norms carried out for the BHR debate. The Norms did not establish any difference between the responsibilities of the state and those of the corporation. Both actors had the

same responsibilities to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights (United Nations, 2003 para. 1). The main difference relied on the scope. The Norms assigned the principal human rights responsibilities to states while corporations saw their responsibilities limited to their "sphere of influence". Contrastingly, the SRSG distributed human rights responsibilities as independent silos: states bear exclusively the duty to protect, corporations are assigned the responsibility to respect or "do no harm", and the provision of remedy is shared separately under specific terms.

What arguments are offered by the SRSG to justify this particular allocation of responsibilities/obligations? Corporations are presented as economic actors who have unique responsibilities. If these responsibilities are entangled with state obligations, the SRSG warns, it may hamper the allocation of responsibilities in practice (Ruggie, 2008 para. 6). Ruggie, recalling the preamble of the Universal Declaration of Human Rights, recognizes that corporations are "organs of society", nonetheless, he qualifies that they are "specialized economic organs, not democratic public interest institutions" and consequently "their responsibilities cannot and should not simply mirror the duties of States" (Ruggie, 2008 para. 53).

The fact that corporations are different from states is presented as the main justification underpinning the whole allocation of responsibilities and obligations in the UN framework. This does not seem to be a strong justification. Ruggie is right when he asserts that corporations are not "democratic public interest institutions". Nonetheless, they do contribute to the public interest of societies by providing a variety of products and services. As Donaldson compellingly argues, "the principal, although not the sole, reason why members of society should want to have productive organizations rather than a state of nature is the enhanced contribution made possible by productive organizations, organizations in which people combine their labor with others to create a given product or service. […] The raison d'être for the productive

organization turns out to be its contribution to society" (Donaldson, 1989, pp. 47-48 as quoted by Wettstein 2015, p. 170).

If it can be argued that corporations do contribute to the public interest of a society, a question follows: is the condition of being a "democratic public interest institution" required criteria for bearing human rights responsibilities beyond "do no harm"? If this was the underlying justification for the SRSG's allocation of responsibilities, then not only would corporations not bear responsibilities like the protection of human rights as he defends, but neither would all those states that did not qualify as democratic. Possibly, this is not what the SRSG had in mind.

Both documents, the UNPRR as well as the UNGPs, besides recognizing a direct corporate human rights responsibility to respect, are instruments that are still deeply state-centric. They rely on the premise that international human rights law only obliges states to respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction (Ruggie, 2011 para. 1). The language used throughout the UNPRR framework and the UNGPs also reflects this. The SRSG purposefully speaks of the corporate *responsibilities* in contrast to the state *duties*. Once again, the reason behind this language is to restate the assumption that only states bear legal obligations for human rights, not corporations. Hence, the differentiated use of the words "duty" and "responsibility". However, as Wettstein discusses (2015, pp. 5-8) both terms can have legal and non-legal meaning, and both are often used interchangeably in philosophical debates. The distinction between the use of the two terms is certainly underspecified and misleading and, eventually, partly undermines the progress achieved by the SRSG (Wettstein, 2015, p. 8).

SRSG's answer to the question "what are the human rights responsibilities of corporations?" is binary, with no apparent grading. Corporations bear the responsibility to respect human rights, understood as "do no harm". States bear

alone the duty to protect human rights. The normative justifications offered by the SRSG for both, the motivations for adhering to the UNGPs as well as the particular allocation of responsibilities proposed leave behind abundant ambiguities. In fact, the work of the SRSG may be read as his desire to reach a consensus out of a negotiation process among multiple parties rather than a normative philosophical reflection. It is particularly in the scholarly normative debate on business and human rights where one can find the most robust arguments discussing why and to what extend should non-state actors adopt human rights responsibilities. As Wettstein concludes:

"the question of why and to what extent the international human rights regime should include also private actors is crucially dependent on ethical reflection" (Wettstein 2012a: 9).

Overall, the work of the SRSG has provided a significant and qualitative leap forward to the business and human rights debate. It not only helped build visibility and awareness but also ignited an intense debate about its foundations and steps moving forward (e.g. Cragg, 2012b; Deva & Bilchitz, 2013a; Wettstein, 2015). The SRSG's framework should not be understood as the final stop, but just as one additional step in the journey of advancing human rights. Still, the grounds of the framework he provided respond to a state-centric view of human rights. As discussed above, this is a perspective that encounters serious difficulties to secure human rights in the context of Post-Westphalia. What remains of this chapter is devoted to the analysis of three additional accounts that can guide us through the allocation of human rights responsibilities of corporations, namely: the universalistic, the capabilities and the publicness accounts. The three of them are well equipped to overcome the limitations of the state-centric perspective. However, they all commonly rely on the underlying assumption that moral agents can bear human rights responsibilities. Thus, to ensure that these three accounts can be

applied the BHR context, we should first prove that corporations can, at least, bear human rights responsibilities.

8.4 Corporations Bearing Moral Responsibilities?

The exclusive state-centric perspective to human rights considers states as the only agents bearing human rights responsibilities of any kind. Corporations are conceived as legal entities subject to indirect human rights responsibilities mediated by the law established by the corresponding state. The SRSG moved the debate forward by proponing that corporations have a direct responsibility to respect human rights. However, as discussed in the previous section, the SRSG proposal is rooted on societal expectations of corporations to do so. The assessment of its foundations revealed important inconsistencies from a normative perspective. Ethics scholars challenged head on the exclusive legal conception of the corporation. They proposed schemes to assign human rights responsibilities to corporations based on moral arguments, e.g. the universalist, the capabilities, or the publicness account.

These accounts, though, look at the responsibilities emanating from human rights as moral responsibilities. Thus, when they place their focus on corporations as potential duty bearers they, explicitly or implicitly, assume that corporations are agents capable of bearing moral responsibilities. However, are they moral agents at all? This is a crucial and controversial question. If corporations cannot be considered to be able to deal with moral human rights responsibilities, none of these moral approaches to human rights responsibilities may make sense to apply to corporations.

Peter French, in his seminal work "The Corporation as a Moral Person" argued that corporations can be "full-fledged moral persons and have whatever privileges, rights and duties as are in the normal course of affairs, accorded to moral persons" (French, 1979, p. 207). He also proposed two central

conditions for moral responsibility. First, causation – i.e. that a potential subject of moral responsibility be capable of acting so as to be the cause of an event. Second, intentionality – that the action in question was intended by the subject or that the event was the direct result of an intentional act of the subject (French, 1979, p. 211). According to French, corporations have "Corporate Internal Decision making structures" and therefore they can cause events as well as act intentionally (French, 1979, p. 211). French's work immediately arose reactions and controversy among scholars (for an illustrative example see Donaldson, 1982; Werhane, 1985).

Eventually, French abandoned his position that corporations were to be considered full moral persons (French, 1995). The debate over the moral agency of corporations is one of the oldest, most prolific and intricate debates within the field of business ethics. It is not my intention here to provide a comprehensive overview or to discuss its ups and downs. Others have eloquently done so elsewhere[22]. Today, it is commonly assumed within the business ethics literature that corporations, whether moral persons or not, can bear moral responsibilities. Moral responsibility does not require moral personhood. While every moral person is morally responsible, agents that do not fulfill the requirement of moral personhood can still be morally responsible agents.

The current state of the art regarding the moral agency of corporations is still incarnated in the work of Philip Pettit, particularly in his article entitled "Responsibility Incorporated" (2007). Pettit claims that corporations satisfy three different requirements any agent has to comply with in order to qualify as moral agents. First, the agent has to have *value relevance*. That is, it "is an autonomous agent and faces a value relevant choice involving the possibility of doing something good or bad or right or wrong". Secondly, it has *value*

[22] For a recent and updated comprehensive overview of the debate see Sepinwall (2016).

judgment: the agent "has the understanding and access to evidence required for being able to make judgments about the relative value of such options". Finally, it has *value sensitivity*; the subject "has the control necessary for being able to choose between options on the basis of judgments about their value" (2007, p. 175).

Thus, in line with Pettit's assessment, it is safe to affirm that corporations do bear moral human rights responsibilities. Consequently, it is meaningful to discuss what would be the implications of these responsibilities through the lenses of the universalist, the capacities and the publicness approach.

8.5 Universalists: You, Me, Them, Everybody

The broadest approach to human rights responsibilities one could adopt would be one in which all responsibilities are assigned to all agents including, of course, corporations. This is the approach taken by universalists who hold the thesis that all moral agents bear human rights responsibilities. Hence, as long as corporations are considered moral agents, or agents capable of bearing moral responsibilities, they should bear the same responsibilities as any other moral agent, including human rights responsibilities.

The final paragraph of the Universal Declaration of Human Rights preamble is an example of a Universalist understanding of the responsibilities that emerge from human rights. It reads as follows:

"Now, Therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end *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, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction." (United Nations, 1948 emphasis added)

Consequently, along these lines, corporations, as effective organs of society as they are, would also be bound by human rights responsibilities to promote respect and secure effective recognition and observance.

The Universalist account holds that human rights responsibilities are owed to one another given our common humanity condition. Any agent failing to respect this shared status and causing harm to another human being can be labeled as a human rights violator.

The universalist thesis claims that "human rights responsibility is best conceptualized such that any and all people who are in a position to act or refrain from acting toward others in accordance with a set of humanistic moral standards ought to do so" (Karp, 2014, p. 63). If this were the case, the discussion whether corporations bear human rights responsibilities would be limited to the question of whether they can be considered moral agents (ibid.).

The universalist account is characterized by its expansive, almost unconstrained, inclusive criteria of human rights responsibilities. Such approach is vulnerable to a series of limitations that particularly attain the discussion of the specific human rights responsibilities. Universalists (e.g. Griffin, 2008; Nussbaum, 2000; Shue, 1996) typically start from the premise that human rights are a kind of object that should be provided or guaranteed without question to every single human being simply because of the fact of being human. Furthermore, it should not "depend on the other brute and/or social factors" (Karp, 2014, p. 70). However, building the case and acknowledging the fact that all human beings are entitled to such objects does not sound like a strong enough argument to justify that any or all "organs of

society", including corporations, should assume responsibility for the lack or abuse of these rights.

If responsibilities for human rights were absolutely universal, there would be no method or criteria to identify which actors should take part in the remediation of specific human rights wrongs. At the same time, we cannot all together act on every single human rights violation occurring anywhere. To make sense of human rights responsibilities we need to have criteria and parameters that allow us to identify who should be acting in a given situation. If all moral agents had human rights responsibilities, the only thing we should worry about is how to hold all moral agents accountable for their human rights wrongs (Karp, 2014, p. 155).

On the whole, to identify who should bear the responsibilities as well as under what circumstances and scope, we need more specific and refined criteria. The capabilities and the publicness approach offer a more nuanced moral account of responsibilities than the one provided by the universalists.

8.6 The Capabilities Approach

The capabilities approach argues that the responsibilities to protect and promote human rights are to be allocated to those agents most capable to actualize this responsibility. Thus, the responsibility to protect and provide, in contrast to the universalist theory, becomes active only in particular circumstances where a specific actor is identified as having greater capacity than other actors to realize such responsibility (Karp, 2014, p. 3). Karp nicely frames it in the form of a principle:

"Whichever agent or agency B has the capacity most effectively to protect and provide for X's human rights, has a prima facie responsibility to protect and provide for X's human rights" (Karp, 2014, p. 89).

The capacity approach represents a direct attempt to dismantle the state-centrism that has traditionally surrounded the human rights responsibilities discussions. With its criteria based on the assessment and comparison of an agent's capabilities, states are treated alongside any other actors, including corporations and other non-state actors, as potential responsibility bearers. In short:

"Responsibility for averting serious harm should be located in the agent who can most easily avert the harm […]" (Wenar, 2007, p. 258).

The capabilities approach lists the potential bearers of responsibilities according to their respective capabilities. Corporations are also included in the equation and, in many occasions, are appointed as primary bearers of human rights responsibilities. The capability approach has a direct impact on the concept of state sovereignty. As soon as it assigns human rights responsibilities to non-state agents, it directly challenges the state-centric assumption that considers the state as the only actor capable to address human rights responsibilities.

The analogy of the drowning child in the pond is often presented as one of the best metaphors to illustrate the reasoning of the capacity approach. Imagine that person A has pushed a kid into a pond; the kid cannot swim and starts drowning. Who is responsible for rescuing the kid? The capacity approach would point to agent B who has the abilities required to rescue the kid from drowning in the pond.

Jenny and John, grandmother and grandson, walk near the pond and see a kid drowning. Jenny is 92 years old and cannot swim; John instead is young, fit and a great swimmer at school. The capability approach would immediately point to John as the actor in the best position to protect the drowning child's right to life.

The capacity principle offers us a criterion to identify the bearer of the responsibility to provide for human rights. What is more, it adapts its outcomes to the particular context where the human right is at stake and to those available agents at the moment. Hence, the capacity approach becomes very appealing in the contexts of weak or failed governance zones within states where other non-state actors can be identified as actors with the capacity to ameliorate the status quo.

A rough capability approach does not differentiate between, individuals or groups, states and non-state actors, public or private agents. We could find a situation where a state is completely incapable of dealing with a human rights situation but still able to participate significantly in its resolution. At the same time, corporation A is identified by the capacity approach as the actor who can most effectively ameliorate the situation. In this situation, a rough application of the capability principle would recommend that the corporation unilaterally engage in the provision of human rights while the state would be discarded.

Some of the most significant scholars behind the capacity model would be uneasy with the outcome of this rough capability approach. They see the need to acknowledge the role of the state as a primary duty bearer of human rights responsibilities. What is more, many discuss what should happen when the state is not capable or willing to take its role as primary duty bearer (e.g. Goodin, 1988; O'Neill, 2001; Shue, 1988; Wenar, 2007).

Goodin (1988) introduces the idea that capacities are socially constructed. There are situations in which the capacity principle would pick up the agents in charge to act according to their roles rather than according to their actual capabilities because these agents are believed to be the most effective to protect and provide for important normative rights. Going back to Jenny and John's example, imagine that Jeremy, a certified lifeguard trained on first-aid techniques, had joined them for a walk around the pond. The capacity

approach, Goodin would argue, should pick Jeremy as the most desirable agent to assist the drowning child even if his friend John is a better swimmer than he is. Because Jeremy is a certified lifeguard, he is bearing the responsibility to act.

Wenar (2007, pp. 260-263) argues in a similar line as Goodin. He points out that there are some social roles that are not absolved by the capacity principle of their role-based responsibilities. For example, in ideal theory, those identified as the parents should be the ones in charge of providing care for their children in the first place; even if the parents are absent or the children's aunt is an excellent caregiver. Similarly, O'Neill (2001, pp. 180-183) holds that the only agents that the capacity approach can identify as bearers of human rights responsibilities are those that can be identified as primary agents of justice. In fact, O'Neill distinguishes between two types of agents of justice: the primary and secondary. Primary agents are those that "may construct other agents or agencies with specific competencies: they may assign powers to and build capacities in individual agents, or they may build institutions – agencies – with certain powers or capacities" (O'Neill, 2001, p. 181). "Secondary agents of justice", by contrast, "are thought to contribute to justice mainly by meeting the demands of primary agents, most evidently by conforming to any legal requirements they establish" (ibid.).

O'Neill supports the idea that the state ought to be the primary agent of justice. States, she argues, ought to have the capacities to create norms that are enforced within their sovereign boundaries. There should be a strict division of labor between the state as primary agents and the rest of secondary agents. However, O'Neill qualifies, such resolved division should be limited to those occasions "where there are powerful and relatively just states, which successfully discipline and regulate other agents and agencies within their boundaries" (O'Neill, 2001, p. 194).

However, as already highlighted, not all sovereign states have the capacities they should have. On occasions, states may not be willing or not able to exercise their unique capacity to institutionalize legitimate rules within their sovereign space. On those occasions "where states are weak, any simple division between primary and secondary agents of justice blurs" (ibid.). Once the primary agent fails to fulfill its human rights responsibilities, the capacity approach then looks for the second best agent able to take the lead. If the secondary agent fails as well, then a tertiary agent steps in. The capacity approach will activate the human rights responsibilities for a given agent as soon as the higher-level agent in the responsibility chain fails. Consequently, "when states fail as agents of justice, the problem is not, therefore, simply a general lack of power. It is rather a lack of a specific range of capabilities that are needed for the delivery of justice" (O'Neill, 2001, p. 190). Justice, O'Neill concludes, "has to be built by a diversity of agents and agencies that possess and lack varying ranges of capabilities, and that can contribute to justice – or to injustice – in more diverse ways […]" (O'Neill, 2001, p. 194).

A rough interpretation to the capacities account would entail the risk to assign human rights responsibilities to any agent who had the ability to act, regardless of the costs it may impose on the agent. Consequently, proponents of the capacity approach have developed criteria in order to establish reasonable limits to the costs an agent should bear once it is identified by the capacity approach as responsibility bearer. Goodin (1988) suggests that agent A should always assist another who is suffering if the benefits for the sufferer are higher than the costs that agent A would have to assume. Miller and Wenar try to provide a less expansive criteria by stating that capacity should be balanced against the relative cost to the agent (D. Miller, 2001, p. 461) and, when the responsibilities and the associated costs are excessive, the actor in question should be able to escape any overburden duties (Wenar, 2007, pp. 258-260).

8.6.1 The Capabilities Approach within the BHR Debate

Onora O'neill was among the first political philosophers to challenge the paradigm that states should be the exclusive primary agents of justice. She soon acknowledged that a variety of non-state actors, including corporations, may have the capacities and therefore should also be considered as potential primary agents in the construction of justice. The BHR debate also looked at the corporation's capacities to find arguments to identify it as a potential human rights duty bearer. Michael Santoro, Florian Wettstein and Stepan Wood are among the most relevant discussants of the corporate human rights responsibilities from a capacity perspective.

Santoro's Fair Share theory (2000) presents four principles to help draw a line between those corporate human rights duties that are morally required and those that are not. His Fair Share theory is based on four premises (Santoro, 2000, p. 193):

1. Several kinds of actions can be carried out to help to protect and promote human rights.
2. Diverse categories of actors, including multinational corporations, international institutions, nation states, NGOs and individuals share collective moral responsibility for human rights.
3. To achieve the most effective overall impact of human rights conditions, the burden of performing these actions should be fairly shared among various moral responsible actors.
4. A fair allocation of human rights duties should take into account the relative *ability* of various actors to assume the associated burden, the relationship of each actor to the human rights victim, and the likelihood of an action being effective of performed by a particular actor.

Additionally, he establishes three actor-specific factors to help identify when a corporation, or any other agent, is complicit in a human rights violation (Santoro, 2000, pp. 154-155; 2010, p. 292). First, the closer, the more involved and the more sustained in time a relationship is the more human rights duties it generates. Secondly, each actor has a set of strengths and weaknesses that condition its effectiveness, which should also be taken into consideration in a fair allocation of human rights duties. "Certain kinds of actors", Santoro emphasizes, "are simply not able to effectively perform some of these duties. Thus, it is futile to assign them a moral duty to do so" (Santoro, 2000, p. 152). Finally, realizing human rights responsibilities may carry along different costs that not all agents may be equally equipped to absorb. The capacity to absorb these costs is also a relevant factor in the allocation of human rights duties. "The greater the capacity to withstand economic retaliation or to absorb the costs of an action, the stronger the correlative duty" (Santoro, 2010, p. 292).

Florian Wettstein claims that multinational corporations often enjoy the status of a "quasi governmental institution". Wettstein argues that corporations can be counted as institutions with the capacity to act as primary agents of justice and therefore bear direct responsibilities for human rights (Wettstein, 2009, p. 286). Wettstein argues that corporations bear responsibilities along Shue's three basic categories of duties corresponding with every basic right: the duties to respect, protect and realize. They should be assessed according to the corporations' capacity to violate, respect and realize these rights (Wettstein, 2009, p. 291).

The duty to respect is presented as a perfect duty of a negative character while the second and third duty categories are positive and imperfect. One of Wettstein's most thought-provoking contributions is to move away from the causality criteria in the assessment of human rights responsibilities of corporations. The role of causality in the assignment of human rights responsibilities is limited to the perfect duty to respect. The capability

approach, instead, becomes the primary criterion to determine the corporate responsibility when dealing with the duties to protect and provide for human rights.

The capability perspective forces us to expand our sight beyond the narrowness of causality. Corporate human rights responsibilities should not be assessed on the basis of the causal effects of the corporate operations, but on the "corporate capabilities to make positive contributions to human development" (Wettstein, 2009, p. 312). Wettstein emphasizes the growth in terms of power corporations have experimented over the last decades, up to the point that he defines them as a "quasi-governmental power". Corporations, Wettstein argues, have unique capacities to carry on remedial duties for the advancement of human development. Often enough, these remedial duties are connected obligations grounded on justice whose realization may directly contribute to human development. According to Wettstein, "the process of assessing multinational corporation's remedial obligations of justice starts with the identification of those human rights to whose realization the corporation is believed to be able to make a significant contribution" (Wettstein, 2009, p. 313). The remedial obligations of corporations unfold at three different categories (Wettstein, 2009, p. 314). First, the specific capabilities of corporations trigger business obligations to develop solutions to persistent human rights issues. Secondly, corporations face collaborative obligations directly connected to their industry-specific capabilities. This category comprises the engagement of corporations in public policy processes, the provision of public goods and services or the maintenance of public infrastructure. Finally, the third remedial obligations are the regulatory obligations. Corporations have a quasi-governmental obligation to engage in the creation of an enabling global economic system that favors human development.

Wood takes a singular perspective to the capability approach. He puts his focus on the corporation's "leverage" and the corresponding responsibilities that, according to him, derive from it. By leverage Wood means the ability of a corporation to influence through its decisions or activities, for better or worse, over other actors with whom the corporation may have responsibility (Wood, 2012, p. 63). Wood establishes four criteria to determine when a corporation bears leverage-based responsibility in regards to human rights (2012, pp. 82-87). First, there exist a morally significant connection between the corporation and either the perpetrator of the human rights abuse or the human rights-holder. As discussed above, Santoro (2010, p. 292) claims that the closer the relationship, the stronger the responsibility. Wood goes one step further by arguing that not only closeness matters to the determination of responsibilities, but also that the character of the interest at stake matters: "the closer the connection between the interest that is threatened and the company's activities, products or services, the stronger the responsibility" (Wood, 2012, p. 83). A second criteria that gives rise to leverage based human rights responsibilities is grounded on the company's ability to make a difference to fundamental human interests by exercising influence over others with whom it has relationships (Wood, 2012, p. 85). This criterion is in close connection with Santoro's effectiveness principle. The more effective a corporation is to make a difference in terms of human rights, the stronger the corresponding moral responsibility (Santoro, 2010, p. 292). The third criteria refers to the costs a corporation should be able to accept in contributing to improve a human rights situation. The cost that a corporation should reasonably accept also increases in connection with the moral significance of the relationship as well as the capacity to make a difference to the state of affairs. Finally, urgency is the fourth criterion connected to a corporate responsibility to exercise leverage. "An immediate threat to a fundamental human interest is not a minimum threshold for leverage-based responsibility to arise, but a factor enhancing the strength of the responsibility. The more fundamental the interest at stake and

the more severe the harm to that interest, the stronger the responsibility" (Wood, 2012, p. 87).

Santoro, Wettstein and Wood are probably the most representative Business Human Rights scholars advocating for a capabilities perspective in the determination of the human rights responsibilities of corporations. As shown above, their accounts put special emphasis on the corporation's alleged effectiveness and capacities to provide remedies, its power to influence third parties, its ability to absorb costs, etc. In doing so, they are advocating for a prototypical engagement of the corporation in the political arena.

A corporation may exercise influence on a state with the intention to advance human rights, or it may design and execute a project to remedy specific human rights wrongs or deficiencies. In any case, when corporations decide to act in terms of human rights they do so responding to an explicit or implicit picture of what should be an ideal society. This is a "picture" or paradigm, I argue, that should be discussed among all those involved. The capabilities approach to the human rights responsibilities of corporations places a great deal of attention to the identification of those corporations in the best position to react to certain human rights wrongs. Yet, the scope of the approach should not end there, a democracy perspective – such as the one here put forward – would suggest to more explicitly consider as well how and under whose perspectives such capacities would be exercised. This would enrich the capabilities approach and protect itself against hypothetical narrow interpretations that may not question the origins and processes on which these capabilities are exercised.

8.7 The Publicness Approach

According to the capabilities approach, not all agents bear human rights responsibilities, only those who have the required capacities to do so. The publicness approach follows a similar pattern. The criteria, though, is not set

by capacities but by the degree of "publicness". That is, those agents identified as relevantly public agents but not relevantly private can be assigned responsibilities to protect and provide human rights (Karp, 2014, p. 116). Karp departs from the premise that for any public agent the protection and provision of human rights is already one of their main legitimate values, ends or projects, whereas the same may not be true of private agents (ibid.).

States, for example, are relevant public actors in world politics. This is partly because they are thought to have the authority to discuss and to make rules that other actors follow and/or because they are responsible and accountable to an audience beyond themselves for their actions (Karp, 2014, p. 118). These conditions, though, can be found in other agents or organizations; they are not limited to the state.

The publicness approach has two main sub-accounts. On the one hand, an agent may be considered as public when it provides collective goods. On the other, an agent is considered public when it acts in its capacity as bearer of a public role.

Collective goods are those goods that are non-rival and non-excludable (ibid.). Non-rival means that an individual enjoying a good does not detract others from the ability of enjoying the same good. A copy of a vinyl record may be enjoyed by one individual, the same record on an internet music platform can be enjoyed by either two, eleven, or thousands of listeners. Non-excludable, instead, means that once the good is provided, everyone can make use of it and it is difficult to restrict access to the good; for example, a street that is well lit benefits all citizens who walk on it.

According to Karp, individual and institutional agents providing collective goods have a superior authoritative status that grants them a prima facie immunity from criticism, especially against paternalistic ethical and political judgments (Karp, 2014, p. 121). The validity of this immunity is, nevertheless,

subjected to the public actor providing for all relevant individuals' normative rights (Rawls, 1999a, pp. 65-81). The question then is how to identify who provides and what collective goods are provided in a particular political context. Karp considers three instances in which an agent can be labeled as public: as provider of empirical collective goods, provider of membership status or being responsive to community demands.

An agent providing empirical collective goods can be labeled as public and thus as bearer of the responsibility to provide and protect human rights in a particular context. This challenges the premise that sovereign states can bear the responsibility to protect and provide human rights on the basis that they are the only "public" agents providing collective goods (Karp, 2014, p. 123). In fact, it is not uncommon at all for corporations to provide transportation infrastructure, security, health or education goods and services. This is particularly the case where TNCs operate in states that lack the capacities or will to provide these goods to its citizens. Under these circumstances, corporations would be identified as bearers of the responsibility to protect and provide human rights in so far as they can be identified as providers of empirical collective goods.

A second approach is based on the provision of membership status in a political community. It puts its focus beyond the provision of collective tangible goods as roads, schools or hospitals. It considers a more abstract dimension that is always thought to belong exclusively to the state: the decision of who belongs to the political community. In Arendt's terms, modern states provide individuals with the "right to have rights" (Arendt, 1968, p. 296); states decide who counts as a member and who does not and therefore who can benefit from collective goods and who cannot. This approach labels as public those agents who can take decisions on who has access and who does not have access to collective goods.

Think, for example, of a mining corporation in a remote region of rural indigenous Guatemala providing schooling for the children of the employees. At the same time, the children of the surrounding communities may have a deficient access to basic education. The mining corporation is acting as a gatekeeper; it is defining who can and who cannot enjoy the right to education. Thus, Karp would argue, the corporation can be identified as a public actor and, therefore, we can assign it the responsibility to protect and provide for human rights.

Finally, the third approach is based on the responsiveness given to the demands of the political community. A test for the responsiveness strand is to observe whether a corporation can be conceptualized as politically responsive to the members of the community where it operates. If a corporation can be identified as providing response to political demands, it can be labeled as a "public" actor and, per extension bearer of the human rights responsibilities to protect and provide.

The second version of Karp's publicness approach puts the emphasis on those agents bearing a public role. It distinguishes between agents with primary and agents with secondary political roles. The former are accepted as agents acting on behalf of the community or a collectivity of individuals in regards to human rights practices. The latter constitute those individuals who, at some point and through their own acts, granted authority and offered support to agents with a primary political role, a support that can be extended or withdrawn. Agents bearing primary political roles are assigned non-discretionary responsibilities to protect and provide human rights. By contrast, agents who have a secondary political role only bear a discretionary responsibility to respect in addition to the universal responsibility not to harm human rights. Karp's publicness approach, particularly, in its second formulation is rather complex. An example helps illustrate his point:

Imagine Company X operating in a weak governance zone dedicated to oil extraction. Company X not only carries out an economic activity, it also generously provides collective goods in form of roads and hospitals for the local community. The publicness approach argues that through the provisions of collective goods, Company X is willing to exercise a political authority and members of the community may accept it on the grounds that it offers valuable collective goods. Corporation X acts as a primary political agent. In this situation, Company X has two options. The first option implies that company X has two roles: an economic role and a political role. Moreover, as a result of this additional recognized political role it has to abide by its non-discretionary responsibilities to protect and provide human rights even at substantial costs for the company.

Alternatively, Company X may legitimately decide that it is not within its goals to accept to become a relevantly public agent and emphasizes that it is the state, or any other agent that should play the primary political role and provide the associated collective goods like hospitals or roads. Hence, Company X may decide to opt for playing a secondary political role. This would activate the discretionary responsibilities to respect human rights, which implies that Company X would have to decide what strategy better serves human rights. For instance, it may consider divesting and leaving the country, or to opt for lobbying the state (the primary political agent) and contribute to enhance its capacities. It may also opt for not getting involved at all. In any case, Company X should clearly demonstrate in what form it is taking others' human rights seriously in its decisions. On top of this, of course, Company X bears at all times the responsibility to refrain from harming human rights; a responsibility that is universally held by all agents and individuals.

The publicness approach is placed in a similar situation as the capabilities account. Both carry out an excellent job in identifying those corporations that may be assigned the role to bear human rights duties. Still, both accounts

would benefit from providing further clarification on how such duties should be discharged.

The publicness approach identifies as potential human rights duty bearers those corporations that either provide public goods or bear public roles. However, it is less clearly outlined in the account what implies to exercise such public role or how to legitimately exercise public roles. Here, the democratic perspective on the question of how to discharge human rights defended in this dissertation would build up and complement the publicness approach. Such perspective emphasizes the need to resort to democracy-based mechanisms in order to exercise a public role (or provide a public good). By incorporating a democracy perspective on the question of *how to discharge human rights duties*, the publicness approach would avoid potential misleading interpretations where the corporation undemocratically decides what it means to exercise a certain public role.

8.8 From Who to How

So far, this chapter presented four different accounts discussing who should be entitled to bear human rights responsibilities, namely: the state-centric, the universalist, the capabilities and the publicness account.

In a context where states see their exclusive powers and capacities outfoxed by ever increasingly powerful non-state actors, both the state-centric and the universalist perspectives fall short to guide corporations in their responsibilities and to effectively contribute to securing human rights. Contrastingly, the capabilities and publicness approach become very appealing accounts in the identification of potential bearers of human rights responsibilities. They have the ability to adapt to different contexts and to different kinds of potential duty bearers. This thesis, building up on these two

accounts, and aims to make more explicit the implication of their political dimension.

In other words, we need that both, the capabilities and the publicness accounts not only address the question of who should bear human rights but also more openly discuss *how* human rights responsibilities should be discharged. Directly addressing the question of *how* helps to emphasize the importance of adopting a democracy perspective to the business and human rights discussion.

The four accounts allocating human rights responsibilities reviewed above were constructed with the intention to respond to the question of *who* should bear human rights responsibilities. They were not developed with the goal to answer the question of *how* human rights responsibilities should be discharged. Yet, all of them make some degree of contribution to this question that is worth highlighting.

In the first part of this chapter, the state-centric approach was discarded because of its difficulties to accommodate itself in a context that was no longer exclusively state-centric. Yet, when enquiring about the question of *how* to discharge human rights responsibilities, the state-centric approach is able to provide specific and insightful guidance.

The state-centric perspective places on the state all the responsibility to not only assume the integrity of all human rights responsibilities but also to decide on how these responsibilities should be deployed. The reason is that the state is considered the only legitimate actor. It enjoys its sovereignty status over its territory and thus, it is pointed at as the most legitimate to decide over the terms of realization of human rights responsibilities. Additionally, the democratic state gathers its authority and power from the democratic mandate of its citizens. It is through the state that citizens shape the instruments (e.g. laws, infrastructures, hospitals, schools, institutions, etc.) that realize human rights.

The force of the globalization process, though, directly undermines the state's abilities to abide by its human rights responsibilities. It is a threat to the state-centric framework. Both the Framework and the Guiding Principles represent an attempt to react and amend this situation. The SRSG attempted to reinforce the state responsibilities while, at the same time, directly assigned corporations the responsibility to respect human rights understood as "do no harm". The UN Guiding Principles define how corporations should discharge their responsibility to "do no harm" in three steps or instruments (see Ruggie, 2011 para. 16-24).

The first proposed instrument by the SRSG to discharge the corporate human rights responsibility to respect takes the form of a policy statement (Ruggie, 2011 para. 16). This statement, approved by the top management of the corporation and made publicly available, should express the corporate commitment to respect human rights. It should also set the bar of expectations in regards to human rights for corporate employees as well as to any other business partner.

The second instrument to discharge corporate human rights responsibilities is certainly more demanding than a public statement by the corporation. The SRSG introduces the concept of due diligence with the intention that "companies not only ensure compliance with national laws but also manages the risk of human rights harm with a view to avoiding it" (Ruggie, 2008 para. 25).

The due diligence process proposed should help assess potential and actual adverse human rights impacts in which the corporation might be involved either through its own activities and operations or through its business relations. The sources nurturing the human rights due diligence process may be internal or external and, where necessary, also count on consulting experts, potentially affected groups and any other relevant stakeholder. The findings obtained out

of the due diligence process are to be integrated in the corporation's management processes and functions to effectively contribute to the prevention and mitigation of corporate human rights impacts (ibid.).

Finally, the third instrument that corporations ought to embrace in order to discharge their responsibility to respect comes under the banner of "remediation". The Guiding Principles prescribe that when the due diligence process identifies actual impacts caused or contributed by the corporation, the corporation "should *provide* for or cooperate in their remediation through legitimate processes" (Ruggie, 2011 para. 22 emphasis added). Later, in the same paragraph, the Guiding Principles point out that the remediation should be carried out by the corporation itself or in cooperation with other actors. Unfortunately, it is not specified what constitutes a "legitimate processes" to provide remedy nor who should be the potential cooperators.

A corporation that has inflicted harm on somebody's human rights is called upon by the UNGPs to remediate that harm. The corporation will have to restate the individual or group's rights. This means that, as part of the process of remediation, the corporation will have to provide and protect these rights. Ruggie also calls on corporation to leverage as a way to "effect change in the wrongful practices of an entity that causes a harm" (Ruggie, 2011 para. 19). Leverage may take the form of capacity building, collaboration or incentives targeted to those institutions that can contribute to prevent or mitigate the corporate impact on human rights.

Nonetheless, besides the battery of policies and instruments presented by the SRSG to guide corporations on how to effectively discharge their human rights responsibility to do no harm, an open issue remains. How should the corporation provide for the harmed rights? How should remedy be implemented? Is the corporation a legitimate actor to decide on its own how the rights of victims should be realized? If this were the case, we would face a

puzzling scenario were the perpetrator of the human rights violations dictates how the rights of the victim should be actualized. This does not seem like an avenue in line with the "legitimate processes" upon which remediation should be provided according to the SRSG's principles.

The universalist account of human rights offered a rather vague guidance on who should bear human rights responsibilities. The fact that the account assigns human rights responsibilities equally and indiscriminately to all moral agents does not provide much orientation on who, and on what grounds, should assume and act on these responsibilities. In fact, different universalist scholars, when inquired about how these human rights responsibilities should be deployed, suggest the creation of institutions. Given the infinite amount of potential bearers of responsibility, the creation of specific institutions may help coordinate, facilitate or mediate the realization of these responsibilities (e.g. Forst, 1999, p. 53; Pogge, 2011, p. 19; Shue, 1988, pp. 695-698). This idea will be further assessed in chapters 9 and 10 as a potential option for corporations to discharge their human rights responsibility in a more just and democratic way.

The capability and publicness accounts, as outlined earlier, present significant advantages in the identification of human rights duty bearers than the scheme proposed by the SRSG or the universalists. For example, both the capability and the publicness accounts share the ability to assign responsibility for providing and protecting human rights beyond causality. Therefore, they go one step beyond Ruggie's proposal and remove the exclusivity of the state from the duty to protect and provide human rights as the SRSG advocates. Additionally, they offer more specific and effective criteria to discriminate among potential duty bearers than the universalist advocates do. The capability and publicness accounts do an excellent job at detailing the reasons for which an agent should bear human rights responsibilities, as well as the extent upon which it should be held responsible for given human rights responsibilities.

Yet, both accounts would greatly benefit if they provided further guidance on the question of *how* corporations should realize their human rights responsibilities.

In this regard, the UNGPs drafted by the SRSG provide more guidance to corporations on *how* they should realize their human rights responsibilities to "do no harm" than the capability and publicness accounts.

For the sake of clarifying my arguments, I will now adopt an exaggerated narrow interpretation of both the capabilities and publicness approach. Obviously, no capabilities or publicness scholar would subscribe the accounts I am going to depict. Yet, the exercise should help reinforce the case for addressing more openly and directly the *how* question.

If we were to adopt a narrow version of the capacity approach we would, most plausibly, have to assume that the agent identified to bear responsibilities is not only the most capable to realize them but also is the most capable of deciding what is the best way to realize such responsibilities. Through such rough capacity lens, human rights victims are regarded as passive agents: no reaction or input is required or expected from their side, they are not actively taken into account – i.e. they wait for their rights to be provided by the corporation. In other words, the corporation is autonomous in the decisions regarding what are the best means to realize the human rights of others. A democracy perspective, instead, would vividly highlight the need to engage into consultations and deliberations with victims regarding the realization of their rights.

In the example of the child drowning in the pond, the capabilities approach identifies agent Y as the one in charge of protecting the child's right to life. No comment is made regarding what should be the best way to save the child's life. Agent Y may decide to dive into the pond and drag the child to the shore; it may opt for throwing a rope to pull him out, or, alternatively, reach the child with a rowing boat. The drowning child is helpless to contribute in any way to

realize his right to life. All the responsibility regarding the details that concern the realization of the child's right to life are left to the judgment of agent Y. This seems appropriate, at least in the extreme case of the child in the pond. However, can we assume that human rights are to be provided exclusively by third parties with no direct involvement whatsoever from the victims? I argue that this is not a reasonable assumption. The child in the pond is in a desperate life-threatening situation with no option other than taking whatever Agent Y may provide.

Take instead the hypothetical case of a large agricultural corporation producing rice. After extensive land purchases in a country with weakly enforced property laws, the company realizes that communities practicing a subsistence agriculture have always inhabited these lands. It is aware that its operations may directly impact on the right to housing and is determined to take action. The corporation, with no further consultation, decides to offer each family an apartment with all facilities included in the closest town. Can it be considered that the corporate responsibility in terms of human rights has been discharged? No, it cannot. Actualizing the corporation's responsibility on the right to housing does not only depend on the corporation's willingness and understanding of the content of the rights. A corporation's responsibility will not be able to be considered fulfilled until affected communities express their requirements; for example, that their sacred sites be respected, that proper housing be offered to their family, community and cultural needs, etc. Human rights responsibilities, as we will see in the next chapter, can only be morally fulfilled if conducted under democratic principles.

Now, let us do the same exercise for the publicness approach. Interestingly, taking this account to the extreme will lead us to similar conclusions as the ones just obtained from the capabilities exercise.

As discussed above, the publicness approach attributes specific non-discretionary human rights responsibilities to those actors that can be identified as public enough to bear them (Karp, 2014 ch. 6). A public agent, unlike a private one, has among its legitimate values, ends and projects the protection and provision of human rights. The publicness approach believes that a "public enough" agent is considered legitimate to take those actions that it deems more appropriate to satisfy its human rights responsibilities. In fact, Karp points out that public agents enjoy "a prima facie immunity from criticism, especially paternalistic ethical and political judgments, from outside political spaces" (ibid.). A strict and narrow interpretation of the publicness account implies to assume that a "public enough" corporation is also legitimate enough to decide what is the best way to realize human rights.

Put differently, once the rough publicness approach identifies an actor playing a primary political role it does not question how to discharge its human rights responsibilities. It does not elaborate on the methods or ways that a public actor should take into consideration in order to discharge its responsibilities.

A democracy look, instead, insists on the value of these details. It stresses the fact that given that corporations become public actors, delivering public goods or assuming public roles, they should be object to democratic scrutiny. Any public actor operating in the public sphere away from any democratic control incurs the risk of exercising illegitimate and unjust dominance among its fellow citizens.

Generally speaking, none of the different accounts reviewed provide a clear and complete satisfactory path forward on *how* should corporations adequately discharge their human rights responsibilities. Partly, the reason for this is that all these accounts have not yet explored the implications of the *how* question for their own means. This leads to an increased risk of reducing the concept of human rights to a commodity to be provided by the corporation with no need

of participation by any other actor. By not openly addressing *how* corporations should tackle their responsibilities, interpretations of the accounts reviewed could easily lead to support positions where the decision on the realization of human rights is exclusively dependent on the corporation. This would place human rights victims in a rather passive role in the realization of their own rights.

Both, the silence of the literature regarding the question of how should human rights responsibilities be discharged, as well as the increased risk of adopting a commoditized understanding of human rights, can be attributable to a major factor: the BHR literature has not yet paid enough attention to exploring and assimilating the profound meaning of the human rights concept.

Part V of this dissertation aims at filling this gap. It will highlight the need of a democracy-based approach to elucidate the question regarding the *how*. Rainer Forst's account of human rights based on the basic right to justification, I will argue, provides the best foundations upon which to construct the guidance corporations need to discharge their human rights responsibilities in a just way.

Part V

9 Discharging Corporate Human Rights Responsibilities: The Duty to Create Institutions.

As outlined in the previous chapter, the business and human rights debate has placed its attention mainly on the question of *who* should bear human rights responsibilities and for *what* reasons. Among the different accounts reviewed, I argued, the capabilities and the publicness approaches are the two best placed to respond to the challenges that globalization poses on human rights. Both accounts assign human rights responsibilities to agents independently of whether they are public or private. However, when inquiring about *how* these responsibilities should be discharged, they either stay silent or provide unconvincing guidance.

The analysis of the capabilities and publicness approach made clear that corporations do bear human rights responsibilities. Although based on different grounds, the two approaches recognize that corporate responsibilities include the duty to "do no harm". However, under the parameters of competency and publicness, they also assign corporations the positive duty to protect and provide human rights. Thus, when responsible corporations roll up their sleeves and get down to work to realize their human rights responsibilities they are inescapably assuming a political role. At this point, the question of *how* to discharge these responsibilities gains all of its relevance.

Such role, if it is to be played in accordance to parameters of justice, I will argue, inevitably requires introducing a democracy perspective to the deployment of human rights responsibilities. This chapter will take this question comprehensively by first, analyzing the origins and potential causes why this issue has remained unaddressed. Secondly, it will point to the conception of human rights developed by the philosopher Rainer Forst as a way forward to construct meaningful guidance on how corporations should

discharge their human rights responsibilities. Finally, it will argue for the duty of corporations to set up democratic institutions to provide remedy in a way that is respectful and consistent with the basic right to justification.

9.1 Installing Human Rights through "Democratic Software"

Charles Beitz noted that with the "public" dimension of human rights come additional public duties. He affirmed that:

"Human rights is a public enterprise and those who would interpret its principles must hold themselves accountable to its public aims and character" (Beitz, 2009, p. xii).

Thus, those agents and institutions working on human rights should be required to be held publicly accountable. Corporations discharging human rights responsibilities, and therefore assuming a political role, should do so guided by principles of democracy. Democracy, as Young argues, should be promoted in the public realm because it is the political framework that best serves the values of justice (I. M. Young, 2002, p. 17). Corporations acting in a political role enter the public realm and, hence, their actions should be circumscribed under the normative umbrella of democracy. Otherwise, corporations failing to embrace a democratic approach to their human rights responsibilities risk of, eventually, undermining human rights.

Imagine a large mining corporation operating in rural Guatemala. Its activities impact the right to education of several nearby indigenous communities. Conscious of its human rights responsibilities, and with no further delay, the corporation decides to provide a schooling system for the community with the most innovative pedagogical methods and contents. At this point, can we consider that the corporate responsibility in terms of human rights has been discharged? Certainly not. The realization of the right to education does not

only depend on the corporation's willingness and understanding of the content of the rights. The Mayan community may not consider its right to education fulfilled unless, for example, its foundational myths or legends are part of the curricula, or that their indigenous language is taught at the corporation's school. And even if the corporation had hired an anthropologist expert on Mayan indigenous culture and could have anticipated the specific needs of the community in terms of education, the human right to education could be considered as not satisfied. Human rights define the contours of the minimum conditions for the life in common. They are not simply "immediate claims to certain substantive 'goods' but to a certain social and political standing of persons as 'norm-givers'" (Forst, 2010, p. 733). This latter political dimension cannot be actualized unless backed by democratic legitimacy. Thus, a democratic approach to human rights would require involving the Mayan community from the outset in the design and definition of the instruments that shall realize their rights.

We can better illustrate the point with a technological metaphor. Human rights are political "apps" that cannot function unless installed democratically. Human rights installed using "software" other than democracy[23] "may appear to be mechanisms of domination rather than an instruments of emancipation" (Beitz, 2009, p. 6).

In the public realm, the goal of democracy is to prevent domination (I. M. Young, 2002, p. 33). Domination can take many forms. Sometimes we can see it clearly in tyrannical and despotic regimes. On occasions, though, domination can come in a subtler way. It can take the form of genuine good intentions

[23] Let us recall that in chapter 4, democracy was defined by its values (political equality and autonomy or self-determination), not by a specific set of institutions. Thus, democracy is not circumscribed here to the structures typically associated with liberal western democratic institutions.

willing to contribute to ameliorating the status quo. The provision of human rights, when not deployed along democratic principles, is a potential source of domination. Human rights can become a pervasive vehicle for imposing or pushing for pre-defined values, institutions, cultures, traditions, etc.

Domination represents an institutional constrain on self-determination - i.e. an agent other than myself determines my plans of action without due justification (I. M. Young, 2002, p. 32). Moreover, as discussed earlier in chapter 3, the only way to preserve self-determination in the public sphere is by engaging individuals to take part in collective democratic processes designing regulations that prevent domination.

Self-determination is one of the two dimensions that, according to Young, ground democracy. The second dimension is self-development (I. M. Young, 2002, p. 33); the idea that any democratic institution ought to provide means to enable individuals to unfold their capacities for self-determination. Self-development is a dimension that is closely connected with access to essential goods such as education, health, food, shelter, etc[24].

It is understandable that corporations, when immersed in the realization of their human rights responsibilities and thus exercise a political role, feel more comfortable paying attention to the self-developmental dimension. It is the easiest to fulfill as it is often connected with the provision of tangible goods. However, to think of human rights exclusively in terms of enablers of self-development drives us into a cul-de-sac. We have discussed the limitations of this approach in chapter 3 through the work of Carol Gould.

Gould argued that freedom is the common foundation for democracy and justice and went on to advance a rich understanding of freedom (Gould, 2004,

[24] Chapter 3 explores in depth the relationship between self-determination, self-development and human rights.

p. 33). For her, freedom not only encompasses the absence of domination but also comprises the capacity to exercise one's actions and the ability of a means for their realization – i.e. self-determination. Hence, her conception of freedom requires all individuals to have an equal "prima facie" right to the material and social conditions deemed necessary to develop these capacities (Gould, 1988, p. 40). This collection of material and social conditions is what Gould identifies as human rights.

Under the scope of the premises discussed in this dissertation, the self-determination approach contended by Gould is unconvincing. She presents the material and social conditions that enable self-development (i.e. human rights) as elements that belong to a pre-political sphere. Their content and shape, we have to assume, come pre-defined. Such assumption, I argue, would encounter plenty of difficulties in an intercultural and globalized context as the one discussed here. As depicted a few lines above by the Mayan community example, the right to education (as any other right) requires a political positioning in its implementation. It requires defining what "education" means in the Mayan context. The right to education, though, may be fleshed out in as many different forms as in contexts to be implemented. Therefore, these material and social conditions require a clear political positioning that cannot be reproduced systematically and uniformly; any political positioning, to be just, must be framed democratically.

9.2 Corporate Risk: Undue Paternalism and Arbitrariness

Providing human rights, understood in Gould's terms of material and social conditions, would lead corporations to improve the welfare of individuals or communities concerned according to the corporation's standards. Despite the improvement on welfare, the overall corporate leverage may not necessarily imply a just decision. Just decisions in the public realm demand democracy.

Moreover, democracy, as discussed in chapter 3 cannot be grounded on liberty exclusively or wellbeing alone. Democracy's cornerstone is political equality. That is to say, the equal consideration of interests as well as the opportunity to participate in the determination of the common legal, economic and political institutions under which one lives (Christiano, 1996, p. 47; 2008).

In fact, one of the risks of corporations embracing a purely self-developmental approach to their human rights responsibilities, like the one advanced by Gould, is that they may adopt paternalistic behaviors. By paternalism I mean "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced" (G. Dworkin, 1983, p. 20; 2014). Undue paternalism is a direct and serious offense against the autonomy of the individual. As J. Christman points out, paternalism cannot be identified by the acts, decisions or goods involved, but on the justifications provided for them. A sincere respect for human autonomy requires to avoid paternalism because it involves the judgment that the person or community is not capable to decide for themselves what the best way to pursue their own good is (Christman, 2015). Corporations adopting paternalistic practices while discharging their human rights responsibilities impose their ends, and hence, force those whose rights are at stake to become instruments towards these same ends. Certainly, this is a scheme that collides head on with the foundations of self-determination and autonomy that chapters 5 and 6 of this dissertation have established for the concept of human rights.

Undue paternalism, as well as the participation in the political arena without democratic control, irremediably leads to arbitrariness. The arbitrary rule of some over others is unjust because it is a rule without the support of proper reasons or justifications (Forst, 2014, p. 7). Domination is a deep source of injustice. It is precisely out of a people's struggle against injustice that human rights have advanced throughout history. Think of the work and militancy of

human rights champions like Olympe de Gouge, Mary Wollstonecraft, Frederich Engels and Karl Max, Martin Luther King Jr. or Mahatma Gandhi. All of them profoundly captured and canalized the aspiration of the people around them against gender, racial, national or economic domination. Human rights have always been "the product of resistance to despotism, oppression, and humiliation" (Habermas, 2010, p. 466).

In short, domination is rule without justification. As Forst (2014, p. 21) points out, a just social order is one in which free and equal persons can give their assent. Democracy becomes the tool through which individuals, as self-determining agents, can participate and decide on the shape and content of those institutions that bind them. Democracy is the instrument that prevents us from arbitrary rule and domination. Democracy realizes justice in the public realm.

Therefore, corporations should not look into its human rights responsibilities as the provision of certain goods or the guarantee of certain capabilities. The political dimension of the discharge of human rights responsibilities requires us to look beyond. Corporations ought to engage in democratic mechanisms facilitating the exchange of reasons and justifications regarding the implementation of their human rights responsibilities. Otherwise, corporations run the risk of transforming human rights into another form of domination rather than a source of self-determination. Hence, the key question for the BHR debate is no longer whether corporations bear human rights responsibilities or what is the nature of these responsibilities. The challenge now is to explore more in depth *how corporations should* deploy their responsibilities.

9.3 The BHR Debate and the Concept of Human Rights

There are at least two key reasons that would explain why a thoughtful discussion on *how* should corporate human rights responsibilities be deployed has not yet taken place in the BHR debate. First, the field has been too busy attending the question of whether corporations should be assigned human rights responsibilities. Second, the lack of focus on the *how* is also the consequence of the rather secondary attention placed by the BHR debate on the question of *what are human rights*. It is difficult to discuss *how* without first having a clear understanding of the *what*. Leveraging on what has been discussed in chapters 5 and 6 on the concept of human rights, I would like to now turn to this second point.

In general, the discussion regarding the nature of the human rights concept has not been among the top priority issues within the BHR field. Very few BHR scholars have integrated the justificatory foundations of human rights within their works. Consequently, its implications for the BHR debate remain under-researched. BHR scholars generally tiptoe around the definition of the concept of human rights and quickly turn their attention to other aspects of the debate; usually the allocation of responsibilities. Typically, a BHR scholar starts by praising the exceptional and distinctive characteristics of the human rights concept; for instance, its universality, irrevocability, equality, etc. (e.g. Cragg, 2012a, pp. 7-10; Wettstein, 2012b, pp. 740-741). Describing what sort of artifacts are human rights is an absolutely necessary exercise not only to discuss their associated responsibilities for corporations but also to discuss the process and mechanisms that should actualize them.

As important as it is to address these definitional characteristics of human rights, this rather descriptive exercise is still insufficient to understand the grounds on which human rights can be justified. A simple question such as "why should corporations take care of human rights?" definitely requires to

first answer questions along the lines of: "what justifies the overriding status of human rights?", "why are human rights universal?" To fully unveil the implications human rights responsibilities have for corporations requires addressing these questions in advance. Only by addressing these questions in the first instance, can one provide guidance on *how* corporations should bear their human rights responsibilities.

Wesley Cragg, Florian Wettstein and Dennis Arnold are three of the most renowned BHR scholars. Their work has been published and discussed widely. A close look in their conceptualization of human rights serves us to emphasize the need to further investigate and integrate specific normative questions regarding the meaning and justification of human rights. Hitherto, these questions have not been adequately addressed within the BHR debate, and they are particularly urgent if we are to provide guidance on how to discharge human rights responsibilities.

Cragg presents human rights as those "principles or standards designed to *protect and enhance the capacity* of human beings to make and to act on choices guided by moral considerations. […] The role of human rights, then, is to *ensure* that every human being has the freedom needed as a moral agent to pursue goals and objectives of his or her own choosing" (Cragg, 2012a, pp. 6-9 emphasis added). Cragg also points out that "respect for human rights *creates conditions* which allow human beings to exercise their uniquely human capabilities" (ibid., emphasis added).

In Cragg's account, human rights are not presented as objects that should be shared, constructed or realized in collaboration with other individuals. Instead, Cragg's perspective implies that human rights ought to be provided from those who "own" the responsibility to those whose human rights are owed. Cragg also acknowledges that human rights have an intrinsic value "because they affirm that the bearers of human rights are human beings equal in moral status

to all other human beings and worthy, therefore, of equality of treatment on all others impacting their capacity as moral agents to lead lives of their own choosing" (Cragg, 2012a, p. 7). In fact, it would be very interesting to discuss with Cragg up to what point the idea that human rights allow individuals to lead a life of their own choosing is compatible with the responsibilities corporations should assume in terms of human rights.

It remains, nevertheless, unspecified how Cragg would combine both views. It is not clear how leading a life of my own choosing can be made compatible with a third party providing what is owed to me without having a chance of participating in the definition of what should be owed to me.

Florian Wettstein, another BHR scholar, presents human rights as moral rights that are directly connected to the possibility of living a human life of dignity. Dignity, Wettstein argues, is a life in freedom and autonomy. He leverages on Sen to affirm that "[…] human rights, as the most important and fundamental category of moral rights, protect those freedoms that are most essential for a dignified and self-determined human life (Sen, 2004, pp. 319,321)" (Wettstein, 2012b, p. 741).

For Wettstein human rights are an ideal starting point for a cross-cultural idea of the *common good* (Wettstein, 2012a, p. 176). Human rights are an instrument that allows for a common ground for human beings to live *a life worth living*, that is, according to Wettstein a life based on freedom and basic human dignity (ibid.). At the root of Wettstein's account lies the idea of human rights as a tool to foster human development; that is, the continuous realization of people's rights or, put differently, human well-being. Wettstein leverages on Amartya Sen's work to point out that well-being is not a matter of how rich a person is, but of what kind of life a person is able to live (Sen, 1985, pp. 23, 28; Wettstein, 2009, pp. 107-108).

The idea of well-being is used as a synonym for "quality of life", which in turn is connected to the degree of fulfillment or lack of capabilities to pick up from different choices in life. The enjoyment (or lack of) well-being is, eventually, directly connected to the enjoyment (or lack) of freedom. For Wettstein human development is about the enhancement of capabilities that expand the range of options individuals can have in life. He associates well-being with freedom; "the freedom to choose to pursue one's own well-being" (Wettstein, 2009, p. 109). Capabilities are conducive to increased well-being. Wettstein endorses O'Neill who asserts that "the realization of people's rights, then, is essentially a process of empowerment of human beings through the development of their basic social and productive skills" (O'Neill, 1986, p. 160; Wettstein, 2009, p. 108).

The guidance we can extract from Wettstein's account in terms of how to realize corporate human rights responsibilities is, once again, limited. The way his framework is constructed poses difficulties to think of corporations as playing any role in the realization of their human rights responsibilities other than as providers of well-being, realizers of human development, or enhancers of capabilities. In the same manner as Cragg, Wettstein does not explicitly specify a role for victims or those whose rights are compromised. Hence, victims are at risk of being conceived as passive agents in the realization of their own rights. It is true that Wettstein acknowledges that human development should be an "active rather than passive and a dynamic rather than a statist interpretation of rights; rights empower, not just benefit, those who hold them" (Wettstein, 2009, p. 108). Thus, is it clear that Wettstein is aware that the idea of human rights goes beyond providing a specific good or capability. Unfortunately, he does not further develop this avenue and its implications for the potential role of victims in the realization of their rights.

Who is to define what exactly is a dignified human life, the common good or a life worth living in the specific context of a corporation facing human rights

responsibilities? The answer can be found in neither Wettstein nor Cragg's understanding of human rights. It is not that both are wrong in their exposition of the human rights concept; it is that they do not go far enough in grasping their complete meaning. Human rights transcend the provision and guarantee of certain capabilities, goods or conditions of well-being.

The work of Dennis Arnold, similarly to Cragg and Wettstein, also revolve around the determination of the human rights responsibilities. Unfortunately, he too does not address head-on the question of *how* should responsibilities be deployed. Nevertheless, Arnold is aware of the need to address the substance of human rights and develops a rich approach to its foundations as part of his theory. Arnold's account of human rights is grounded around three pillars. First, human rights are conceived as Hohfeldian claims-rights; that is, they are not requests or hopes, but the "ultimate rational basis for making a demand upon others" (Arnold, 2010, pp. 384-385). Interestingly, Arnold highlights that, given their nature, the justification of human rights is crucially important. "Only rights that can be rationally justified, rather than simply asserted or demanded, carry with them this sort of claim against others" (Arnold, 2010, p. 385).

Secondly, human rights are grounded on human agency. Any other approach is discarded; be it divine or based on a hypothetical contract. By human agency Arnold means, basically, the capacity to self-determine one's own desires and preferences. His account of human rights is dual in the sense that human rights have value, at the same time, intrinsically and instrumentally. Intrinsically they are representative of unique dignity and self-government conditions that must be respected in every human being. On the other hand, Arnold embraces James Griffin's instrumental approach when he affirms that all human beings share a common interest in pursuing three fundamental interests (Arnold, 2010, pp. 385-386; Arnold, Audi, & Zwolinski, 2010, p. 574; Griffin, 2008, p. 33). First, the enjoyment of the autonomy to conceive a worthwhile life. Second, the

freedom to pursue this conception of life. Third, a minimal proviso of well-being to realize it - i.e. the minimum health, education or physical welfare required to pursue this vision. Human rights are instruments for the protection of these fundamental interests.

Finally, Arnold limits the scope of human rights to Henry Shue's basic rights (Arnold, 2010, p. 386) – i.e. "those rights necessary for the attainment of other rights and without which it is not possible to live a *decent* human life" (Shue, 1996, p. 23 emphasis added) and which represent "everyone's minimum reasonable demands on the rest of humanity" (1996, p. 19).

Based on his agential assessment of human rights Arnold concludes that "TNC managers have duties to both ensure that they do not physically harm or illegitimately undermine the liberty of any persons, and the additional obligation to *ensure that subsistence rights are met*" (Arnold, 2010, p. 387 emphasis added). It is worth to emphasize that, according to Shue, the rights to subsistence refers to a right "to have available for *consumption* what is needed for a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic interventions" (Shue, 1996, p. 23 emphasis added). Thus, besides his rich and elaborated account of human rights, Arnold can avoid to embrace the "goods provision" orientation already pointed out in Cragg and Wettstein's conceptualizations of human rights.

Human rights, through Arnold's lens, are rights owed to, and should be claimed by, all human beings. They make a "decent" human life possible. And they represent fundamental human interests. However, the key question is who decides what a "decent" life consists of? Who decides what specifically means, in a given context, the content and implementation of ensuring subsistence rights? In light of Arnold's account, the answer to these questions is to be found in the corporation.

The corporation is depicted as the "provider" of human rights while the victim is simply considered a claimant. Arnold insists that corporations when standing in a relevant relationship to a vulnerable partner, own "special obligations to protect the vulnerable party from harm when they have the capacity to do so" (Arnold, 2013, p. 137). Human vulnerability, nevertheless, must be assessed against a relevant standard. Arnold proposes to use "one's capability to function well" (ibid.). This last point is puzzling. It can be interpreted in two ways. First, it can mean that there exists one criteria of assessing capabilities common to all human beings. This, nonetheless, would necessarily imply that there exists a pre-defined list of "ideal" capabilities that would most probably have to respond to an "ideal" of human life.

The second interpretation would imply that the corporation assumes the assessment of those vulnerable individuals and applies it according to its own criteria. In this case, the corporation would play a political role since it is defining the criteria by which a community of (vulnerable) individuals ought to be assessed.

Arnold adopted a claim-rights approach to its conception of human rights, in part because he wanted to protect human rights victims from paternalism (Arnold et al., 2010, p. 572). However, his own approach, takes corporations toward adopting political roles in the realization of their human rights responsibilities for which he does not prescribe any democratic check. Therefore, there is a risk that the corporation deploys these responsibilities in a paternalistic way.

Arnold insists that the only valid account of human rights that can help in the discussion about the corporate human rights responsibilities is neither legal nor political. Only a morally grounded approach works (2010, p. 371). He forcefully discards a hypothetical conception of human rights grounded on a political or legal basis. The reason is that Arnold, as well as Santoro (2010, p.

290), are understandably uneasy with the idea that human rights should be contingent on a potential political agreement or on the existence or ratification of a national or international piece of law. “Ethical or moral arguments for human rights stand or fall on the quality of the ethical reasoning deployed” (Arnold et al., 2010, p. 573).

The political dimension that I discuss here does not contradict Arnold’s approach. In fact he likes to remark that a political conception of human rights is also compatible with a moral one as long as it is based on moral grounds (2010, p. 379). And this is exactly what is happening when we are discussing *how corporations should discharge their human rights responsibilities*. Corporations working on discharging their human rights responsibilities are assuming a political role in the sense that they participate in the realization of other individuals’ human rights. Moral responsibilities to realize human rights generate political responsibilities.

Overall, although Cragg, Wettstein and Arnold’s accounts are a small sample of the debate, their assessment helps to gauge the pulse of the overall normative discussion on the human rights responsibilities of corporations. The first conclusion we obtain is that the field is rich in discussing and identifying on what grounds are corporations responsible in human rights terms. By contrast, not enough attention has been placed on the crucial question of *how corporations should discharge these responsibilities*. However, the road taken by the debate on the conceptualization of human rights, as well as on corporate responsibilities, already provides hints in the direction of *how* to realize these corporate responsibilities.

Cragg, Wettstein and Arnold, an important part of the normative BHR debate, conceive human rights as the provision and guarantee of concepts like human capabilities, well-being, fundamental interests, etc. The dominant approach to

the concept of human rights in the normative BHR debate is teleological. This is an approach that has different limitations.

First of all, the focus is placed on effectively producing the desired outcome. In the case of the BHR debate, the energy placed on a series of capabilities, notions of well-being or interests. The mechanism through which these items should be produced or realized has received rather secondary attention. As the ultimate goal is about securing elements such as capabilities or wellbeing, *how* this is done fades into the background. The consequence is that neither the methods for distributing these outcomes nor their production play a significant role in the normative BHR debate to date. Consequently, this approach does not emphasize enough the political dimension of justice. Only when the production and provision of material goods is done under conditions accepted by all - i.e. under conditions of non-domination (Forst, 2014, p. 12) - can human rights become instruments for furthering justice.

Second, behind the repeated concepts of capabilities, well-being or fundamental interests there lies, explicitly or implicitly, a pre-defined conception of what should be the substance of these elements. Behind concepts such as a "dignified life" or "decent life", there is a background picture of what this life should consist of. The intended or unintended outcome is the advancement of a substantive notion of what constitutes the "good life" according to the understanding of the proponents of the theory. This approach to human rights, as Raz, Beitz and Forst commented (Beitz, 2009, pp. 62-65; Forst, 2015, pp. 72-73; Raz, 2010, p. 325) is not neutral and, as a consequence, "it seems to be partially non-universalizable" (Forst, 2010, p. 723).

Universality, we should recall, is a definitional characteristic of human rights. Therefore, one can expect to encounter difficulties in advancing a teleological approach especially in intercultural contexts as the ones in which large corporations often operate in. Furthermore, the advancement of a pre-defined

conception of the "good life" without justification can become a source of domination and hence of injustice. Corporations discharging their human rights responsibilities under the logic of the prevailing teleological approach to human rights in the BHR debate may position themselves in an objectionable position. By putting forward their own vision of "the good life" to realize their human rights responsibilities they may, either intentionally or unintentionally, limit the self-determination possibilities of those whose rights are at stake.

Finally, the BHR debate relentlessly emphasizes the need to provide, enhance or secure capabilities, well-being, subsistence goods or fundamental interests. The lack of attention to the question of *how should corporate human rights responsibilities be discharged* comes with a risk. Under the current dominant teleological approach, it can be easily interpreted that once corporations are identified as duty bearers, the body of theory does not point to anybody else. The corporation may be the only one in charge to realize the chore of provision, enhancement or securement of these objects. Victims, or those individuals whose rights might be under threat, seem to play no role. They may remain passive, waiting for the corporation to enhance, provide or secure their rights. Thus, victims are at risk of becoming recipients of goods and, as a result, human rights may become a commodity to be delivered.

At the heart of this "good-recipient" centered understanding of human rights and its corresponding responsibilities lies the Suum Cuique conception of justice discussed in chapter 4. The central question of justice is narrowed to what goods are owed and to whom. Meanwhile the question of *how* these goods should be produced or distributed remains neglected.

Corporations, in the exercise of their human rights responsibilities, should not be limited to providing capabilities, well-being or fundamental interests. If corporations are limited to a "provider" role, then there is no way that one can distinguish whether the lack of a victim's capabilities is the result of a natural

disaster (e.g. a flood or an earthquake), or the result of an unjust and oppressive economic or social system. In a "goods-recipient" approach, victims have no opportunity either to challenge the system that led to the threat of their rights or to participate in the structures and frameworks being developed by the corporation to realize their rights.

A strict "goods-recipient" perspective leads to a commoditization of human rights, which ultimately does not tackle the true cause of injustice nor contributes to an improvement of the status quo in terms of justice. The reason is that "the basic impulse that opposes injustice is not primarily one of wanting something, or more of something, but is instead that of not wanting to be dominated, harassed or overruled" (Forst, 2014, p. 8). Thus, victims ought to have the opportunity to participate and be active in the definition of the instruments that shall realize their own rights.

"Justice is about who determines (and with what justification) the basic structure of society as well as its essential institutional workings" (Forst, 2014, p. 13). Corporations, when discharging their human rights responsibilities, also take part in the determination of the basic structure of society as well as in its essential institutional workings. A political role of this caliber requires democratic legitimation.

9.4 Introducing a Forstian Perspective on Human Rights

In the BHR debate, a profound shift on the way human rights are conceived is required to justly discharge corporate human rights responsibilities. The perspective based on well-being, capabilities or fundamental interests is not enough. An exclusive focus on a "goods-centered" approach does not completely respond to a broad idea of justice. Imagine, for example, a dictator guaranteeing all the fundamental interests and essential rights. From an outcome oriented human rights perspective, his rule would certainly provide

more welfare than an impoverished democracy would. Still, a democratic system would be more just than a dictatorship.

Thus, only a democratic turn can avoid corporations exercising undue domination through a goods-centered understanding of human rights. Rainer Forst's theory of human rights provides this turn. It provides a robust alternative to the widely spread teleological approach to human rights prevailing in the BHR debate.

Forst's theory of human rights is rooted on a fundamental basic right owned by every human being: the right to justification (Forst, 1999, p. 40). It is a right directly connected with a universal capacity owned by all humans: the ability to give and demand moral arguments for those social relations that involve them in a particular context. Through a Forstian perspective, human rights "should not be seen as rights to goods necessary for the 'good life'. Rather, they should be seen as rights that put an end to political oppression and the imposition of a social status which deprives one of one's freedom and of access to the social means necessary to being a person of equal standing (Forst, 2010, p. 725). Therefore, the discharge of human rights responsibilities should not be limited to the provision of certain goods. To have responsibilities in terms of human rights means to enable victims the possibility to receive and give justification for all those rules and structures that bind them. This includes the instruments and methods through which their human rights will be realized.

As argued in detail in chapter 6, human rights are constructed discursively at two levels: the moral and the political. At a moral level, not all arguments resulting out of a discourse can become human rights. Only those arguments that comply with the criteria of reciprocity and generality can be accepted. These two principles decisively enhance the requirements for a claim to be considered a human right.

Although, Forst's moral constructivist dimension is crucial for justifying human rights, the political constructivism perspective is indispensable to tackle the question of *how* to discharge corporate human responsibilities. The political constructivist dimension puts emphasis on the discourse process that should accompany the realization of a moral human right. It opens the doors to discuss the interpretation and the specific institutions necessary to accommodate a human right to apply to a specific context. In this respect, any context where "demands for human rights concretely arise and towards which those human rights are directed" becomes a political context (Forst, 1999, p. 48). Thus, the political is not restricted to the sphere of the state; it is circumscribed to those individuals or communities whose rights might significantly result affected. The emphasis is placed on a discourse process, and therefore the design of the institutions and structures for their realization is secondary and not pre-defined from the outset. The priority is the construction of a justified set of human rights that a legitimate political authority ought to respect and guarantee (Forst, 2010, p. 726). To achieve this goal, though, the basic right to justification must be guaranteed at all times.

Teleological oriented BHR scholars, e.g. Wettstein or Arnold, have acknowledged the importance of providing justification for moral claims such as human rights. Wettstein, for example, cites Tugendhat (1992, p. 315) to make the point that moral claims always require an intersubjective justification (Wettstein, 2009, p. 29). Arnold, for his part, praises the importance of human rights justification and emphasizes that only those rights that can be rationally justified, rather than simply asserted or demanded can be considered human rights (Arnold, 2010, p. 385). Unfortunately, neither Arnold nor Wettstein further explore the potential implication that the justificatory perspective can have for their own arguments as well as the BHR debate at large.

In the scholarly discussion of the human rights responsibilities of corporations, human rights are often taken as given monolithic principles. The corporation is

not expected to engage in a discourse regarding the form or the content of the mechanisms that shall realize their rights with those whose rights may be impacted. Hence, when the corporation is identified as a human rights duty bearer, there is no other task left for the corporation other than to provide the goods, or enhance the capabilities supposedly connected to the right. The prevailing teleological view on the BHR debate, with its silence on the question of *how*, may support, or at least not oppose, the idea that corporations bearing human rights responsibilities unilaterally decide on the realization of specific rights – i.e. without necessary involving those whose rights might be affected. This can place corporations in unwanted and unjust roles of domination.

From a Forst perspective, human rights are not conceived as uniform or unequivocal truths but as something that can be discussed and deliberated upon, at least on the practical terms of their implementation. It is important to note here that I am not advocating for corporations to engage in a discourse with victims about what their human rights are. In Forst's terms, corporations ought not to take part in the moral construction of human rights. Instead, in those contexts of human rights violations where corporations are involved, they ought to participate in the political construction of human rights. That is to say, to take part, when necessary[25], in the joint definition and implementation of the mechanisms that shall realize the human rights victim's.

Consequently, the duty to discharge corporate human rights responsibilities becomes a more demanding and complex task than the one we could expect under the parameters of the "goods recipient" approach of Arnold's, Wettstein's or Cragg's theory, for example. Corporations, when confronting human rights responsibilities inevitably enter into a political context and

[25] For example, when suggested by the capabilities or the publicness accounts of human rights responsibilities.

become political actors. Because they are dealing with human rights, they ought to make sure that the right to justification of all those individuals whose rights are affected is respected. This means that corporations, in order to justly and respectfully fulfill their human rights responsibilities ought to provide the spaces where this basic right to justification can materialize. In other words, corporations have a duty to set up institutions or initiatives that realize the basic right to justification to justly and effectively discharge their human rights responsibilities.

9.5 A Duty to Set Up Institutions

The duty to set up institutions that I here put forward attempts to foster the engagement between corporations and victims of human rights or those whose rights might potentially be threatened. The goal is to provide victims with a true opportunity to take ownership of their own human rights and to become active agents in their construction and realization.

This duty does not imply that corporations should share the burden of their human rights responsibilities with victims. Instead, it means that any effective and just discharge of the corporate human rights responsibilities must necessarily count with the assent of those whose rights are impacted. Victims have a basic right to give and provide justifications for all those policies, rules or institutions that bind them. The redress, compensation or realization of their human rights is, unquestionably, a dimension deeply connected with their right to justification and therefore, absolutely indispensable to be object to a democratic discourse.

The actualization of the right to justification requires to set up an institution or initiative, or to participate in an already existing one, that provides the space for all relevant actors to establish a democratic discourse where victims are

granted a real opportunity to take active command of those frameworks that might bind them.

The duty to set up institutions in connection to the discharge of human rights responsibilities has been investigated and advanced by at least three relevant scholars over the last decades, namely: Rainer Forst (1999, 2010), Henry Shue (1988, 1996) and Thomas Pogge (2002, 2011). The three of them have in common that they are universalists in terms of human rights duties – i.e. they hold that human rights generate duties among all human beings. In fact they defend that it is primarily the government, and per extension the citizens, the ones that should bear human rights responsibilities. The argument for the duty to establish institutions for the provision of human rights is presented as a consequence of their universalist approach.

Henry Shue was the first of the three scholars to pinpoint the idea of establishing a duty to create institutions in connection with human rights. He conceived the duty to create institutions as a tool serving his tripartite framework of correlative duties. Shue, as commented earlier in chapters 6 and 7, holds that for every right there exist three correlative duties: the duty to avoid deprivation, the duty to protect from deprivation and the duty to aid the deprived. More specifically, Shue developed the following scheme of correlative duties (Shue, 1996, pp. 56-60):

I. Duties to *avoid* depriving
II. Duties to *protect* from deprivation
    II.1. By enforcing duty (I) and
    II.2. By designing institutions that avoid the creation of strong incentives to violate duty (I)
III. Duties to *aid* the deprived
    III.1. Who are the one's special responsibility

III.2. Who are victims of social failures in the performance of duties (I), (II-1), (II-2) and

III.3. Who are victims of natural disasters

In his analysis of the duty to protect (II), Shue specifies that this duty is not exhausted at simply enforcing the primary duty to avoid (II.1), "duties to protect also encompass the design of institutions that do not leave individuals with duties to avoid, the fulfillment of which would necessitate super-human qualities" (Shue, 1996, p. 59). Shue finds in the development of institutions an appealing instrument serving the duties to avoid and protect from deprivation in those occasions where these duties would become "too overwhelming" for the duty bearer. That is to say, when the realization of the corresponding right would require more than the capacity to provide by the duty bearer. Institutions, in Shue's terms, can act as mediators between duty bearers and the claimant of rights (1988). Shue highlights that institutions can become a source of cooperation and coordination among diverse duty bearers that would not exist otherwise. As a result, institutions can enhance the efficiency of the duty realization by, for example, allocating previously unallocated duties. Additionally, institutions can also provide respite when duties are too demanding for the duty bearer (Shue, 1988, pp. 695-698).

Pogge stresses that governments may be the primary guardians of human rights but it is ultimately the people "on whom their realization crucially depends" (Pogge, 2002, p. 63). Pogge advocates for an institutional approach to human rights responsibilities where the responsibility of governments and individuals is to work for an institutional order and public culture that ensure that all members of society have secure access to the objects of their human rights" (Pogge, 2002, p. 65). Through these lenses, human rights can be violated not only through wrongful conduct of an individual or a collection of individuals. The injustice resulting out of the design of social institutions, "the rules and procedures, roles and agencies that structure and organize societies and other

social systems" (Pogge, 2011, p. 13), can also constitute a human rights violation. Therefore, Pogge sustains that citizens of a society have two types of obligations towards making their social institutions more just. On the one hand, "a negative duty not to collaborate in designing or imposing unjust social institutions upon other human beings" (Pogge, 2011, p. 16). On the other, a positive duty to facilitate the realization of human rights by promoting "the realization of human rights through the improvement of institutional arrangements" (Pogge, 2011, p. 19).

Rainer Forst stands along similar lines as Shue and Pogge in pushing for a duty to set up institutions. Forst refers to the moral qualities and the status of all human beings to argue that every person has a duty not only to respect the human rights of others but also to help them when breached elsewhere. "This moral duty to help victims of flagrant injustice translates into a 'mediated' positive duty to construct institutions that effectively guarantee that such violations of rights are recorded, fought against, and prevented" (Forst, 1999, p. 53).

While Shue, Pogge and Forst share a common universalist basis for grounding a duty to set up institutions for promoting human rights, Forst's motivations underpinning this duty differ from Shue's and Pogge's. The latter insist to qualify the setting up of institutions as a duty based on the instrumental benefits resulting out of them. Given that human rights responsibilities are conceived as universal, institutions offer the possibility to coordinate and facilitate collaboration among the multitude of duty bearers. In other words, institutions make the entire process of providing for human rights more effective. Shue and Pogge ground their duty to set up institutions on teleological grounds. Forst, instead, clearly states that the "primary goal of these efforts is to enable the victims of injustice to establish a political structure in which their basic right to justification is no longer denied and violated" (Forst, 1999, p. 53). The duty to set up institutions has an intrinsic

value because it "primarily implies respecting every person's basic right to justification" (ibid.).

9.6 The Duty to Set Up Institutions: a Matter of Justice

The duty of corporations to create institutions to discharge their human rights responsibilities justly, and to do so according to the right to justification, is a duty that is particularly relevant where the state is weak or absent. In Onora O'Neill's terms, one can argue that its realization places corporations into the role of a primary agent of justice. Primary agents are those agents that "may construct other agents or agencies with specific competencies: they may assign powers to and build capacities in individual agents, or they may build institutions – agencies – with certain powers or capacities" (O'Neill, 2001, p. 181). By contrast, secondary agents of justice, by contrast, "are thought to contribute to justice mainly by meeting the demands of primary agents, most evidently by conforming to any legal requirements they establish" (ibid.).

In the field of business ethics, the discussion regarding the adequacy of conceiving corporations as primary agents of justice, that is, as creators, transformers or promoters of just institutions is anything but new. Peter Ulrich, for long a beacon in the German speaking business ethics field, argues that "company managers must see beyond the mere observance of business integrity and acknowledge their republican-political share of responsibility […] at the level of the company and the industrial federation" (Ulrich, 2008, p. 410). Through the lens of Ulrich's republican approach to corporate responsibility, managers are called out not to "simply shrug their shoulders and point to the practical constrains of self-assertion under the given competitive conditions" (ibid.). Ulrich calls for corporations to become active agents through engaging in "ethically justified reforms of the institutional framework" (Ulrich, 2008, p. 414).

Along Ulrich's tradition, Florian Wettstein and Nien-hê Hsieh are the scholars that most thoroughly explored the idea that corporations hold responsibilities connected to the creation and promotion of just institutions at an international level (see e.g. Hsieh, 2004, 2009; Wettstein, 2009, 2010, 2013b). There exists, at least, one common underlying assumption in the arguments of these two scholars, as well as in Ulrich's. The three of them hold that corporations should not be isolated from their context and the institutions with which they operate alongside. Instead, they should be attentive and react accordingly when the contexts or institutions that surround them are unjust.

Along these lines Wettstein holds that "multinational corporations have a responsibility to actively promote and work toward just structures or toward the abolition or transformation of unjust ones and, as such, to become [primary] agents of justice" (Wettstein, 2013b, p. 19). Similarly, according to Hsieh "corporations have a responsibility to promote the establishment of institutions from which they are separate and to which they then will be subject to regulation" (Hsieh, 2009, p. 269). Hsieh connects such responsibility with Rawls duty of assistance. Corporations, he argues, have a limited duty of assistance toward "those living in developing economies, even though the duty is normally understood to fall on the governments of developed economies" (Hsieh, 2004, p. 643).

Both Wettstein and Hsieh embrace O'Neill's distinction between primary and secondary agents of justice, as well as the idea that, under non-ideal conditions – i.e. under the rule of a weak state – corporations, given their vigorous capacities, should become primary agents of justice. They circumscribe to the argument to promote just institutions within the "paradigm shift" opened up by the political CSR debate (Hsieh, 2009, p. 252; Wettstein, 2013b, p. 20). The political CSR debate, Hsieh acknowledges, "recognizes a responsibility in the part of the TNCs to contribute to the development of a robust institutional framework" (Hsieh, 2009, p. 252). The duty to set up institutions to discharge

corporate human rights responsibilities put forward in this dissertation is informed by, and leverages from Hsieh and Wettstein's arguments. Yet, the democratic perspective on human rights taken in previous chapters requires us to emphasize and qualify three key aspects of the duty to promote just institutions, namely: first, its positive political grounding; secondly, the need to transcend effectiveness as the variable through which the duty is assessed; finally, the need to understand the duty as the provision of an opportunity to victims to participate in those institutions that bind them.

First of all, it is crucial to highlight that the duty to promote just institutions is a political duty: one grounded on *positive responsibilities* to contribute to changing situations of injustice. Both authors, Wettstein and Hsieh, coincide to emphasize its political nature, but differ on their grounding reasons. According to Hsieh, corporations operating in burdened societies often take part in systems whose outcomes breach or jeopardize human rights. According to him, "it is wrong to benefit from a system in which one's activities give rise to potential harms and persons subject to the possibility of harm lack protection and the basic means to seek redress" (Hsieh, 2009, p. 259). On this basis, Hsieh points out that corporations operating in burdened societies "have a responsibility to help promote the institutions associated with well-ordered societies in those countries on grounds that they ought to do no harm" (ibid.). Eventually, Hsieh adopts a position that resembles the thesis underlying the second pillar of the UNGPs. That is, corporations only have to respect human rights, which means "not to infringe on the rights of others – put simply, to do no harm" (Ruggie, 2008 para. 24).

Yet, justifying the duty to set up or promote institutions on negative responsibility grounds as Hsieh does has a limited reach. Wettstein builds the case for rejecting Hsieh's negative responsibility argument clearly. He points out that Hsieh's argument is based on "the assumption that the duty to do no harm automatically implies an active responsibility to promote just institutions,

where the lack thereof is rendering business conduct harmful" (Wettstein, 2010, p. 277). That is, Wettstein notes, "anything but evident" (ibid.). The duty to refrain from harming others' rights is "primarily a *passive duty*" (ibid. emphasis on original). The promotion of just institutions is a political endeavor that inevitably entails going beyond the mere considerations of doing no harm (2010, p. 281). Wettstein resorts to the work of Iris Marion Young to highlight that any political obligation is a form of positive obligation (2010, p. 281). In Young's terms, to advocate for taking part in the transformation of unjust institutions, as Hsieh does, is an "activity in which people organize collectively to regulate or transform some aspects of their shared social conditions, along with the communicative activities in which they try to persuade one another to join such collective action or decide what direction they wish to take it" (I. M. Young, 2004, p. 377).

A second key aspect of the duty to set up just institutions that requires qualification is its effectiveness. Beyond their opposite views on the foundations of the corporate duty to promote just institutions both scholars, Wettstein and Hsieh, make this duty contingent on its effectiveness. Wettstein states that, "the duty to promote just institutions, also in Hsieh's account, crucially hinges on the prospective positive impact of the corporation's advocacy on the institutional framework in which it operates" (Wettstein, 2010, p. 278). Similarly, Hsieh argues that where the intervention of corporations may not yield any desired effect or may simply result counterproductive, the duty to promote just institutions shall be limited (Hsieh, 2009, p. 264). As Wettstein acknowledges, by turning the focus on the "'effectiveness' or potential impact we are clearly leaving the deontological realm of doing no harm and instead take a consequence-sensitive position" (Wettstein, 2010, p. 278).

The consequence of Hsieh and Wettstein's approach is that the emphasis of the duty to promote just institutions is primarily placed on the outcomes derived

from the duty; the process and the justification that accompany the duty are not fully acknowledged. It is important to note here that I am not refuting Hsieh's and Wettstein's judicious consequence-sensitivity condition. It is reasonable to hold that corporations should not engage in a political role in the promotion of just institutions that clearly does not generate any positive impact. However, the concept of "effectiveness" is not free of normative load. An institution is usually effective for somebody for a specific purpose. The consequence-sensitivity condition, hence, should be based on a conception of "effectiveness" that incorporates the input from those to whom the institution shall apply. If we are to believe that the duty to promote institutions is a positive political duty aiming to advance justice where there is none, then, this political role should only be deployed democratically. Put differently, any political process involving institutions in the public sphere requires democratic checks if it aims to be recognized as just. The mechanisms put forward by the corporate duty to promote just institutions are no exception. Otherwise, the institution in question runs the risk of becoming an instrument of domination and, consequently, to represent an unjustified or arbitrary interference to those individuals or communities whose rights might be at stake. In practical terms, this means that any corporate initiative aiming to provide remedy for human rights victims should not be assessed only in terms of its effectiveness in fixing the causes that led to the violation or the amount or form of compensation; it should also include parameters reflecting on its ability to incorporate victims in the design, governance and assessment of the remedy tool. As relevant as effectiveness is, it is a necessary but not sufficient criterion to consider this duty as justly discharged.

The third aspect that is important to discuss in connection to the duty to promote just institutions is the potential risk that political interference can cause among communities and individuals under its scope. Hsieh refers to this

risk as the "arbitrary interference" objection [26]. Hsieh defines arbitrary interference as the making of decisions that "affect another individual's interests without any consideration for that individual's interests or her judgments about those interests" (Hsieh, 2004, p. 653). Hsieh proposes to include the protection against arbitrary interference "among the social bases of self-respect and hence [be] designated a basic right" (ibid.). Overcoming arbitrary interference, Hsieh argues, requires the ability to contest managerial decisions on the side of employees. This is a claim that might, for instance, "take the form of a right to collective bargaining along with the right to protection against arbitrary discrimination" (ibid.). He convincingly advances the argument that corporations "have an additional obligation, which is to help provide mechanisms through which those affected by their activities are able to contest corporate decisions" (Hsieh, 2004, p. 658).

In this context, though, there is no point in restricting his arguments to the scope of corporate employees and not including other types of stakeholders that might potentially become victims of human rights. Having the opportunity to contest those decisions and institutions that bind me, as Hsieh argues, is certainly a crucial aspect of realizing justice in the public sphere. Yet, a democracy perspective, as the one advanced here, requires going one step further than providing the opportunity to contest. A democratic perspective on the corporate duty to promote just institutions requires that corporations, in the exercise of this duty, provide mechanisms for contestation (grievance) as well as opportunities to participate in the definition of the institutions, rules and norms of the public sphere that bind me.

[26] He addressed this objection extensively in two occasions (see Hsieh, 2004, pp. 652-653; 2009, pp. 264-267). For the discussion at hand, the relevant arguments for this discussion are presented in his 2004 article.

In conclusion, and to sum up this chapter, the duty to promote just institutions to discharge human rights directly leverages on the work and discussion of Florian Wettstein and Nien-he Hsieh but hinges on certain nuances. The duty put forward here is a political duty grounded on the positive responsibility corporations have to transform those unjust institutions or context in which they participate in. Additionally, the duty shall not be assessed exclusively in terms of its effectiveness but shall also take into account the extent to which rights-holders are active participants in. The participation of rights-holders in the mechanisms devised by the duty must include, but not be restricted to, the communication of grievances. A truly democratic approach to human rights requires that the institutions set up for the protection of human rights count with the active participation of those whose rights are at stake in the definition, governance, and monitoring of the mechanisms resulting from the corporate duty. The next chapter builds upon all of these insights to contribute, with specific guidelines, to the debate on the features that should define any just non-state-based non-judicial remedy mechanism.

10 Human Rights Remedies: Beyond Grievance Mechanisms

In the previous chapter, I argued that corporations have a duty to set up just institutions in their quest for discharging their human rights responsibilities. Such duty transforms the way in which corporations should approach their attempts to provide remedy. Remedy should not be simply limited to the provision of certain goods, or the establishment of grievance mechanisms. The basic right to justification underpinning the concept of human rights requires going one step further. It requires engaging with victims to establish a discourse with the purpose of commonly defining what it means to realize human rights within their context.

Promoting or setting up institutions for the provision of remedy is a political endeavor. And as any political endeavor, its justness can only be guaranteed if the construction and the functioning of the institution or mechanism follow democratic guidelines. Failing to operate otherwise may easily turn the corporate initiative to discharge its human rights obligations into an instrument of domination, and hence, of injustice. Corporations should avoid finding themselves in this potentially harmful situation.

Operational grievance mechanisms (OGMs) are popular mechanisms through which corporations can channel their human rights remedy efforts. In 2011, the UNGPs endorsed, in its third pillar regarding the access to remedies, OGMs as a form of non-judicial non-state avenues through which rights-holders can obtain remedies (Ruggie, 2011 Art. 28-31). However, while the UNGPs place a lot of attention to the management of grievances, the discussion on the provision of appropriate remedy mechanisms fell into the background. This lack of specific focus on remedy provision has translated into the emergence of

new forms of company-led grievance mechanisms, which reinforce, rather than mitigate, domination patterns on victims.

OGMs, though, have the potential to become the instrument through which corporations can realize their duty to set up just institutions for the realization of their remedy responsibilities. The goal, though, should be that OGMs act as instruments to avoid domination and contribute to foster self-determination among those whose rights might be at stake.

Thus, the question that this chapter tackles is "what parameters should an OGM follow to be considered as a just instrument for the provision of remedy?" In this respect, I argue that any OGM should be constructed along four guidelines: put victims at its center, contextualize its forms and contents, be oriented towards the redress and transformation of the variables that led to the impact, and be guided by deliberative democratic principles. The chapter closes with an assessment of the remedy mechanisms put in place in the aftermath of the Rana Plaza tragedy along these four guidelines.

10.1 Operational Grievance Mechanisms and the Third Pillar of the UNGPs

International law recognizes the access to remedy for victims of human rights abuses as a fundamental right[27]. The basic principles and guidelines set by the UN General Assembly Resolution 60/147 establish that states have the "obligation to respect, ensure respect for and implement international human rights law and international humanitarian law" (United Nations, 2005a) . Yet,

[27] The basic principles and guidelines on the right to remedy stated on the Resolution adopted by the UN General Assembly on December 16, 2005, collect the list of international law instruments in connection to the right to remedy (see preamble UN Resolution 60/147).

remedy gaps abound, and the context of business related human rights violations is no exception.

Over the last decades, corporations have unprecedentedly explored opportunities to market their goods and services beyond their national borders and started exploiting natural resources in the most remote of places. In many occasions, such expansion has come along with adverse human rights impacts in zones where unstable or weak state governmental institutions are unwilling or incapable to fulfill the remedy obligations that international law imposes on them. The SRSG has referred to these contexts as "governance gaps" (Ruggie, 2008 Art. 3). As a consequence, businesses, together with states and victims, are often confronted with remedy-deficient landscapes.

These gaps have led impacted communities to direct their human rights complaints and concerns directly to corporations (Vermijs, 2013, p. 18). In such remedy-deficient landscapes (Knuckey & Jenkin, 2015, p. 802), tools such as OGMs, with their early warning and preventive functions, have emerged as convenient instruments to cover these gaps.

OGMs are non-judicial non-state based grievance mechanisms established to work at "the level where business enterprises interface with the individuals or groups they may impact (affected stakeholders)" (Rees, 2011, p. 7). They systematically collect complaints, and may directly provide remedies to those whose rights might be at stake. OGMs may be implemented without the intervention of governmental, judicial, or international institutions, or multi-stakeholder processes (Knuckey & Jenkin, 2015, p. 802). Over the last decades, the use of OGMs has increased tremendously. There has also been a rise on the literature written on OMGs, which has been prolific in presenting illustrative examples and discussing best practices (e.g. Freeman, 2014; Rees & Vermijs, 2008; Shift, 2014; Wilson & Blackmore, 2013).

In 2011, the SRSG recognized OGMs as potentially effective means for corporations to enable remediation (Ruggie, 2011 Art. 22) and incorporated them into the third pillar of the UNGPs. As discussed in chapter 8, the UNGPs represent the state of the art in the business and human rights responsibilities discussion and are regarded as an internationally and broadly accepted framework. Thus, it is important to circumscribe OGMs within the UNGP parameters.

The UNGPs recognize the importance for victims to see their right to remedy fulfilled. The entire third pillar of the UNGPs is fully dedicated to discussing what instruments should be put in place to ensure that victims of business human rights violations have access to appropriate remedy mechanisms. In its foundational principle, the third pillar declares that states, in their duty to protect human rights, must provide the adequate measures and instruments to ensure that victims of business-related human rights abuses have access to effective remedy (Ruggie, 2011 Art. 25). Similarly, corporations, where they "have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes" (Ruggie, 2011 Art. 22).

The UNGPs define remedy as those initiatives oriented towards counteracting or making good any human rights harm; they may adopt a variety of forms: apologies, restitution, rehabilitation, financial or non-financial compensation, etc. (Ruggie, 2011 Commentary to Art. 25). The third pillar of the UNGPs devices three avenues through which victims of corporate human rights abuses shall have access to remedy, namely through (i) state-based judicial, (ii) state-based non-judicial, and (iii) non-state-based non-judicial grievance mechanisms. The combination of these three mechanisms "should form the foundation of a wider system of remedy" (Ruggie, 2011 Commentary to Art. 25).

OGMs fall into the non-state-based non-judicial grievance mechanisms category, and according to the UNGPs, they perform two key functions (Ruggie, 2011 Commentary to Art. 29). First, OGMs provide a channel through which rights-holders can raise their complaints and concerns. Through OGMs, corporations can collect, identify and analyze their impact on the rights of others and shape their policies and strategies accordingly. The second key function of an OGM, according to the UNGPs, is to allow the corporation, once impact has been identified, to provide early and direct remedy; thus, "preventing harms from compounding and grievances from escalating" (Ruggie, 2011 Commentary to Art. 29). Kaufman and McDonnald add that OGMs may also serve a third purpose, namely: granting victims the opportunity to "find remedy in contexts where the courts or other state-based remedial systems are unavailable or unable to respond" (Kaufman & McDonnell, 2016, p. 128). Although effective judicial remedy systems are essential to any robust and effective human rights regime, they may not always be available, accessible, appropriate, or the desired avenue for those whose rights are at stake; in these situations non-judicial grievance mechanisms can act as a convenient support (Rees, 2011, p. 7).

OGMs characterize themselves for being directly accessible to those whose rights are or might be impacted (Ruggie, 2011 Art. 29). Typically, they are administered by corporations, alone or in collaboration with others – including victims, their representatives or other stakeholders – who can engage directly with the company in the identification of issues and the device of remedies (Rees, 2011, p. 8). For corporations, OGMs constitute a convenient complement to stakeholder engagement and collective bargain processes. However, they should not be used to undermine the role of legitimate trade unions in addressing labor-related disputes or to preclude access to judicial or non-judicial grievance mechanisms (Rees, 2011, p. 9; Ruggie, 2011 Commentary to Art. 29).

The advantages associated with OGMs are numerous and underpin an increasingly appealing business case for their adoption by corporations (Shift, 2014, p. 7). Vermij highlights three categories of advantages put forward by OGMs (Vermijs, 2013, pp. 26-31). Firstly, OGMs can contribute to meeting external standards and expectations. Corporations may have voluntarily adopted commitments with a number of stakeholders outside the company ranging from local communities, NGOs, to private regulatory frameworks or international industry standards, to name a few. OGMs provide corporations with an excellent tool to keep them closely aligned with the demands and requirements of stakeholders. Secondly, OGMs are connected to substantial savings derived from their ability to avoid conflict-related costs (See as well Kemp, Owen, Gotzmann, & Bond, 2011). Given their preventive and early detection character, OGMs enable to identify minor incidents that, otherwise, may escalate into unmanageable disputes. Unattended grievances may escalate into major public campaigns or violent protests that can easily transform into corporate reputational damage, and operational disruptions that may carry along significant, previously overlooked costs (Vermijs, 2013, p. 29). Thirdly, OGMs can become learning platforms through which corporations can gather data on the causes and variables behind each grievance to, eventually, draw insights and lessons to inform better company policy decisions (Rees, 2010, 2011; Ruggie, 2008; United Nations, 2011; Vermijs, 2013, p. 30).

OGMs, though, are no panacea and also place challenges to those corporations adopting them. Vermij identifies 5 common difficulties and uncertainties, most of them connected to the internal functioning of the corporation and the mechanism itself (Vermijs, 2013, pp. 30-31). First, OGMs often require significant resources in terms of time and money from the company. Secondly, OGMs may be perceived as an internal loss of control by the corporation on the overall dispute resolution initiative. Thirdly, the fear of opening "Pandora's box" and not being able to foresee which type of grievances may arise.

Fourthly, the fact that grievances may be perceived as personal failures and hence impact performance reviews of corporate employees. Finally, the fear that OGMs may be used by certain community members to advance their own personal interests as well as unreasonable demands to the company.

Yet, judging by the broad acceptance and welcome provided to the OGMs, the benefits seem to outweigh the disadvantages. Since they were first endorsed by the SRSG in the Protect Respect and Remedy Framework in 2008, a number of international and renowned actors, standards and guidelines have incorporated OGMs into their frameworks or have taken the steps to align their provisions on OGMs to those pointed by the SRSG. Relevant examples include certification standards like the Forest Stewardship Council (FSC), the ISO 14001; international business frameworks like the OECD Guidelines on Multinational Corporations or the ISO 26000 Guidance on Social Responsibility; or, more specifically, initiatives conditioning the access to project financing by development banks (e.g. the IFC Performance Standards, or the Equator Principles) (Rees & Vermijs, 2008).

OGMs are now well established and widely accepted instruments to provide remedy along other state-based judicial and non-judicial remedy mechanisms. OGMs have come to stay. Their early warning and preventive functions as well as their associated benefits in conjunction with the endorsement provided by the SRSG have placed them at the forefront of the Business and Human Rights debate.

The allure of OGMs as instruments responding to governance gaps does not come without risks and challenges. Corporations usually have a major role in their design and management and this can expose them to criticism concerning their legitimacy and the interests they may serve in the first place (Rees, 2011, p. 7). The SRSG took these risks seriously and proactively drafted a list of criteria against which any non-judicial grievance mechanism should be

benchmarked to ensure its effectiveness, namely: legitimacy, accessibility, predictability, equitability, transparency, rights compatibility and a source of continuous learning (Ruggie, 2011 Art. 31). Furthermore, the UNGPs contain a specific provision concerning the need to engage rights-holders in the definition and assessment of OGMs. The commentary to article 31, section H, reads as follows:

"For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, *both be the subject of complaints and unilaterally determine their outcome*, these mechanisms should focus on reaching agreed solutions through *dialogue*. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism" (Ruggie, 2011 commentary to Art. 31, emphasis added).

With this comment, the SRSG tries to avoid a situation where corporations impose grievance mechanisms without the consultation from rights-holders or other salient stakeholders; a fact that could easily lead victims to a heightened sense of disempowerment and disrespect (Ruggie, 2011 commentary to Art. 31, emphasis added). Hence, his emphasis on the concept of dialogue.

10.2 The Emergence of Company-led Remedy Mechanisms

On occasions, OGMs are administered by industry associations, multi-stakeholder initiatives, or international multilateral organizations (Rees & Vermijs, 2008; Ruggie, 2011 Art. 28; Shift, 2014). Yet, the majority of the OMGs are designed and implemented by the target companies (Kaufman & McDonnell, 2016, p. 128). This means that, typically, the same corporations that might be adversely impacting the human rights of individuals set and run

the mechanisms that should provide remedy to the victims. This represents a clear conflict of interests (ibid.), particularly through a remedy perspective. In addition, OGMs often lack specific remedy actions, or the ones they provide are inappropriate to the context of victims and their cultural background. This, in turn, exacerbates rather than lessens, the uneasiness of rights-holders and places the OGM in question on the path towards failure to meet international standards on the right to remedy (Kaufman & McDonnell, 2016, p. 129).

The UNGPs provide detailed guidance on what should consist an ideal OGM in the context of a company being connected to human rights impacts (See Ruggie, 2011 Art. 28-31). They emphasize that any grievance mechanism should be based on engagement and dialogue, and that it should include consultation to those for whose use it is intended on the design and performance of the mechanism (Ruggie, 2011 Art. 31 - H). Yet, while the grievance dimension of an OGM received plenty of attention by the UNGPs, the OGM's dimension of remedy falls into the background. The UNGPs briefly point out that the accompanying remedies should be in "accord with internationally recognized human rights" (Ruggie, 2011 Art. 31 - F). Unfortunately, they do not elaborate further on what shall constitute an ideal provision of remedy. In other words, while the UNGPs devote more attention to the design, management and response to grievances, the identification of the specific parameters and guidelines that should comprise an appropriate and just remedy provision is left rather unattended.

The insufficient guidance on the remedy dimension of OGMs eventually places corporations, not those individuals and communities whose rights might be impacted, at the center of the remedy provision efforts. This has, at least, two basic implications. On the one hand, the lack of concrete remedies of OMGs becomes a common source of discontent and just adds to the failure of the OGM as a whole to fulfill the international standards on the right to remedy (Kaufman & McDonnell, 2016, p. 129). On the other hand,

corporations seek to comply with the UNGPs recommendations on OGMs and, simultaneously, provide concrete remedy solutions in remedy deficient contexts.

This has led to the recent emergence of contentious forms of remedy mechanisms led by corporations; also known as "company-created human rights abuse remedy mechanisms", or CHRMs for short (Knuckey & Jenkin, 2015).

A core characteristic of a CHRM is that it is a decision-making process created by the corporation and its nature "is closer to adjudication than to dialogue-based 'decide together' approaches" (Knuckey & Jenkin, 2015, p. 802). CHRMs differ from traditional OGMs in the sense that their primary purpose is not to mitigate conflict escalation or to provide early warnings in an ongoing basis. CHRMs, instead, are oriented towards the provision of a fixed remedy for a defined class of victims of human rights abuse that took place within a specific past time range (ibid). Knuckey and Jenkin affirm that CHRMs open up a "potentially promising new frontier for addressing adverse human rights impacts or violations association with business activities" (ibid). In this respect, CHRMs can benefit rights-holders under specific situations and serve as convenient complementary remedy mechanisms. Their narrow scope allows them to offer concrete remedies for specific wrongs, improving effectiveness and tailoring solutions to particular events or vulnerable groups (ibid, 807). Additionally, they may guarantee access to swift and effective paths to remedy to rights-holders who may, otherwise, have a limited or no access at all to judicial or alternative non-judicial mechanisms (ibid, 803).

Contrastingly, CHRMs also entail risks. They have the potential to become a parallel private remedial mechanism undermining the confidence and efforts to improve state based judicial processes and governance gaps (ibid, 816). These risks are "particularly acute in contexts where the potential claimants have few

other options for pursuing remedies, and have little choice but to take what they are offered" (ibid, 809). The case of the human rights violations that occurred at the Porgera mining operation in Papua New Guinea and the corresponding OGM implemented by the company, Barrick Gold Corporation, is illustrative of the challenges connected to CHRMs.

For years, the Porgera security guards patrolling the mining area have brutally and repeatedly raped approximately 200 local women of the Porgera valley (Stackl, 2014) . In 2012, and in response to such terrible human rights violations, the company decided to implement a remedial framework to provide reparations to the victims. The framework consisted of a standardized "Remedy Package" offered to the victims that included training and business grants. In exchange, the company required victims to sign for waiving their legal rights. Some of the victims - mostly poor, traumatized and illiterate – had no other option but to accept the compensation that had been offered to them as they lacked the means to resort to alternative judicial or non-judicial remedy mechanisms (Stackl, 2014). Interestingly, in a letter to the UN High Commissioner for Human Rights the company claimed that its remedy framework was totally aligned to the UNGPs and that "it had been developed after an 18 month consultation process with leading experts around the world, in Papua New Guinea, and in the Porgera Region" (Barrick, 2013). Yet, Barrick Gold's worldwide extensive consultation project did not include either victims, any of their representatives or leaders.

Nonetheless, besides their risks, CHRMs may still be justified in very specific circumstances. This may be the case in remedy deficient contexts where both corporations and rights-holders are confronted with accountability or governance gaps (Knuckey & Jenkin, 2015, p. 803). Where well implemented, they may "enable the participatory development of innovative and tailored remedies, align remediation processes and outcomes with the expectations and needs of victims, provide a swifter, less bureaucratic path to remedy, empower

rights-holders, restore dignity by offering acknowledgement and satisfaction, and improve company–community relations" (ibid, 815). Yet, given the serious risks associated with CHRMs, Knuckey and Jenkin urge great caution in their use. They should be implemented sparingly and under strict safeguards based on the severity of the claims, the vulnerability of the community and finality of the settlement (ibid, 816).

The difficulties and risks associated with CHRMs, though, are not only circumscribed to their potential to undermine state based judicial mechanisms for remedy provision or other more legitimate instruments as Knuckey and Jenkin outline. The essential problem with CHRMs, and the reason why they should be implemented with the utmost care, and only on very restricted occasions, is that they can easily become instruments of domination.

10.3 A Forstian Look into CHRMs

Any company running a CHRM demonstrates a genuine capacity to collect and analyze grievances as well as its firm willingness to adopt specific remedy measures to potential or actual human rights impacts. Furthermore, as illustrated by the Porgera case, implementing a CHRM is not incompatible with taking seriously the provisions set by the UNGPs on the need to consult and to establish dialogue with relevant stakeholders (Ruggie, 2011 Art. 31).

Yet, except for those rare occasions in which they might be justified (Knuckey & Jenkin, 2015, p. 814), CHRMs cannot be accepted as a just mechanism through which corporations may fulfill their human rights responsibilities in terms of remedy. CHRMs overlook a key variable underpinning the corporate duty to set up just institutions that prevents them to be considered as a just initiative for the advancement of human rights, namely: the participation of the rights-holders in the *definition*, *governance* and *monitoring* of the remedy mechanism.

As discussed in previous chapters, all human beings are entitled to the basic right to justification; that is, the idea that, above all, human rights enable individuals to give and receive justification for all those institutions that may bind them (Forst, 1999, 2012). Actualizing this basic right requires, to those bearing human rights responsibilities, the duty to set up initiatives facilitating a democratic discourse where rights-holders are granted the opportunity to actively participate in the initiatives or institutions that shall realize their rights. The primary goal of these initiatives or institutions is to "enable the victims of injustice to establish a political structure in which their basic right to justification is no longer denied and violated" (Forst, 1999, p. 53). In contrast to the unilaterality in the remedy provision of the CHRM, the human rights perspective brought in by Rainer Forst helps us highlight the importance of the *process* through which human rights require to be implemented.

The corporation's redress, compensation or the realization of any other human rights remedy responsibility is, unquestionably, a dimension deeply connected with the victims' right to justification and therefore, absolutely indispensable to be object of democratic discourse.

In a CHRM, such as the one implemented by the Barrick Gold Corporation, the corporation stands as the only one in charge to take up the chore of providing, enhancing or securing human rights. Victims, or those individuals whose rights might be under threat, are expected to remain passive while the corporation fulfills its remedy responsibilities. Under this perspective, human rights become a commodity to be delivered. The reason is that, under a CHRM logic, corporations may not see the need to incorporate any input from victims in their initiatives to provide remedies. Victims, consequently, may be conceived as claimants that need to be satisfied; they are not considered as equal counterparts in the realization of their rights.

Ultimately, in a CHRM, corporations determine the scope, the content and form of the remedy provision. They impose their ends and force rights-holders to become instruments towards these ends. In this context, human rights can no longer be considered instruments of emancipation, but become rather instruments of domination. Domination is a constrain on self-determination – i.e. an agent other than the rights-holder determines his or her plans of action without due justification (I. M. Young, 2002, p. 32). And, as discussed in previous chapters, the only way to preserve self-determination in the public sphere is by engaging individuals to take part in collective democratic processes designing instruments preventing domination. Only when the production and provision of material goods is done under conditions accepted by all - i.e. under conditions of non-domination (Forst, 2014, p. 12) - can human rights become instruments for furthering justice.

Hence, because human rights are a public enterprise that requires accountability from those that realize them (Beitz, 2009, p. xii), participation of the rights-holders becomes an imperative aspect to any just remedy initiative. Participation, here, is not limited to dialogue or consultation with victims, though. Participation, through the lens of the basic right to justification, requires corporations to set up remedy mechanisms where rights-holders have a say in the definition, governance and monitoring of the remedy mechanism.

Corporations implementing CHRMs as part of their strategy on OGMs may do so out of a sincere commitment to actively participate in the resolution of specific human rights abuses. Yet, by setting aside those whose rights are at stake, it remains unclear whose interest the CHRM is willing to serve. Through CHRMs, corporations may also serve an internal and less public agenda, for instance: the avoidance of a potential litigation in public courts that may impact the company's reputation, or the minimization of the risk of more expensive and unpredictable court orders (Knuckey & Jenkin, 2015, p. 815).

In the Porgera mining operations, the participative dimension was totally overlooked in the Barrick Gold Corporation's mechanisms for remedy provision. The lack of engagement turned out to be a heavy burden for both the corporation and the victims. Barrick Gold would have certainly benefited from having secured, in the first place, safe spaces for discourse where victims, or their legitimate representatives, could have actively participated in the definition, management and monitoring of the remedy mechanisms. The consequences of not involving rights-holders in the remedy provision, as the Porgera example illustrates, were two-fold. First, the corporation did not achieve its target to remediate human rights wrongs effectively. Secondly, by imposing a CHRM remedy mechanism to victims, the corporation added an additional burden of domination onto victims and, thus, build upon injustice.

10.4 Four Criteria for the Construction of Just Corporate Remedy Mechanisms

The previous section underscored how non-state based non-judicial operational grievance mechanisms can drift towards the use of CHRMs. The underlying risk of adopting such forms of company-led remedy initiatives is the imposition of an additional burden of domination, and hence of injustice, onto rights-holders. In fact, one of the fundamental inadequacies of OGMs is that "they are structured to leave the company in a position of power and the complainant in a position of dependency" (Knuckey & Jenkin, 2015, p. 815).

Article 31 of the UNGPs stipulates nine criteria that should guide and ensure the effectiveness of non-judicial grievance mechanisms, both state-based and non-state-based; namely: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility and a source of continuous learning. Yet, this set of criteria, as the Porgera case highlights, result insufficient to stop the drift of OGMs towards the features that characterize CHRM initiatives. Even

in the cases where the effectiveness criteria set by the UNGPs are followed at the highest standards, relying exclusively on the corporation to assess and report on the performance and adequacy of its own OGMs can be a risky approach (Knuckey & Jenkin, 2015, p. 816), if not a flagrant conflict of interests (Kaufman & McDonnell, 2016, p. 128).

In order to mitigate these risks, and leveraging on the duty to set up institutions to guarantee the basic right to justification discussed earlier, I here propose four criteria that should guide the construction of any OGM aiming to operate within the parameters of justice; namely: being victim centered, contextualized, orientated towards the redress and transformation of human rights wrongs, and functioning through deliberative democratic principles.

The goal of these four criteria is to secure a safe space where the victims' basic right to justification can be realized. Such space should allow rights-holders to participate freely and democratically in the deliberations concerning the content, institutions and mechanisms that shall provide remedy to their impacted rights. The participation and the involvement of victims in the co-creation and performance of the OGMs contribute to build trust between rights-holders and the corporation (Rees, 2011, p. 15). Thus, the concept of dialogue becomes central. By dialogue I here mean the co-development of knowledge where the emphasis is on building mutual understanding through human connection (Westoby & Owen, 2010). Scholars working in the field of company-community conflicts in mining have documented important benefits connected to the participation of local communities in the resolution of company-community conflicts (See review by Kemp et al., 2011, p. 99); namely: the expansion of the possibilities for managing conflicts, the promotion of human rights, the adoption of more sustainable decisions, and the perception of fairer outcomes (ibid.).

The first of the four criteria that should guide the remedy dimension of any OGM led by a corporation aims at enhancing the relevance of the victim. I argue that the institutions or spaces provided by corporations in their attempt to discharge their human rights responsibilities must be absolutely *victim centered.* That is, all aims and efforts of the institution shall be oriented towards serving and enabling the basic right to justification of those whose human rights have been violated or could potentially result impacted in connection with corporate activities. This does not mean that corporations should provide certain goods or guarantee specific rights right away. Justice, as argued previously, is not (only) a matter of providing goods but of enabling opportunities to exchange reasons among individuals regarding the institutions that shall be imposed on them (Forst, 2014, p. 8). Thus, corporations are called to enter into a substantive discourse with all those affected regarding the meaning of a specific right in a given context, as well as the form and actualization of remedies required. In other words, the central premise guiding any institution designed to respond to corporate human rights violations (read OGMs) should be to treat victims as subjects of justice, not as mere objects or recipients of justice (Forst, 2014, pp. 210-212). As the previous sections of this chapter should have made clear, this is not a criteria complied by instruments like CHRMs. A first step towards moving in the direction set by the victim-centeredness criteria would be to allow rights-holders to collaborate equally on the definition of the agenda. An OGM in which the corporation dominates the agenda for remedy may only emphasize the power asymmetries existing between the corporation and the rights-holders. This would only reinforce the idea that remedy to human rights impact is contingent on the good will of the corporation.

The second criteria holds that any attempt to construct an institution or initiative to deal with human rights remedy responsibilities should *be contextualized*; that is to say, it should take different forms according to the

requirements of different contexts. There should be no “one-size fits all” approach when remedy for human rights impacts is at stake. The Porgera case provides a clear example for the need to contextualize any remedy mechanism. As part of the remedy and compensation package, the Barrick Gold Corporation offered victims support to find alternative sources of livelihood (e.g. crates of chickens, bales of second-hand clothes to resell), as well as medical checks and other goods and services (Knuckey & Jenkin, 2015, p. 809). Yet, victims felt deeply offended and unsatisfied (ibid.). In the victims’ context, these forms of assistance are conceived as development aid, not remedy for rape (Kaufman & McDonnell, 2016, p. 129). Their local customs and traditional justice, as well as their sense for what represents a fair remedy in case of extreme violence, demanded their compensation be provided in cash or pigs instead (Knuckey & Jenkin, 2015, p. 809). The contextualization criteria leverages on the idea that “corporate responsibility cannot be understood without considering the background conditions in which corporations operate" (Hsieh, 2009, p. 253). Therefore, corporations should investigate and learn extensively about the communities to which they are connected. In addition, the context in which corporations have violated human rights is a context of domination. In these situations, the corporation, willingly or unwillingly, imposed or participated in an “arbitrary rule without proper justification and without proper possibilities of justification in place” (Forst, 2014, p. 201). The context is, on that account, defined by all those who have been victim of the domination scheme. Thus, the political community that should take part in the discourse oriented initiative “exists where a context of rule or domination exists, and such contexts are not often coextensive with established communities” (ibid.). Put differently, the political community that should take part in the discourse is independently defined of nation-state boundaries or functional categories such as industry, clusters or guilds.

Any OGM aiming to provide remedy, I argue, should not understand human rights simply as the provision among victims of certain goods required for the enjoyment of a predefined "good life". OGMs should look into rights as "rights that put an end to political oppression and the imposition of a social status which deprive one of one's freedom and of access to the social means necessary to being a person of equal standing" (Forst, 2010, p. 725). This connects us with the third of the four guidelines put forth in this section. OGMs should be *oriented towards the redress and transformation* of those variables that connect them to human rights violations. That is, they should not restrict their remedy focus exclusively backwards to a fixed event in the past, as is the case in CHRMs. Instead, an OGM should also dedicate attention to fixing the variables that led to the deleterious impacts and thus adopt a forward-looking approach to remedy. Such approach is intimately associated with Iris Marion Young's social connection responsibility model, which is presented as an alternative to the conception of responsibility as blame or liability (I. M. Young, 2003, 2004, 2006).

In spite of looking backwards to identify and blame a particular actor, Young's approach is forward-looking. It explores the background conditions that led to the harmful events and puts the burden of responsibility on those agents that are in a position to contribute to improve these conditions. This responsibility is essentially shared (I. M. Young, 2004, p. 380), which means that the victims and all those affected can also be considered to be an active part of the equation in remedying the harmful conditions. On occasions, the provision of effective remedy may require the transformation of profound social, economic or political structural processes. This may involve a multitude of actors in diverse social positions to work together (I. M. Young, 2006, p. 123). Thus, OGMs should act as a platform to coordinate the shared responsibility to achieve the necessary transformations, and foster collaboration among the different actors involved.

Finally, the last condition that an OGM aiming to provide a human rights remedy should bear in mind is that its function is to *be guided by deliberative democratic principles*. The goal of an OGM should be to enable a discourse through which the victim's right to justification can flourish. Thus, it should be oriented towards reaching a common understanding or reasoned consensus (Risse, 2004, p. 295) regarding the meaning and shape that any remedy for a given human rights impact should adopt into a particular context or situation. Human rights are not simply "immediate claims to certain substantive 'goods' but to a certain social and political standing of persons as 'norm-givers'" (Forst, 2010, p. 733). The political dimension of human rights requires that those in charge of implementing remedies do so backed up by democratic legitimacy. Corporations can construct such legitimacy through discourse (Palazzo & Scherer, 2006; Scherer & Palazzo, 2007; Suchman, 1995, p. 585). Yet, a discourse can be labeled as just if it fulfills the parameters of inclusion, equality, reasonableness, and publicity, as defined by I. M. Young (2002, pp. 31, 23-35).

Inclusion means that all those affected by a corporate human rights violation should participate in the definition of the remedy mechanisms so the resulting outcome can be considered legitimate. Otherwise, if those who are victims are not allowed to take part or represent their interests in the remedy definition they would, eventually, be treated as means, not as ends in themselves. Given that usually it is impracticable to establish a discourse at an individual basis, institutions and mechanisms for human rights remedy (i.e. OGMs) should seek for representative and legitimate counterparts. It is particularly important to allocate efforts to actively identify diverging voices of dissent, and engage with groups that are less visible or even marginalized (e.g. elderly, women, children, ethnic or religious minorities, etc.).

Political equality is a defining characteristic of democracy. It must play a central role in the discourse OGMs should construct to guarantee the victims'

right to justification. It is not only that all those affected should have the opportunity to participate in the remedy initiative; it is that they should all do so on an equal basis. This implies that all participants ought to enjoy equal opportunities to express their interests and concerns. Sometimes this may require providing victims with specific training and support so they comprehend their own rights. Ultimately, victims should be well equipped to enter into a discourse where they can discuss the shape and content of the realization of their human rights. This condition, however, cannot be realized unless a third condition is warranted: the freedom from domination (I. M. Young, 2002, p. 24). The institution or initiative to implement remedy should incorporate mechanisms so no participant is able to coerce or threaten others to adopt a given argument during the discourse process.

Participants are required to be reasonable when entering into the democratic process. To be reasonable means to be willing to listen to other participant's contributions, respect them and make an effort to understand their position. One ought to join the discussion with a mindset open to challenge its own positions as well as to be persuaded by the arguments of others. Reasonableness is not determined by a certain type of content brought forward by the participant but by her willingness to enter the discussion with the intention to reach an agreement. "Only if the participants believe that some kind of agreement among them is possible in principle can they in good faith trust one another to listen and aim to persuade one another" (I. M. Young, 2002, p. 24). Reasonableness demands participants, and specifically to the mechanism or initiative put in place to provide remedy, to create and nurture an atmosphere of trust.

The conditions of inclusion, equality and reasonableness, lead to the creation of a public sphere where decision-making happens and participants hold one another accountable. This is what Young defines as publicity (2002, p. 25). Participants in the discourse ought to speak for the plurality of individuals that

encompass the public sphere in which decisions are taken. Thus, neither corporations nor victims should adopt positions serving their private interests. This requires not only transparency and good faith; but also to convey messages in a way that are understandable in the public sphere and that counterparts could accept even if they would not agree. Publicity is not about being understood or accepted by all other participants but about presenting arguments that are understandable and acceptable by all (I. M. Young, 2002, p. 25).

10.5 From Company-led to Rights-holder-led Remedy Provisions

The emergence of company-led OGMs, propelled by the endorsement by the UNGPs, has come at the expense of an increased risk of exerting domination schemes on victims. CHRMs, I have argued, are the most conspicuous example. Yet, human rights scholars have started to acknowledge these risks and study potential alternatives to avoid them (e.g. Kaufman & McDonnell, 2016; Knuckey & Jenkin, 2015).

In this regard, Kaufman and McDonnell emphasize the need to transcend the concept of corporate stakeholder engagement. In contrast to company-led OGMs, they propose to promote and advocate for "community-driven" OGMs (CDOGMs)(Kaufman & McDonnell, 2016). Such initiatives are aligned with the basic right to justification endorsed by this dissertation. They emphasize "*the agency of communities* and other stakeholders to prevent and remedy violations of right by business operations" (Kaufman & McDonnell, 2016, p. 129 emphasis added).

Their approach is based on a simple premise: the success of remedy mechanisms and the promotion of human rights requires that these initiatives

"be designed and approved by the affected persons – the rights-holders – rather than those who are believed to have caused the problems in the first place" (Kaufman & McDonnell, 2016, p. 128). Some examples of this countering approach to the excesses of company-led OGMs include Community-led Human Rights Impact Assessments, Community-designed Impact and Benefit Agreements, and Community-driven appropriation of Free Prior and Informed Consent (FPIC) tools, among others.

Community-led Human Rights Impact Assessments include rights-holders, and not only company personnel and external remedy experts, in the design and monitoring of the impacts caused by a specific company project. Through these mechanisms, Kaufman & McDonnell point out, communities can "shape the way in which a project is conceived in a way that is not possible when it is merely one of a number of consulted parties" (ibid, 130).

Community-designed Impact and Benefit Agreements are legally binding contracts established between the company and the communities to regulate and formalize the avenues through which communities will benefit from the company project (ibid, 130). They can be designed to provide remedies appropriate to the situation and contexts of the different parties that other remedy mechanisms may not be able to provide (Gathii & Odumosu-Ayanu, 2016, p. 92).

Finally, the appropriation by local communities to the right to prior consultation on resource development projects (Costanza, 2015) is also a recent development along the lines of the CDOGMs described above. It partially reflects the discourse approach that comes attached to the basic right to justification perspective on human rights[28]. The international and regional

[28] The self-organized community-led OGMs described by Costanza do not come without risks. On occasions they may threaten democracy by silencing those who may think differently than the majority of the community (Costanza, 2015, p. 277).

human rights regime is not unfamiliar with the incorporation of discourse democracy-based mechanisms in connection with the realization of rights (e.g. the International Labor Organization's Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples). Articles 6 and 7 of the ILO's Convention 169, an international legally binding treaty, ascribes to governments the obligation to consult indigenous peoples on those projects impacting their lives, beliefs, institutions or lands they may occupy. Similarly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), a non-binding instrument, requires signatory states to warrant Indigenous Peoples the obligation to not only consult, but to obtain Free Prior and Informed Consent (FPIC) from them. The ILO 169 and the UNDRIP are rights and obligations that were written by, and are aimed at states. Furthermore, the discussion about the implications for corporations of these rights is common in the management field (e.g. IFC, 2012; Murphy & Vives, 2013)[29]. Yet, what is novel is that grassroots movements and local indigenous communities are adopting the language associated to these human rights instruments to self-organize consultations to voice their positions on projects impacting their livelihoods and forms of living (Costanza, 2015).

10.6 Remedy in the Aftermath of the Rana Plaza Catastrophe

This research project argues for an enhanced participation of all of those whose rights might be impacted in the definition and implementation of

[29] The IFC developed the "Performance Standards on Environmental and Social Sustainability" to set the standards that its clients should meet throughout the life of an investment made by them (IFC, 2012, p. 2). The Performance Standard 7, motivated by the ILO 169 and the UNDRIP, provides extensive and detailed guidance on how corporations should manage consultations with indigenous communities in order to obtain their FPIC.

remedy mechanisms that concern them. This should be specially the case when corporations, complementing or replacing the role of an incapable or unwilling state, assume a leadership role in the provision of remedy. The provision of human rights remedy often entails the discussion and transformation of certain aspects of the public life of a community. Thus, a just and legitimate provision of remedy requires a process based on a democratic discourse engaging the rights-holders as well as other agents or institutions (e.g. the corporation or the OGM) that shall provide the remedy. The four parameters discussed above should contribute to the construction of this discourse.

Setting up a discourse of this kind is not an easy task for corporations. Taking a more collaborative approach with external stakeholders toward determining the cause of a dispute to earn the trust of the community is one of the most difficult challenges for a company (Sherman, 2009, p. 19). The use of collaborative design can be a strategy to counter power imbalances between corporations and right-holders (Kemp et al., 2011, p. 105). Yet, minorities or fringe stakeholders may require specific channels to make sure they can participate adequately in the process. Corporations can assist in good-faith these groups to lodge their grievances but "these good deeds could also be read as perpetuating the company centric-process" (Kemp et al., 2011, p. 104).

Often, those whose rights are impacted are not in a position to participate in discussions on equal terms and take decisions on their best interests. Victims may lack the knowledge to properly assess the implications of what is being offered to them and what could be achieved in terms of remedy. Still, their opinions should be heard and their concerns be taken into consideration in a systematic and formalized way, and, when necessary, provide training or further assistance. The corporation should incorporate into the OGM adequate provisions and policies to avoid patronizing such vulnerable communities. The case of the Rana Plaza tragedy, outlined in the introduction chapter of this dissertation, will help here to illustrate the need and, at the same time, the

difficulty of incorporating rights-holders into remedy mechanisms guided by a discourse process to provide just remedy.

At the time of writing this dissertation, more than three years after the tragic event, one reaches the conclusion that the collapse of the Rana Plaza building was a widely anticipated accident. Bangladesh' Ready-Made Garment (RMG) industry is characterized by a constant trickle of big and small anonymous deadly accidents. Prior and after the collapse of Rana Plaza, similar tragedies occurred. Yet, a complex interplay of forces takes place in Bangladesh hampering the advancement and protection of human rights. An underdeveloped economy, a poor regulation enforced by weak and often corrupt institutions, overloaded infrastructures, and a pernicious business model accompanied by an overwhelming demand; all these ingredients add up to a lethal cocktail in which there is no one single trigger behind each catastrophe. The context of the Bangladeshi RMG industry perfectly fits into what Iris Marion Young would term as a "structural injustice" (I. M. Young, 2006).

Bangladesh is a global manufacturing hub for the RMG industry. Customers, including the biggest players and most renowned brands in the European and American markets, heavily source and rely on the Bangladeshi's RMG industry manufacturing capacity. The RMG industry in Bangladesh has dramatically grown over the last decades to become the second largest in the world and has become a key driver of Bangladesh's economy. In 1984, 384 factories comprised the RMG in Bangladesh. Thirty years later, in 2014, the number of factories is estimated to be between 5,000 to 6,000 (Labowitz & Baumann-Pauly, 2014, p. 14). The ILO reports that the RMG exports in 2013-14 were worth US$24.5 billion, accounting for over 80% of the nation's export earnings (ILO, 2016). The exports destination is mainly the United States and European countries. (ILO, 2014). The RMG sector employs about 4.2 million workers of which 60% are estimated to be women (ILO, 2016).Bangladeshi

women play a central role in the Bangladeshi economic development; in an essentially rural country, they were crucial for the emergence of the RMG industry and decidedly contributed with their work to the ease of poverty ratios in Bangladesh (ILO, 2014).

Large retail garment corporations sourcing from Bangladesh often limit their operations to design, marketing, and retail distribution. It is common among the retail industry not to have ownership ties with the local factories. For many of the Western retail garment corporations, their relationship with the manufacturing of their product in Bangladesh is limited to a purchasing agent acting on their behalf and arranging all the necessary details (Labowitz & Baumann-Pauly, 2014, pp. 17, 20).

The demand for apparel goods is extremely volatile. At the same time, the apparel industry is willing to react to end-customer desires for low cost clothing almost instantly and across the globe. This translates into the supply chain in the form of large volume orders at extremely tight lead times. The Bangladeshi RMG industry mostly operates on an "indirect sourcing" business model (Labowitz & Baumann-Pauly, 2014, p. 17). Local manufacturers accept large volume orders often beyond their production capacity. What is in excess of their manufacturing capacities is subcontracted to usually smaller "indirect" second tier manufacturers, who can also re-subcontract to a third tier. "Indirect" subcontractors act as auxiliary engines of the industry, ready to be turned on by the main subcontractor in case of being overburdened by large volume orders, delays in production, or any other contingencies. This sourcing business model offers an extraordinary reaction capacity to large volume orders at a low cost. However, in the Bangladeshi context, it comes along with deeply negative effects at the bottom of the supply chain. As we move further down the "subcontracting chain" margins shrink, working conditions worsen, and oversight becomes more lenient.

The Bangladeshi government has played a poor role in regulating and monitoring the evolution of the booming RMG industry (Labowitz & Baumann-Pauly, 2014, p. 30). The government lacked the political will, technical capacity, and resources necessary to protect the basic rights of its own citizen workers. Only in 2013, in the aftermath of the Rana Plaza and Tazree factories, and following years of pressure by unions, NGOs, corporations and foreign governments, did the state take action to enhance the Bangladesh Labor Act. Under the guidance, sponsoring and supervision of the ILO, the Bangladesh government is now engaged in a comprehensive regulatory reform that should tackle a variety of challenges like the fire prevention and structural maintenance of factories, health and safety at the workplace, and the setting up of a transparent and accountable subcontracting system, etc. (ILO, 2016). The minimum wage was increased to $68 per month, up from $38 before the revision, which was the lowest among the major apparel exporting countries in the world (ILO, 2014).

The ILO recognizes that progress towards the respect of international labor standards in Bangladesh is being made. The ambitious national plan, though, lies well behind schedule and most of its targets remain unmet (ILO, 2016; Labowitz & Baumann-Pauly, 2014, p. 30). Additionally, the gap existing between the Bangladesh national law regulating trade unions and what is required by ILO Conventions 87 and 98 remains wide[30], despite the fact that Bangladesh ratified both documents (ILO, 2014).

[30] ILO's Convention 87 concerns the rights associated to the freedom of association and the protection of the right to organize as adopted in San Francisco, 31st International Labor Conference session (09 Jul 1948).
ILO's Convention 98 concerns the application of the principles of the right to organize and to bargain collectively as adopted in Geneva, 32nd International Labor Conference session (01 Jul 1949).

The poor state of the infrastructure just adds to the crude RMG industry situation. The electric supply remained poor, erratic and overburdened over the last decades. It hinders the RMG industry from gaining productivity and condemns it to a production model where competitiveness can only be obtained by maintaining extremely low wages in exposed working conditions (Labowitz & Baumann-Pauly, 2014, p. 42). Bangladesh is the only country within the UN Least Developed Countries list in which the level of industrial production is comparable to an emerging economy. The country, though, lacks the industrial capacity to support this level of production. The industrial disasters that plague Bangladesh, ILO Director-General Guy Ryder concludes, may just be a reflection of this (ILO, 2014).

Eventually, the Rana Plaza collapse and the Tazreen factory fire where the straw that broke the camel's back. Anger and grief took over national and international public opinion, drawing pressure on both large Western corporations and the Bangladeshi government to take action and provide remedy. Conversations among a variety of actors led to put the focus onto two urgent topics: redressing the lame conditions of the RMG sector factories in order to guarantee the basic work safety of its workers; and to provide remedy for the 1,136 victims and more than 2,500 injured workers of the Rana Plaza tragedy. Interestingly, initiatives to provide remedy in these two fronts rapidly adopted the form of multi-stakeholder initiatives. On the one hand, the Accord and Alliance initiatives focused on work place safety. On the other, the Rana Plaza Trust Fund centered its attention in the provision of economic compensation to the victims of the Rana Plaza accident.

10.6.1 The Accord and the Alliance Initiatives

Given the lack of an adequate public oversight of the working conditions at the RMG Bangladeshi factories, the world's most important international brands and retailers joined together with NGOs, unions and other civil society representatives. The discussions among them crystallized into two private

governance frameworks: the Bangladesh Accord on Fire and Building Safety and the Alliance for Bangladesh Worker Safety. The two initiatives aim to contribute to enhancing the safety conditions of workers in the RMG factories with special emphasis on preventing fire and remedying structural deficiencies on factory buildings.

The two schemes served similar purposes and shared numerous characteristics and limitations [31]. Both consisted of a common human rights standard framework on factory safety including a short-term inspection regime among the top tier of factories as well as training and resources for factory improvements offered over a five-year period. Together, the two initiatives embody almost 1,900 factories in Bangladesh and more than 175 global brands, including the biggest world retailers, representing a significant part of the total RMG exports in Bangladesh[32].

Additionally, both initiatives established legally binding penalty/arbitration mechanisms for solving disputes among their members. They also face similar limitations and criticisms: both operate separately and redundantly, and have not been able to coordinate a system to address the financing of remediation nor the indirect sourcing practices among their members (Labowitz & Baumann-Pauly, 2014, p. 47). The differentiating factor between the two initiatives is the role trade unions play. Global and local trade unions are among the signatories of the Accord initiatives and enjoy an equal representation in the steering committee. Thus, they participate in the governance of the framework in the same conditions as corporations do.

[31] For a complete comparison of the two frameworks consult Appendix 2 of the Labowitz and Baumann-Pauly report (2014, pp. 53-56). Also visit http://bangladeshaccord.org/about/ as well as http://www.bangladeshworkersafety.org/en/about/about-the-alliance

[32] Plenty of information and detail about the inspection, monitoring and improvement of factory facilities is provided on the website of both initiatives: http://www.bangladeshworkersafety.org and http://bangladeshaccord.org

Additionally, the ILO serves as the neutral chair of the Accord (2015). Instead, the Alliance, mostly backed by US companies (e.g. Walmart, Gap, VF, Target) does not incorporate trade unions either as signatories or into its governance mechanisms. The Clean Clothes Campaign and Oxfam signaled the Alliance as a unilateral corporate initiative, designed and governed by corporations directly excluding any participation from factory workers (CCC, 2016; Oxfam Australia, 2013).

Still, both the Alliance and the Accord have been praised for representing "a significant step forward for a standards based, collective approach to solving a pressing problem of business and human rights" (Labowitz & Baumann-Pauly, 2014, p. 38)

10.6.2 The Rana Plaza Trust Fund

The second multi-stakeholder initiative that emerged out of the Rana Plaza catastrophe responded to the compelling claim to provide a form of remedy to the thousands who had lost their life or resulted injured. At the time the tragedy took place, Bangladesh legislation lacked an actuarial scheme to provide compensation for workers who died or suffered disabilities as a result of labor accidents. This left victims and families without any kind of economic compensation and many without the resources to provide themselves with adequate medical and psychological treatment.

A multiplicity of actors, including transnational corporations, NGOs and trade unions joined forces by creating the "Rana Plaza Arrangement". This agreement aimed at providing a single approach to the provision of financial support and medical care to the victims of the catastrophe. The agreement set up a claims process in which those injured and those that were a dependent of a person who had died in the accident had access to the payments. The payments were designed as a compensation for the loss of income and medical costs. The methodology to calculate the amounts awarded to victims was

designed in accordance with the ILO Employment Injury Benefits Convention 121. Special emphasis was placed on ensuring transparency and equitability throughout the entire process (for a detailed explanation see Rana Plaza Arrangement, 2015a, 2015b).

The entire process was designed with the intention to protect vulnerable individuals. In Bangladesh, inheritance rights are based on the tradition established by ones' own religion. The result is that daughters and widows do not have equal access to the inheritance left by a deceased father or husband and are often object of harassment and violence (Farouk, 2005; The Economist, 2013). Additionally, many of the beneficiaries were entitled to large amounts of money having no financial literacy on how best to manage it. To overcome these challenges the committee, in coordination with a local bank, devised an innovative scheme to ensure funds reached each beneficiary and established an assessment team to guide them in making meaningful financial decision to support their best interests.

The agreement was signed by the Bangladesh Ministry of Labor and Employment, Bangladesh employer associations, local and international trade unions, NGOs and four retail companies, namely: Bonmarché, El Corte Inglés, Loblaw, and Primark (Rana Plaza Arrangement, 2013). It established a coordination committee that "brings together all of the major stakeholders involved in payments to Rana Plaza workers and their families and dependents". The ILO acts as a neutral and independent chair. The committee was tasked to oversee the coordination and monitoring of the entire payment process, including the rise of funds and the calculation of compensations for victims (Rana Plaza Arrangement, 2015c).

The agreement established The Rana Plaza Trust Fund with the intention to collect the 30 million US$ that were estimated to adequately compensate victims according to the scales set by the committee and the ILO. The fund

collects donations from private and public organizations as well as individuals "who wish to give to the victims in a spirit of solidarity and compassion" (Rana Plaza Arrangement, 2015d). The website also states clearly that "any donation to the Rana Plaza Donors Trust Fund from any contributor is voluntary and does not imply legal responsibility or obligation for the accident". In other words, contributions to the Fund simply represented a form of charity. The list of donors included companies like H&M, Inditex, Walmart and C&A.

Eventually, on June 8th 2015, after more than two years of intense pressures from NGOs, the fund eventually reached the target amount securing the complete payment for all the victims (Rana Plaza Arrangement, 2015e).

10.6.3 The Rana Plaza Remedies: an Assessment Through the Four Guidelines

The Accord and Alliance, as well as the Rana Plaza Trust Fund, are initiatives that push the boundaries. In the midst of a complex context such as that of the Bangladeshi society and economy, they provide innovative and goal-oriented efforts to overcome the structural challenges that threaten the RMG industry, and most importantly, the human rights and wellbeing of the workers and families that depend on it.

These two sets of initiatives, one with emphasis on the fire and building safety and the other on compensating victims, set an important precedent. They have become a benchmark on which to seek guidance to provide remedy. Tragedies like the Union Carbide in Bhopal in 1984, killing thousands and leaving them with no compensation, would now have a methodology and an instrument on which to look at to provide remediation. Yet, one can identify in these initiatives many areas for improvement when assessed against the four criteria proposed earlier to guide the implementation of just remedy mechanisms. Given their very distinct aim and nature, I will now assess the compliance of

Alliance, Accord on the one side, and the Trust Fund on the other, against these criteria.

The Accord and Alliance initiatives are characterized by their narrow scope. They are fully focused on issues regarding workplace safety. No attention is placed on the variety of human rights issues that also undermine the RMG sector, namely: discrimination, trade unions and the right of free association, social security, verbal and physical abuse, forced overtime, etc. (Burke, 2015; Human Rights Watch, 2014, 2015). Thus, they only cover partially the range of potential (and actual) human rights impacts existing within the Bangladeshi RGM industry. Their approach, though, can be considered as transformational and forward looking. The efforts of both initiatives are oriented towards remedying some of the structural issues that subvert the RMG sector. The Alliance initiative, though, faces particular challenges when assessed against the victim-centeredness perspective. The input of unions is considered in the monitoring schemes set by the framework (Alliance for Bangladesh Worker Safety, 2015); yet, their role in areas like the design or the governance of the initiative is secondary. Consequently, no democratic discourse can be established in line with the parameters of inclusion, equality, reasonability and publicity discussed. The discrepancies on the ideal role worker representation should play in the remedy schemes are among the factors explaining why the Bangladeshi RMG industry today has two instruments instead of one, targeting fire and building safety issues. Needless to say that, from a pragmatic perspective, this represents not only a burden for workers but also for the entire industry that it is now forced to deal with the monitoring and requirements of two different mechanisms, adding to the already complex environment in which the industry operates in. Both schemes would certainly provide higher quality remedy and transformations, in terms of justice, if they included more openly and in equal standing unions and other workers'

representatives not only in their monitoring schemes, but also in their governance[33] and development of the overall framework.

The Rana Plaza Trust Fund represents an unprecedented example of a scheme developed to provide remedy in form of compensation to victims of large human rights impacts connected to businesses. The fund, as explained above, made a dedicated effort to make sure the needs and the vulnerabilities of its beneficiaries were taken into account. It provided victims with administrative, financial and medical assistance through the entire process to make sure they opted for decisions on their best interest and designed the instruments bearing in mind their specific needs, as well as their traditions, beliefs and culture. In this regard, one can claim that the Trust Fund did a good job in contextualizing the remedy tools to the victims' profile, as well as in placing their interest at the core of the scheme. Yet, the victims played no role in the definition of the form or the content of the fund. No direct representatives of the victims joined the discussion on the scope, the strategy, or the methodology to be adopted by the fund in the provision of compensation. The fund was presented to the victims as a well-customized finalized product that offered them no right to reply or to object; resulting in a sort of "take it or leave it" situation. Thus, once again, no opportunity was granted to rights-holders to participate in a democratic discourse where they could raise their voice and actively participate in the remedy mechanism. Additionally, the Trust Fund completely lacks the transformational criteria that every remedy mechanism should incorporate. The fund aims exclusively to provide compensation to those who resulted directly impacted by the Rana Plaza collapse. No other victims connected to previous or future accidents in the RMG industry are considered. In this regard, the Fund has a lot in common with the CHRM initiatives

[33] The Accord framework already includes unions in its steering committee with 6 representatives, out of 13 members. 6 members represent corporations and an ILO representative holds the chair of the committee.

discussed earlier, which provide a fixed remedy for a specific wrong occurred in the past.

Remedy mechanisms should be a leverage to exercise self-determination; an instrument guaranteeing the basic right to justification. In light of the analysis carried out for the Accord, the Alliance and the Trust Fund, one cannot conclude that such basic right was effectively and fully provided. Still, these initiatives, with their limitations, move towards the right direction. A key take away out of the analysis is to understand that what a corporation or an OGM might consider as the optimal response to a grievance, even if carefully crafted for specific rights-holders, is not necessarily the most optimal in terms of justice. The approach to human rights through the lens of the basic right to justification attempts to cover this gap. The goal should be no other than giving voice to those who are often neglected in corporate human rights abuses. Yet, what remedy formulas should OGMs and corporations consider so their remedy actions strengthen rather than weaken self-determination? The next chapter will propose some ideas that academic research should further investigate to, eventually, come up with remedy mechanisms that better align with the essence of human rights, that is: justice.

11 Moving Forward

Corporations are increasingly under pressure to assume the human rights responsibilities that come associated with their operations and relationships. Acting upon one's human rights responsibilities, this dissertation holds, is not simply a matter of good intentions but, more fundamentally, a matter of justice. I have argued that the concept of human rights goes beyond a collection of goods or capabilities that ought to be provided or granted without question. Human rights also represent the struggle against discrimination, against the imposition of any social status that deprives freedom and equal standing, against those rules that have been imposed without justification. In short: against oppression. To realize human rights completely requires acknowledging this political dimension along with the indispensably associated capabilities and resources. In the public sphere, justice requires that the political dimension of human rights be actualized through democratic mechanisms.

The immense majority of business enterprises out there have no intention to harm anybody's human rights. Nonetheless, violations occur. An increasing number of corporations are taking their human rights responsibilities seriously and seek further guidance on *how* to effectively discharge these responsibilities. Scholars in the BHR field have discussed extensively about why should corporations assume these responsibilities, as well as, what should be their ideal scope. Contrastingly, the question on how corporations should manage or realize these responsibilities in a just way has not received adequate attention. This dissertation aimed precisely at advancing research in this direction.

The main accounts discussing the human rights responsibilities of corporations – e.g. the UN Guiding Principles, the capabilities or the publicness approaches – typically associate discharging these responsibilities with the provision of

certain goods, capabilities or resources. This dissertation holds that this is not enough to fully realize the corporation's human rights responsibilities. In fact, I argue that the main normative BHR accounts are at risk of endorsing a commoditized conception of human rights in which corporate responsibilities start and end with the provision of the allegedly "missing" goods. Partly, this position is underpinned by the fact that the prevalent normative understanding of the human rights concept in the BHR literature does not fully reflect the complete meaning of human rights. The democracy perspective to human rights adopted here helps to unearth the political dimension underneath the concept of human rights. This is a dimension that the BHR debate has not yet fully acknowledged nor integrated in its discussions.

Human rights are not exhausted by the provision or guarantee of certain goods. They also establish certain thresholds that must be respected in any attempt to construct a societal life in common; hence, their political dimension. Until recently, states were conceived as the exclusive bearers of human rights responsibilities and, therefore, the political dimension of human rights fell entirely under the umbrella of the state. However, the moment corporations, and other non-state agents, start adopting human rights responsibilities they, explicitly or implicitly, participate in the definition of the parameters that should guide the life in common of a specific community. Hence, corporations become political actors.

The normative approach to human rights taken by the philosopher Rainer Forst stresses the value of the human rights' political dimension and detaches them from the exclusive hands of the state. The priority ought to be placed on defining the content of human rights and not on the specific institution that shall realize them. Human rights express the political autonomy of each individual; her ability to demand and provide justifications for all those policies or institutions that bind her. This ability is what Forst sets as the primordial right from which all other human rights emanate: the right to

justification. The realization of this right requires that all those whose rights might result impacted have the opportunity to take part in the definition of those policies or decisions that may realize their human rights.

Such argument has direct implications for corporations facing responsibilities to provide remedy for their human rights impacts. It transforms the way corporations should look into their remedy responsibilities. It requires them to join or construct institutions or mechanisms – e.g. operational grievance mechanisms – where rights-holders can be equal participants into a deliberative process, in which they take part in the design, monitoring and governance of the remedy mechanism.

These institutions, I have claimed, should be constructed around four premises: they should be victim-centered, able to adapt to different political and social contexts, oriented towards solving the injustices that lead to human rights violations and function along the parameters of deliberative democracy.

11.1 Further Research

How should corporations realize their human rights responsibilities? This is the research question that this dissertation tackled. It starts with a *how* and therefore relentlessly implores for specific instructions for corporations to follow in order to justly discharge their human rights responsibilities. The field of management is highly oriented towards practical approaches and therefore the question at hand is very topical in a nascent field such as the BHR debate. However, as this dissertation has illustrated, questions starting with a *how* are not only practical questions. They contain, or are connected to, a normative dimension that must be acknowledged and elaborated upon.

Corporations are called to construct or to participate in the construction of institutions or initiatives that allow the right to justification to emerge neatly in

the discharge of corporate remedy responsibilities. This requires engaging in a discourse with rights-holders on the definition, monitoring and governance of the remedy mechanism. As highlighted earlier in the previous chapter, the discourse-based initiatives for the provision of remedy should be victim-centered, context oriented, aim to redress and transform, and grounded on deliberative democracy principles. The chapter also discussed the risks of developing OGMs that are too constrained in their remedy provision and that are completely controlled by the corporation (e.g. CHRMs). In contrast to this kind of company-led OGMs, some scholars propose to advance formulas where communities and rights-holders take the lead (Kaufman & McDonnell, 2016; Knuckey & Jenkin, 2015).

Yet, there exists a third way of constructing OGMs that has only been partially touched upon in this research and that would require further scholarship in order to release all its untapped potential. This third way is multi-stakeholder initiatives (MSIs).

Expectedly, in many occasions the amount of stakeholders involved in a discourse on the provision of remedy extends to others beyond the rights-holders and the corporation at issue. Other actors relevant to the remedy provision and transformation of the circumstances that led to the adverse impacts may have a say and be instrumental for the success of the OGM - e.g. the state, other corporations, trade unions, NGOs, etc. MSIs are an instrument with the potential to deliver and meet the requirements imposed by the right to justification to a corporation providing remedy and, at the same time, integrate the participation of all these different actors.

MSIs are recognized as potential administrators of non-judicial non state-based remedy mechanisms by the UNGPs (Ruggie, 2011 Art. 28). In this role, MSIs can function at different ranges, through different approaches and processes and with a high degree of legitimacy and consent (See Rees & Vermijs, 2008;

Shift, 2014). For example, MSIs can operate at an industry level (e.g. Fair Labor Association, International Council Toy Industries), multi-industry level (e.g. Ethical Trading Initiative, Social Accountability International), national level (e.g. UK's Labour Dispute System or India's National HR Commission), regional level (e.g. Inter-American Development Bank, Asian Development Bank), or international level (e.g. International Labour Organization, World Bank's Compliance Advisor/Ombudsman) (See Rees & Vermijs, 2008; Shift, 2014).

Broadly, MSIs are defined as "private governance mechanisms involving corporations, civil society organizations, and sometimes other actors, such as governments, academia or unions, to cope with social and environmental challenges across industries and on a global scale" (Mena & Palazzo, 2012, p. 528). They attempt to fill the regulatory gaps left behind by the impossibility of public (state) institutions to react to the challenges of a Post-Westphalia context. They are now considered as effective ways to address the accountability gaps of TNCs (Koenig-Archibugi, 2004, p. 254). MSIs quintessentially represent what Rosenau and Czempiel defined as "governance without government" (Rosenau & Czempiel, 1992). They have been described as "one of the most innovative and startling institutional designs of the past 50 years" (Cashore, Auld, & Newsom, 2004, p. 4 as cited by Vogel, 2008, p. 270). The number of MSI has rapidly increased over the last two decades (Baumann-Pauly, Nolan, Heerden, & Samway, 2016). Vogel ascribes such consistent growth to three factors; namely: "the lack of credibility of industry self-regulation, the increase in consumer and NGO influence and activism, and the influence of norms of 'good governance' that emphasize the importance of collaboration and partnership" (Vogel, 2008, p. 270).

One can find examples of MSIs across a variety of industries and contexts. MSIs often set standards for environmental practices (e.g. Forest Stewardship Council or the Marine Stewardship Council); become learning platforms (e.g.

the United Nations Global Compact); focus on a specific product (e.g. the Round Table on Responsible Soy or the Better Cotton Initiative); work on transparency and corruption (e.g. the Extractive Industry Transparency Initiative); promote labor standards (e.g. SA8000 or Fair Labor Association), etc. The common ground for all these initiatives is that they "seek to close regulatory gaps that contribute to human rights abuses" and "they do so in specific operational contexts, not in any overarching manner" (Ruggie, 2007 para. 53).

Their scope and content varies greatly from one initiative to another. However, scholars point out that industry-specific MSIs are more likely to succeed in legitimately fulfilling governance gaps (Baumann-Pauly et al., 2016). Success, particularly at the improvement of labor standards, is connected to the establishment of long term, mutually beneficial relations among the participating actors as well as the cooperation from public institutions where private actors cannot overcome the issue on their own (R. M. Locke, 2013, p. 17).

MSIs emerged as a reaction to unilaterally designed self-regulation schemes. These codes "tended to be weak and often aimed more at public relations than substantial improvements in social and environmental performance" (Utting, 2002, p. 2). MSIs also develop regulatory codes, but do so in the form of soft law. That is, rules that although creating non-legally binding obligations, they "derive their normative force through recognition of social expectations by states and other key actors" (Ruggie, 2007 para. 45). They paved a middle way between the voluntary principles of self-regulation and the state-based legal accountability mechanisms (Baumann-Pauly et al., 2016; Koenig-Archibugi, 2004).

MSIs are tools with the potential to exercise legitimate governance where states are missing or incapable to deliver on their own government

responsibilities. Mena and Palazzo specify that when MSIs create rules, they "take on a state-like function, as they issue regulations replacing or adding to the existing public rules" (Mena & Palazzo, 2012, p. 536). This research project has repeatedly argued that the provision of human rights, as well as the remedy of their adverse impacts, constitutes a political endeavor, and thus requires a democratic approach. MSIs have the potential to collect the necessary legitimacy as well as to channel the democratic participation required to justly and effectively discharge the corporate responsibility to provide remedy on human rights.

MSIs can perform a large variety of functions: awareness raising, brokering and bringing parts together, provide training, act as learning platforms, deliver capacity building, etc. (van Huijstee, 2012, p. 17). Palazzo and Scherer (2010, pp. 237-238) distinguish four levels of increasing engagement; namely: (1) MSIs as providers of learning platforms, (2) MSIs as developers of standards, rules of conduct or guidelines, (3) MSIs as providers of auditing and accountability mechanisms, and (4) MSIs as certifiers of business conduct complying with the standards. MSIs, when applied to the corporate remedy provision cause, typically develop functions related to the review of complaints, assess them against the initiative's code of conduct or standard, facilitate information to the different counterparts, and also act as mediators or adjudicators between rights-holders and corporations (Shift, 2014, p. 16).

The literature on MSIs has exploded in recent years. However, to my best knowledge nobody has researched on the potential role MSIs can play in terms of instruments for the provision of human rights remedy. Furthermore, if we accept the premise that discussing the instruments through which grievances should be collected and managed is not enough to consider that remedy is justly provided, and a lot of questions should be asked to make sure MSIs deliver all their potential as part of remedy mechanisms. For instance, what type of governances should an MSI adopt to ensure rights-holders are

legitimately engaged in the definition of the remedy mechanisms that concern them? Who should be part of a MSI aiming to provide remedy in a specific context and who should not? Should public administrations be an additional actor in an MSI oriented towards the provision of remedy? What specific requirements, if any, should an MSI oriented towards the provision of remedy fulfill that should differ from the traditional MSIs oriented towards the construction of private regulation?

Besides the questions on the role of MSIs in terms of remedy provision, I hope this dissertation also sparked questions on many other intriguing directions. I would like to point out more succinctly some of these avenues for further research that should also be pursued in order to advance the practical and the theoretical dimensions of the findings of this dissertation.

Along the different chapters, I have burdened corporations with many responsibilities that go far beyond the traditional duties a liberal democratic governance system would allocate to them. I hope to have argued convincingly enough why this is the case. Yet, all these responsibilities raise the underlying question of the limits of private actors assuming human rights duties vis-à-vis the state. Up to what point corporations should be allowed to lead the provision of human rights? Are states being disenfranchised of their duties and obligations? Should corporations integrate unwilling or incapable states into its human rights policies? How should this be managed?

This study has repeatedly emphasized the need to adapt the meaning and shape of human rights according to each specific political context. Forst defines the term "political context" as anywhere "demands for human rights concretely arise and towards which those human rights are directed" (Forst, 1999, p. 48). This would imply corporations, and particularly the initiatives they should advance, to secure the right to justification, and to assess and filter human rights claims. What guidelines could be provided to corporations to help them

sort out the claims they receive? What constitutes a legitimate human rights claim? Rainer Forst states that any reasonable human rights claim is one that complies with the criteria of reciprocity and generality. However, what does this mean in practical terms?

A deliberative approach to human rights, I have argued, is capable of providing a starting point on which corporations can leverage to find guidance on how to discharge their human rights responsibilities. Yet, the deliberative approach to human rights is not free of difficulties and risks. The corporate initiatives that shall facilitate the right to justification should be oriented towards building discourses in which the participants deliberate over the implications of realizing human rights in a specific context. However, what are the limits between deliberating and bargaining on human rights? Often, the relationships binding victims and corporations are characterized by uneven relationships of power; in this type of context, how do we ensure that human rights are not object of bargain and that discourse takes place according to the conditions of fairness deliberative democracy demands?

Another open question regarding the deliberative approach to corporate human rights responsibilities is whether the arguments of victims, or those whose basic rights are at stake, should be taken at the same level as those of the (potential) perpetrator. In other words, given that a human rights violation has occurred and remedy ought to be provided, should the corporate initiative to realize the right to justification be a space where arguments from victims and corporations are presented at equal standing? Or should the victims' input be given preference?

In light of the configuration of human rights responsibilities advanced in this research, and the prominent role allocated to corporations, the reassessment of the role of the state becomes indispensable. Otherwise, it could give the false impression that its participation is no longer needed, or that it should be placed

on the background. Thus, we need to figure out answers to questions such as: what should be the role of the state in the emergence of the corporation in the realization of human rights responsibilities that this research advances? Should corporations involve weak or unwilling states in the institutions or initiatives they construct to provide the right to justification? These are questions that have not been addressed in this research but that may require explicit attention from political and management scholars if corporations are to advance in the direction pointed here.

11.2 Eppur Si Muove

The Rana Plaza collapse, the working conditions at the Qatar 2022 World Cup construction sites, the sweatshops in turkey exploiting Syrian refugee children, the struggle of indigenous communities in Central America against unwanted mining projects, the supply chain of technological devices, the right to privacy and freedom of expression in the internet; all these human rights issues have, at least, two elements in common. First, they have corporations at the eye of the storm[34]. Second, these are issues expected to persist for an extended period of time. There is plenty of room for despair. However, there is also room for hope and progress in the BHR field: the UN Guiding Principles would have probably been considered a chimera 20 years ago, conversations on a binding treaty on business and human rights started in 2014, the United States and Europe enacted or are discussing legislation requiring human rights due diligence, the BHR field keeps on gaining prominence in business forums and business schools.

[34] All the mentioned human rights issues have been published as "big issues" at the Business and Human Rights Center website: http://business-humanrights.org

Despite everything, things move forward in the BHR debate although probably not at the speed many of us would like. Since their inception, the modern human rights construct has helped communicate and denounce injustices all around the world. Yet, there is no room for complacency. Human rights are a powerful construct, which, at the same time, is extremely demanding and complex. On occasions, this dissertation has argued, the BHR debate has not fully considered the nuances behind the human rights concept and opted for a rather unquestioned understanding of human rights. Instead, here I have tried to dig deeper into the meaning of this concept. The intention has been no other than to better understand how corporate responsibilities connected to human rights should be justly discharged for the benefit of victims.

One of the key dimensions of human rights is the political, which in fact has been relegated to a secondary role in the BHR debate. The profound challenges globalization impinges on the governance of human rights magnify the need to address this dimension. The emergence of corporations as bearers of human rights responsibilities places them in a position where they become active agents in the setting of rules and policies that define the public sphere of many communities and societies. The realization of human rights is also a political endeavor, and therefore to be just, it ought to be subjected to democratic scrutiny.

Many may rightly disagree with the deliberative conception of democracy I endorse, with the Rainer Forst notion of human rights I promote, or with the corporate human rights duties I prescribe along this dissertation. None of these propositions follow the traditional dictum of the liberal democracy principles. Yet, these three propositions are the result of taking very seriously the idea that justice in the political realm requires democracy. And this includes, I have argued, those situations in which corporations are required to take action in regards to their human rights responsibilities.

The concept of democracy, nevertheless, should not be understood as if it were a categorical notion; it is not an all-or-nothing concept. Democracy, as Frank Cunningham argues, is a matter of degree and what is essential is that "rather than regarding democracy as a quality that a social site either has or lacks, one should focus on 'publics' to ask how democratic (or undemocratic) they are, how democratic they might (or ought to) be, and how democracy within them can be enhanced" (Cunningham, 2002, p. 144).

This dissertation has attempted to do just that: to seek for and explore new "publics" and enquire about their democratic qualities. In fact, I believe, exploring and enquiring the business and human rights debate about its democratic qualities may be the only way to secure, in the foreseeable future, the relevancy of both human rights and democracy. These pages should have provided some arguments illustrating why this is the case.

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Curriculum Vitae

Jordi Vives i Gabriel was born in 1983 and grew up in Barcelona (Catalonia, Spain). In 2006, he received his Bachelor and Master's in Business Administration from the Esade Business School, which he had pursued since 2001. Jordi earned three years' experience in the private sector by working at Deloitte and Hewlett Packard before starting his scholarly career. In 2010, he obtained his Master's in Research in Political and Social Science by the Pompeu Fabra University. He started his PhD at the University of St. Gallen in the fall of 2011 under the supervision of Prof. Dr. Wettstein and Prof. Dr. Guido Palazzo. In February 2012, the oikos Foundation granted him the oikos Fellowship, which supported his research for three years. At oikos, Jordi led the oikos Case Writing Competition programme. In 2014, the Swiss National Science Foundation (SNF) granted Jordi a "Doc.Mobility" scholarship in order to continue his studies at the Legal Studies and Business Ethics Department at The Wharton School, University of Pennsylvania. Jordi has been academic assistant at the Esade Business School's Social Science Department since September 2010, and researcher at the Institute for Business Ethics at the University of St. Gallen since February 2012.