

Business Responsibilities for Human Rights: A Commentary on Arnold

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Abstract

Human rights have come to play a prominent role in debates about the responsibilities of business. In the business ethics literature, there are two approaches to the question of whether businesses have human rights obligations. The 'moral' approach conceives of human rights as antecedently existing basic moral rights. The 'institutional' approach starts with contemporary human rights practice in which human rights refer to rights enumerated in the Universal Declaration of Human Rights and subsequent international documents, and in which states are the primary duty bearers of human rights. This commentary argues that the implications of adopting one or the other approach are much greater than most scholars recognize, and that we have reason to reject the moral approach and to adopt the institutional approach instead. The commentary highlights key questions that need to be addressed if human rights are to play a central role in framing the responsibilities of business.

Keywords: human rights obligations, corporate responsibility, managerial responsibility, moral rights and duties, United Nations Guiding Principles

In debates about the responsibilities of business, human rights have come to play an increasingly prominent role.¹ For many, this represents a welcome development. Human rights provide an independent standard against which third parties, such as non-governmental organizations (NGOs), can criticize harmful business activities. Human rights also carry the potential of legal action when domestic governments and regulatory bodies are weak and less able to hold business enterprises accountable. Human rights promise to help make concrete the responsibilities of business towards society.

Denis Arnold is among those who argue for attributing human rights obligations to transnational corporations (TNCs) as part of the responsibilities of business, especially when states – the traditional bearers of human rights obligations – are weak. Arnold's most

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¹ For a helpful overview of the engagement of business ethics scholarship around human rights, see George Brenkert, 'Business Ethics and Human Rights' (2016) 1:2 *Business and Human Rights Journal* 277. For an analysis of the disconnect between the literature on corporate social responsibility (CSR) and the 'business and human rights debate', see Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22:4 *Business Ethics Quarterly* 739.

recent contribution to this debate involves rejecting an argument of mine in which I caution against extending obligations for human rights from states to TNCs.² Arnold objects that ‘by advocating a dualist basic structure for the international system, one in which corporations have no direct or indirect human rights obligations, Hsieh is arguing for a Westphalian model in a post-Westphalian era’.³ In rejecting my account, Arnold aims ‘to facilitate movement away from a debate about *whether* TNCs have human rights obligations, so that attention might be focused on management strategies for *implementing* human rights standards and political and legal strategies for holding firms *accountable* for the violation of human rights obligations in their global operations’.⁴

In this article, I respond to Arnold’s objections and expand upon my original account. Contrary to Arnold, I argue we should not move just yet from the debate about whether TNCs have human rights obligations. One reason is that specifying standards for which TNCs ought to be held accountable depends on the content of their human rights obligations and, in turn, whether they have such obligations in the first place. More fundamentally, however, *the way* in which one argues whether TNCs have human rights obligations matters crucially for questions about what human rights standards apply to them and what is involved in holding TNCs accountable for failing to meet them. In the business ethics literature, there are broadly two ways to approach the question of whether TNCs have human rights obligations, each involving a distinct conception of human rights. I call these two approaches ‘moral’ and ‘institutional’. In his account, Arnold recognizes both conceptions as grounding obligations on the part of TNCs.⁵ In this article, I argue that the implications of adopting one or the other conception are much greater than his account suggests, and moreover, that we have reason *not* to adopt the moral approach, which informs much of Arnold’s account.

The moral approach conceives of human rights as ‘basic moral rights’ that ‘take the form of side-constraints that bound the moral space in which corporations may legitimately pursue economic ends’ and are grounded in considerations of human autonomy or agency. This is a common view in the business ethics literature. Arnold has done much to develop and defend this view.⁶ He writes, ‘agentic accounts of human

² Denis Arnold, ‘Corporations and Human Rights Obligations’ (2016) 1:2 *Business and Human Rights Journal* 255. The original article of mine that Arnold criticizes is Nien-hê Hsieh, ‘Should Business Have Human Rights Obligations?’ (2015) 14:2 *Journal of Human Rights* 218. In that article, I use the term ‘multinational enterprises’ or ‘MNEs’ and extend the argument to for-profit business enterprises more generally. Following Christopher Bartlett and Sumantra Ghoshal, Arnold uses the term ‘transnational corporation’ to encompass ‘multinational companies’ (companies with a ‘decentralized governance structure with self-sufficient companies cooperating in host nations’), ‘global companies’ (companies with ‘centralized governance of a parent company operating from a home nation’), and ‘international companies’ (companies characterized by a combination of centralized and decentralized core competencies’). See Christopher Bartlett and Sumantra Ghoshal, *Managing across Borders: The Transnational Solution*, 2nd edition (Boston: Harvard Business School Press, 2002). To avoid confusion, I will use the term ‘transnational corporation’ or ‘TNC’ when referencing my own argument. This does not affect the nature of my initial argument as the account was meant to extend to all for-profit business enterprises.

³ Arnold, note 3, 275.

⁴ Ibid; emphasis in original.

⁵ For Arnold, ‘there are compelling reasons to believe that TNCs have agentially grounded moral obligations to respect basic human rights and that there are also sound social contract-based reasons for concluding that businesses have human rights obligations’. Arnold, note 3, 275.

⁶ For an earlier account of Arnold in which he defends the agentic conception of human rights, see Denis G. Arnold, ‘Transnational Corporations and the Duty to Respect Basic Human Rights’ (2010) 20:3 *Business Ethics Quarterly* 371–99; Denis G. Arnold, ‘Global Justice and International Business’ (2013) 32:1 *Business Ethics Quarterly* 125–43;

rights provide an appropriately deep foundation for corporate human rights obligations, particularly when limited in scope to basic rights such as liberty, physical security, and subsistence'.⁷ The institutional approach is the one I adopt in my original account and argue for in this article. This approach starts with contemporary human rights practice, in which human rights refer to those rights enumerated in the Universal Declaration of Human Rights and subsequent international treaties and documents, and states are the primary duty bearers of human rights.⁸ While many human rights correspond to what are widely recognized as antecedently existing basic moral rights (e.g., a right to bodily integrity), not all human rights are attempts to realize basic moral rights in a legal form (e.g., a right to vote).⁹ Human rights, in this view, are not simply antecedent basic moral rights that are given legal expression, but rights that involve institutional recognition. They are both moral and institutional.¹⁰

In this article, I distinguish more carefully between these two approaches and defend the case for adopting the institutional approach. To begin, if human rights are understood merely as antecedent basic moral rights and this is the basis for grounding corresponding obligations on the part of TNCs, there is reason to doubt how much is gained by framing these obligations in terms of *human* rights. There already is a long-standing view that there are moral duties on the part of business enterprises and their managers, and as I have argued elsewhere, we would do well to look to these basic duties as the basis for an account of the responsibilities of business.¹¹ Moreover, if the aim is to bring in features associated with contemporary human rights practice – e.g., the range of interests protected by human rights or the permissibility of state intervention to ensure their enforcement – then it is precisely by adopting the institutional approach that we are able to associate these features with what it means to have a human rights obligation on the part of TNCs. The institutional approach also provides a more plausible starting point to account for the view – widely held by proponents of attributing human rights obligations to TNCs – that the responsibilities of TNCs in relation to human rights are distinct from that of states. For example, if human rights are merely antecedent basic moral rights, the challenge is to explain why TNCs, or for that matter individuals, should not have the same set of obligations for human rights as do states.

The article is organized as follows. In the first section, I summarize and motivate my original account and then outline the two objections raised by Arnold. In my

(*F*'note continued)

Denis G. Arnold and Andrew Valentin, 'CSR at the Base of the Pyramid: Exploitation, Empowerment, and Poverty Alleviation' (2013) 66:10 *Journal of Business Research* 1904–14.

⁷ Arnold, note 3, 264.

⁸ These include The International Covenant on Civil and Political Rights; The International Covenant on Economic, Social, and Cultural Rights; and The Genocide Convention.

⁹ Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2013) 14.

¹⁰ This distinction parallels the debate in philosophy and law about the nature of human rights. For a helpful overview, see Rowan Cruft, S. Matthew Liao and Massimo Renzo, 'The Philosophical Foundations of Human Rights: An Overview' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015) 1.

¹¹ Nien-hê Hsieh, 'Multinational Enterprises and Incomplete Institutions: The Demandingness of Minimum Moral Standards' in Michael Boylan (ed.), *Business Ethics*, 2nd edition (Hoboken: John Wiley and Sons, 2013) 409. Nien-hê Hsieh, 'Multinational Corporations, Global Justice and Corporate Responsibility: A Question of Purpose' (2013) 23:111 *Politeia* 129–47. Nien-hê Hsieh, 'The Responsibilities and Role of Business in Relation to Society' *Business Ethics Quarterly* (forthcoming).

original account, I argue that assigning human rights obligations to TNCs risks undermining an important ideal associated with human rights. The ideal is what Allen Buchanan terms ‘status egalitarianism’ or, roughly, the idea that all citizens have ‘equal standing’.¹² In the second section, I respond to Arnold’s first objection, which is that my original account rules out any responsibilities on the part of TNCs with respect to human rights. Given that I acknowledge responsibilities in relation to human rights on the part of TNCs, I explain my use of the term ‘obligation’ and why I reserve the term for the duties of states. In the third section, I address the second objection raised by Arnold. Arnold argues there is no reason to worry that attributing the full range of human rights obligations to TNCs risks undermining status egalitarianism. If anything, he argues, it is enhanced by doing so. In response, I clarify just what is at stake with respect to the ideal of status egalitarianism and make explicit the concern underlying my view, which is that assigning obligations for human rights to TNCs risks attributing to them the authority properly reserved for states. The fourth section concludes by summarizing key issues that need to be addressed if human rights are to play a central role in framing the responsibilities of business, and by defending the relevance of an institutional approach to human rights in a post-Westphalian era.

I. SHOULD BUSINESS HAVE HUMAN RIGHTS OBLIGATIONS?

The Universal Declaration of Human Rights and subsequent international treaties and documents enumerate an extensive list of human rights.¹³ They include security rights (e.g., freedom from enslavement and a right to bodily integrity); due process rights (e.g., a right to a fair and public hearing); liberty rights (e.g., freedom of movement and freedom of thought, conscience and religion); political rights (e.g., a right to vote); equality rights (e.g., protection against discrimination); and social rights (e.g., rights to education, to work, and to an adequate standard of living).¹⁴ The correlative obligations on the part of states are threefold: states must refrain from infringing upon these rights (e.g., not engage in torture); states must fulfil the claims embodied in these rights (e.g., provide education); and states must protect citizens against the threats of third parties that limit their enjoyment of these rights.

Most proponents of attributing human rights obligations to TNCs have in mind a less demanding set of obligations. These obligations are less demanding in two ways. First, the proposed obligations correspond to a subset of internationally recognized human rights.¹⁵ For example, as noted in the introduction, Arnold argues that the case for attributing human rights obligations to TNCs is strongest ‘when limited in scope to basic rights such as liberty, physical security, and subsistence’.¹⁶ Second, the corresponding

¹² Buchanan, note 10.

¹³ The Universal Declaration of Human Rights; The International Covenant on Civil and Political Rights; The International Covenant on Economic, Social, and Cultural Rights; and The Genocide Convention.

¹⁴ James Nickel, ‘Human Rights’, *The Stanford Encyclopedia of Philosophy* (Spring 2014 edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2014/entries/rights-human/> (accessed 3 November 2014).

¹⁵ This is not the case for the United Nations ‘Protect, Respect and Remedy’ Framework developed through the work of John Ruggie. In his account of developing the framework, Ruggie makes clear the framework needs to encompass all rights and not only ‘an arbitrary subset’. See John Ruggie, *Just Business* (New York: W.W. Norton, 2013), 79.

¹⁶ Arnold, note 3, 264.

obligations require TNCs to refrain from infringing upon these rights, but not always to fulfil these rights or to protect these rights against threats by third parties. To continue with the above example, TNCs may be said to have an obligation not to infringe upon the liberty of individuals even though they do not have an obligation to protect individuals against threats to their liberty by third parties, as would be required of states.

In ‘Should Business have Human Rights Obligations?’, I ask whether the contemporary practice of human rights should give us pause in attributing to TNCs the *full range* of human rights obligations that states have – that is, obligations not to infringe upon, as well as to fulfil and to protect, all the human rights enumerated in the Universal Declaration of Human Rights and subsequent international treaties and documents. In focusing on the full range of human rights obligations as understood in contemporary practice, the aim of my original account is to examine what is gained in debates about the responsibilities of business by invoking the idea of human rights. As I note in my original account, there is a strong case for recognizing responsibilities that correspond to basic moral rights on the part of managers of TNCs, and business enterprises more generally. If human rights are understood merely as antecedently existing moral rights, then the question about whether TNCs have human rights obligations can be addressed within existing debates about the responsibilities of business. What makes the question about whether TNCs have obligations for human rights a distinctive and significant question is that human rights encompass interests beyond those associated with basic moral rights and carry with them the potential for legal sanction as a matter of international law. Indeed, that is what makes the idea of human rights so powerful. They are claims that secure and advance a wide range of interests for every individual, and they are to be enforced by law. This is also, I take it, what drives the interest in attributing obligations for human rights to TNCs, especially when states are weak. In contemporary practice, however, the primary bearers of human rights obligations are states. Examining why states have these obligations provides a way to understand what is special about adding the idea of *human* rights to debates about the responsibilities of business alongside the idea of moral rights.

The nature of my original argument is not a legal or conventional one. That is, the argument is not that human rights obligations should be limited to states because that is the case under the current international human rights regime.¹⁷ The argument also does not rule out the enactment of laws or treaties that require TNCs to uphold specific human rights obligations.¹⁸ Rather, by starting with contemporary practice, the institutional approach is similar to what Joseph Raz takes to be the task of a theory of human rights, which ‘is (a) to establish the essential features which contemporary human rights

¹⁷ Hsieh, note 3, 219.

¹⁸ See Alexandra Popova, ‘Business and Human Rights after Ruggie’s Mandate’ in Jean Martin and Karen Bravo (eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: Cambridge University Press, 2016) 106. Arnold writes, ‘Hsieh’s position is inconsistent with that of Buchanan, whose conclusions regarding the current international legal human rights system include the idea that, “In principle, there appears to be no barrier to modifying the system of international legal human rights” to hold “non-state actors such as global corporations” legally accountable for human rights duties articulated in the Guiding Principles’. See Arnold, note 3, 274. Depending on the nature of the obligations, my account is consistent with making them legally binding. It also should be noted that new negotiations for such a treaty are currently ongoing at the United Nations, and that an open-ended working group has been established for his purpose. I thank Florian Wettstein for calling my attention to this.

practice attributes to the rights it acknowledges to be human rights; and (b) to identify the moral standards which qualify anything to be so acknowledged'.¹⁹ Here Raz is rejecting accounts, such as those by Alan Gewirth and James Griffin, which view human rights as antecedent moral rights, rather than as rights that also require institutional recognition.²⁰

In my original account, I draw upon the work of Allen Buchanan, who identifies the ideal of 'status egalitarianism' as one feature that distinguishes human rights from basic moral rights.²¹ Status egalitarianism involves (1) universal ascription of rights; (2) equality of rights; (3) the state obligation to make all citizens' rights effective; (4) equality before the law; and (5) rights against discrimination on the basis of race or gender.²² According to Buchanan, in emphasizing 'status', the aim of human rights is to 'signal that what is at stake is not distributive equality (equality in the distribution of resources or opportunities or outcomes), but something more basic, namely, a notion of equal standing'.²³ In my original account, I argue that this ideal cannot be met and, moreover, risks being undermined if TNCs are held to have the full range of human rights obligations as do states.

The argument involves two worries. The first is that attributing human rights obligations to TNCs requires them 'to adopt a perspective of impartiality and equal treatment that seems not only overly demanding, but also incompatible with what is required of private actors in the realm of economic activity'.²⁴ The second worry is that equal standing with respect to other members of society involves enforcement of this standing at the level of society by various institutions. By attributing human rights obligations to TNCs the worry is that 'no longer are citizens understood to be members in equal standing to one another, but rather in equal standing in relation to others within the scope of activity of TNCs'.²⁵ The worry is that the scope of status egalitarianism shrinks.

Arnold raises two objections. The first is that my original account can be interpreted to conclude that TNCs have no responsibilities with respect to impartiality, if any responsibilities at all. Arnold writes, 'Hsieh seems committed to the position that as economic actors firms have no obligations other than to maximize economic value'.²⁶ The second objection is that in most debates about attributing human rights obligations to TNCs, the obligations in question represent a subset of the obligations associated with states. The objection continues that with respect to this specific subset of obligations, the standard of impartiality to which states are held in fulfilling their human rights obligations

¹⁹ Joseph Raz, 'Human Rights without Foundations'. In Samantha Besson and John Tasiouls (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321, 327.

²⁰ Alan Gewirth, *Human Rights: Essays on Justifications and Applications* (Chicago: University of Chicago Press, 1982) and James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008). The approach I adopt in my original account and develop in this commentary is also consistent with Samantha Besson, 'The Bearers of Human Rights Duties and Responsibilities for Human Rights: A Quiet (R)Evolution' (2015) 32:1 *Social Philosophy and Policy* 244.

²¹ Buchanan, note 10, 30.

²² *Ibid.*, 29–30.

²³ *Ibid.*, 30.

²⁴ Hsieh, note 3, 225.

²⁵ *Ibid.*, 226.

²⁶ Arnold, note 3, 272. He writes, 'On this interpretation firms should be free to discriminate in hiring based on race, sex, or caste, they should be free to discriminate against women by paying men more than women for equal work, and they should be free to discriminate against the poor by requiring them to work overtime to earn subsistence wages and by neglecting their health and safety at work'.

does not apply. That is, there is no risk to the ideal of status egalitarianism in attributing human rights obligations to TNCs.²⁷ If anything, according to Arnold, if TNCs ‘meet human rights obligations (e.g., the ILO conventions) doing so will *enhance* rather than diminish status equality, as it will expand the extent to which human rights are respected’.²⁸

II. OBLIGATION, RESPONSIBILITY AND ACCOUNTABILITY

In this section, I address Arnold’s first objection that my original account rules out any responsibilities on the part of TNCs in relation to human rights. I begin by pointing out there may be much more agreement between Arnold’s account and my own in terms of what is required of TNCs.

In my original account, although I argue against assigning to TNCs the full range of human rights obligations associated with states, I point out this does not rule out more limited duties on the part of TNCs in relation to human rights.²⁹ I hold that TNCs have duties not to be complicit in state violations of human rights and I allow for duties on the part of TNCs to help promote and support regimes that recognize human rights.³⁰ Furthermore, as noted above, none of this rules out duties on the part of TNCs and their managers to respect basic moral rights, such as rights to liberty and physical security. Indeed, as I have argued elsewhere, we would do well to look to such basic moral duties as the basis for an account of the responsibilities of business.³¹ In assigning human rights obligations to TNCs, Arnold has in mind a more limited set of duties than the full range associated with states, and he grounds these duties in respect for basic moral rights.³² In this light, the disagreement between Arnold and myself may not be as great as Arnold believes.

This then raises the question of why Arnold objects to my original account. In my original account, I use the term ‘obligation’ to refer to duties on the part of states in relation to human rights, and the term ‘responsibility’ to refer to duties on the part of TNCs and other non-state actors in relation to human rights.³³ One reason, though not

²⁷ Arnold writes, ‘If this interpretation is correct, it is a puzzling criticism of corporate human rights obligations (both agentically grounded human rights obligations and obligations grounded in the work of the UN and the ILO). The Guiding Principles, for example, were carefully designed specifically to avoid confusion about the roles of corporations versus states in the promotion and protection of human rights. ... There is no expectation that TNCs and other business enterprises take on a state-like role regarding human rights in the United Nations “Protect, Respect and Remedy” Framework’. He also writes, ‘even under such circumstances the expectation is not that TNCs ensure status equality for everyone, or even status equality for those directly impacted by their operations, but instead the expectation is that they meet a more limited scope of obligations’. Arnold, note 3, 273.

²⁸ *Ibid.*, 274. Emphasis in original.

²⁹ Hsieh, note 3, 227–30. As I write in the original account, ‘none of this is to deny responsibilities on the part of business enterprises and their managers in relation to human rights’, p. 230.

³⁰ Nien-hê Hsieh, ‘Does Global Business Have a Responsibility to Promote Just Institutions?’ *Business Ethics Quarterly* 19:1 (2009) 251.

³¹ Hsieh, note 31, Nien-hê Hsieh ‘Multinational Enterprises and Corporate Responsibility: A Matter of Justice?’ in Michael Boylan (ed.), *Morality and Global Justice: The Reader* (Boulder: Westview Press, 2011) 185; Nien-hê Hsieh, ‘Multinational Enterprises and Incomplete Institutions: The Demandingness of Minimum Moral Standards’ in Michael Boylan (ed.), *Business Ethics*, 2nd edition (Hoboken: Wiley 2013) 409; Hsieh, note 12.

³² Arnold writes, for example, accounts of human rights grounded in considerations of human agency ‘provide an appropriately deep foundation for corporate human rights obligations, particularly when limited in scope to basic rights such as liberty, physical security, and subsistence’. Arnold, note 3, 264.

³³ The difference between ‘obligation’ and ‘responsibility’, for example, is not intended to capture the difference between a perfect and imperfect duty as it has by others. See, for example, Wettstein, note 1.

made explicit, is the thought that some duties that TNCs have in relation to human rights are sufficiently distinct from the sorts of duties that states have. Another is to capture the sense in which states are still understood as the primary duty bearers of human rights. In contrast, Arnold appears to use the term ‘obligation’ to include responsibilities for human rights on the part of TNCs.

On one level, it would not be inconsistent with my original account to use the term ‘obligation’ to refer to the responsibilities on the part of TNCs in relation to human rights, as long as the difference is made clear in what is required of states and TNCs. To make things concrete, consider an example from my original account.³⁴ According to Article 26 of the Universal Declaration of Human Rights, ‘Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit’. As Arnold notes, many human rights are best understood as claim rights, which ‘entitle individuals to assistance from other parties in the form of protection against injury or death, the provision of help in cases of need, the performance of responsibilities previously agreed upon or legally required, or to compensation from harm caused’.³⁵ The right to education is no exception. A state would be failing in its human rights obligation if it did not provide an education that meets these criteria. In contrast, if TNCs do not have the same obligations as states, the relevant obligation is to not interfere in individuals’ access to education. As another example, consider Article 4 which states, ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’. It involves a claim to protection against enslavement that is directed against states. In contrast, in the case of TNCs, the relevant obligation is not to enslave, but not protect individuals against enslavement by other parties.

That having been said, referring to the responsibilities of TNCs as ‘human rights obligations’ raises an important question the original account does not consider and that also does not appear to be addressed by Arnold. The question concerns what is involved in holding TNCs accountable for failing to meet their responsibilities. As Joseph Raz notes, one feature of human rights in contemporary practice is that human rights ‘set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena, even when – in cases not involving violation of either human rights or the commission of other offences – the action would not be permissible, or normatively available on the grounds that it would infringe the sovereignty of the state’.³⁶ In the case of states, the failure to uphold human rights provides grounds for intervention by other states despite claims of sovereignty.

The rationale for reserving ‘obligation’ to refer to the human rights duties of states can be interpreted in terms of this question about what is involved in holding agents accountable for failures to meet their duties in relation to human rights. Under the current United Nations ‘Protect, Respect and Remedy’ Framework and Guiding Principles on Human Rights on Business and Human Rights, for example, TNCs are not to be held accountable in

³⁴ Hsieh, note 3, 228–9.

³⁵ Arnold, note 3, 262.

³⁶ Raz, note 20, 328.

the same way as states for failures to meet their duties in relation to human rights.³⁷ The decision was a deliberate choice in part as a matter of practical compromise and the UN Framework explicitly avoids use of the term ‘obligation’ to refer to the duties of TNCs in relation to human rights to clarify that these duties are not legal duties.³⁸ What Arnold may have in mind then is that TNCs ought to be held accountable in the same way as states for failing to meet their duties in relation to human rights. On this reading of Arnold’s account, the objection to my account is not so much the scope of the duties on the part of TNCs in relation to human rights, but rather what Arnold understands my account to imply about what is involved in holding TNCs accountable for failing in their duties.

It is beyond the scope of this article to provide a full answer to this question of whether TNCs ought to be held accountable in the same way as states and their officials for failing to meet their duties in relation to human rights. Instead, I close by raising two points to underscore that the way in which one argues for attributing duties on the part of TNCs in relation to human rights has implications for what is involved in holding TNCs accountable for failing to meet their duties.

First, if the issue of accountability is the basis for Arnold’s objection, it seems to follow that other non-state actors, including private citizens, ought to be held accountable in the same way. Other non-state actors, including private citizens, can just as much violate an individual’s right not to be restricted in access to education or the right not to be enslaved. That is, an individual’s right against interference in accessing education or against enslavement is violated if the offending party is a TNC or a private citizen. Second, if there is a distinction between the way in which private citizens and TNCs ought to be held accountable, there is reason to doubt that the distinction is grounded in the view that human rights are basic moral rights. If human rights are understood as basic moral rights, more needs to be said why it is that these rights do not ground the same correlative duties on the part of all non-state agents, and not just TNCs, and how the moral duty is realized as a matter of international law.

III. STATUS EGALITARIANISM AND JURISDICTION

In this section, I take up the second objection raised by Arnold. To address this objection, I introduce the idea of jurisdiction, which is central to the realization of the ideal of status egalitarianism and an institutional approach to human rights more generally.

According to Samantha Besson, who draws on the work of Joseph Raz, ‘jurisdiction refers to *de facto* authority, that is to say the practical political and legal authority that is not yet legitimate or justified authority, but claims to be, or at least is held to be, legitimate by its subjects’.³⁹ She continues, ‘*qua de facto* authority, jurisdiction consists

³⁷ Human Rights Council, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: a Framework for Business and Human Rights’, A/HRC/8/5 (7 April 2008). Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011).

³⁸ Ruggie, note 16.

³⁹ Besson, note 21, 254. Here Besson draws on Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995), 215.

in effective, overall and normative power or control (whether it is prescriptive, executive, or adjudicative). It amounts to more than the mere exercise of coercion or power, as a result: it also includes a normative dimension by reference to the imposition of reasons for action on its subjects and the corresponding appeal for compliance'.⁴⁰ Human rights obligations are assigned to states because they have jurisdiction over others. Without jurisdiction, fulfilling human rights obligations and meeting the requirements of status egalitarianism become merely matters of power or force without the normative dimension. To be clear, jurisdiction need not be associated with a specific territory. Rather, it is 'functional' in the sense that it relates to the role that an institution plays.⁴¹ Jurisdiction is also 'an all or nothing matter and not a matter of degree: either one is giving reasons for action and requiring compliance, or one is not'.⁴²

With this in mind, I turn to Arnold's second objection to my original account. Arnold objects that most proponents of attributing human rights obligations to TNCs have in mind only a subset of the obligations attributed to states. With respect to this subset of obligations, there is no risk to undermining the ideal of status egalitarianism, and that if anything, fulfillment of human rights by TNCs in fact enhances, rather than diminishes, status equality. There are three ways to interpret his claim. I consider each in turn.

The first interpretation is that if TNCs meet the more limited obligations attributed to them by Arnold and others, then status egalitarianism is enhanced. In response to this first interpretation, consider again the right against enslavement. Following the discussion in the previous section, the duty on the part of TNCs is to refrain from enslaving, but this does not extend to protecting individuals against enslavement by others.⁴³ The latter would be considered the obligation of states. If status egalitarianism were simply a matter of the extent to which individual claims are met or satisfied, then status egalitarianism would be enhanced by TNCs refraining from enslaving; fewer individuals would be enslaved. However, status egalitarianism is not simply about whether more individuals have their claims met or satisfied. Status egalitarianism concerns the equal standing of all individuals to press their claims and to have their claims enforced against others. This is a matter of protection and enforcement within the relevant jurisdiction, an obligation not attributed to TNCs.

The second interpretation of Arnold's objection is that even if TNCs do not have the same obligations as states in relation to human rights, if they meet some of the claims associated with states, then status egalitarianism is enhanced. To address this interpretation of Arnold's objection, consider again the right to education. Suppose a TNC provides education to members of the local community in line with what is required by Article 26 of

⁴⁰ The discussion in Hsieh, note 3, provides one way to justify rejection by John Ruggie of assigning to TNCs human rights obligations within their 'sphere of influence'.

⁴¹ Besson, note 21, 254.

⁴² Ibid.

⁴³ Article 2 of the Universal Declaration of Human Rights states, 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'. Article 7 states, 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

the Universal Declaration of Human Rights. These members of the local community enjoy the benefits associated with the right. At the same time, they do not have a right to that education. Recall that in the account so far, the obligation of TNCs with respect to the right to education is not to interfere with the education of others. There is no obligation to provide education. Status egalitarianism, however, is a claim against specific duty-bearers – namely, those with ability to enforce laws and those that have a responsibility to ensure the equal moral standing of individuals within their jurisdiction. If TNCs do not have this duty in the first place, it does not follow that by realizing the value associated with human rights TNCs have somehow realized the ideal of status egalitarianism. There is a difference between the value associated with a right (and being able to realize that value) and having the *right* to that value, which in turn grounds a duty.⁴⁴

The third interpretation of Arnold's objection is that if TNCs have the same obligations as states, then status egalitarianism is enhanced. Addressing this objection brings us back to the thesis in my original account. Making explicit the role of jurisdiction in specifying the appropriate duty-bearer for human rights obligations helps to bring to the fore the concern underlying my original account in assigning to TNCs the sorts of human rights obligations associated with states. Specifically, the concern is that in assigning human rights obligations to TNCs we attribute to them a kind of authority that is usually reserved for political and legal institutions.

To begin, jurisdiction is a feature of institutions in relation to members of political communities, and TNCs lack the institutional features to serve as authorities over others. They lack mechanisms by which individuals are able to hold them accountable and they are not in the position to impose reasons on others to act and to be in compliance with those reasons across the range of issues with which human rights are concerned. More generally, as economic actors, TNCs should be subject to the jurisdiction of political institutions and not exercise jurisdiction themselves over political matters. In my original account, I hint at this concern, writing that assigning human rights obligations to TNCs 'may even be seen as elevating their status relative to other members of society beyond what is associated with their standing as economic actors'.⁴⁵ It involves a risk of attributing to them the sort of authority properly reserved for states. Making explicit the concept of jurisdiction enables us to sharpen this concern.

As I have argued, when faced with weak institutions that undermine the provision of human rights, rather than take on the obligations of states, TNCs have a duty to help establish and support legal and political institutions that support human rights. However, more needs to be said about two situations that may arise under such conditions. The first is whether there are situations in which TNCs are already *de facto* authorities. The second is whether there are situations in which conditions are so dire that assigning human rights obligations to TNCs is a second-best solution. Proponents of an institutional conception of human rights are sceptical. Besson, for example, concludes that the 'political and egalitarian nature of human rights would tend to deny this

⁴⁴ At one level, this is similar to Robert Nozick's point about the way in which to value the minimization of rights violations. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

⁴⁵ Hsieh, note 3, 226.

possibility and to favor only inclusive groups, and groups that endeavor to politically represent all individuals in the community'.⁴⁶ Nevertheless, it remains an important question to consider in greater detail.⁴⁷ Perhaps there are certain organizational changes that TNCs must make to become more 'state-like', such as establishing formal means for consultation with local communities and creating independent bodies to adjudicate and ameliorate conflicts.⁴⁸

IV. CONCLUSION

In this article, I respond to a series of objections raised by Arnold against an account of mine in which I sound a note of caution in extending human rights obligations from states to TNCs. In turn, three broad points emerge.

First, in terms of the scope of the responsibilities that TNCs have in relation to human rights, there may be much less disagreement between Arnold's account and my own. Like Arnold, I acknowledge a range of duties on the part of TNCs in relation to human rights. What I do not do is use the term 'obligation' to refer to them. Although this may be seen as a matter of terminology, it may reflect potential underlying differences in our understanding of the duties of TNCs. Part of the rationale, as I explain it, is to acknowledge that some responsibilities in relation to human rights on the part of TNCs are sufficiently distinct from the sorts of obligations associated with states, and that states remain the primary duty-bearers for human rights.

Second, I highlight two approaches to addressing the question of whether TNCs have human rights obligations – one moral and the other institutional – and make the case for adopting an institutional approach in theorizing about the responsibilities of business in relation to human rights. This is not to deny that there are basic moral rights that ground duties on the part of TNCs. As I have argued elsewhere, there is a strong case to be made that such rights ground fairly demanding duties on the part of TNCs. Rather, the point is that if the promise and power of the idea of human rights are to be realized in the context of framing the responsibilities of TNCs, we need to look to the contemporary practice of human rights, which involves an institutional, and not a moral, approach.

Third, in the course of this discussion, I raise three questions that remain to be examined in thinking about the responsibilities of TNCs in relation to human rights. The first is whether TNCs and other non-state actors, including private citizens, ought to be held legally accountable, in the way that states are, for failing to meet their responsibilities in relation to human rights. The second is whether there are conditions under which TNCs are *de facto* authorities such that the human rights obligations associated with states attach to them. The third question is whether there are conditions under which states are so weak and the under-provision of human rights is so great such

⁴⁶ Besson, note 21, 258.

⁴⁷ Onora O'Neill, for example, is one who takes seriously this question with respect to questions of human rights and justice. See Onora O'Neill, *Justice Across Boundaries: Whose Obligations?* (Cambridge: Cambridge University Press, 2016).

⁴⁸ One account that argues for human rights obligations on the part of TNCs on grounds they are *de facto* authorities is Florian Wettstein, *Multinational Corporations and Global Justice* (Redwood City: Stanford University Press, 2009).

that TNCs and other non-state actors ought to take up the role of states in relation to human rights.

In a post-Westphalian era, it seems these are exactly the questions to address. Notice, however, that it is by working within an institutional conception of human rights that we arrive at these questions. In one sense, this should not come as a surprise. It is the sharp delineation between states and non-state actors with regard to human rights obligations on such a conception of human rights that brings these questions to the fore. This should give us pause in adopting the conception of human rights as basic moral rights in addressing the responsibilities of business in relation to human rights. To be certain, if human rights are best understood as basic moral rights, then there is little difficulty in ascribing human rights obligations to TNCs. They are rights that ground duties on the part of all moral agents, including the managers of TNCs and, according to some, TNCs themselves.⁴⁹ At the same time, if human rights are basic moral rights, it is difficult to understand the relevance of whether we are in a Westphalian or post-Westphalian era. In contrast to institutionally recognized rights, basic moral rights are not contingent on institutional or social facts. The duties they ground on the part of TNCs, it seems, are independent of the broader institutional context. It is precisely by adopting the institutional conception of human rights that we are able to identify and diagnose the challenges for determining the responsibilities of business in relation to human rights in the contemporary era.

⁴⁹ On attributing moral agency to corporations in relation to corporate responsibility, see Nien-hê Hsieh, 'Corporate Moral Agency, Positive Duties, and Purpose' in Eric Orts and N. Craig Smith (eds.), *The Moral Responsibility of Firms* (Oxford: Oxford University Press, forthcoming).